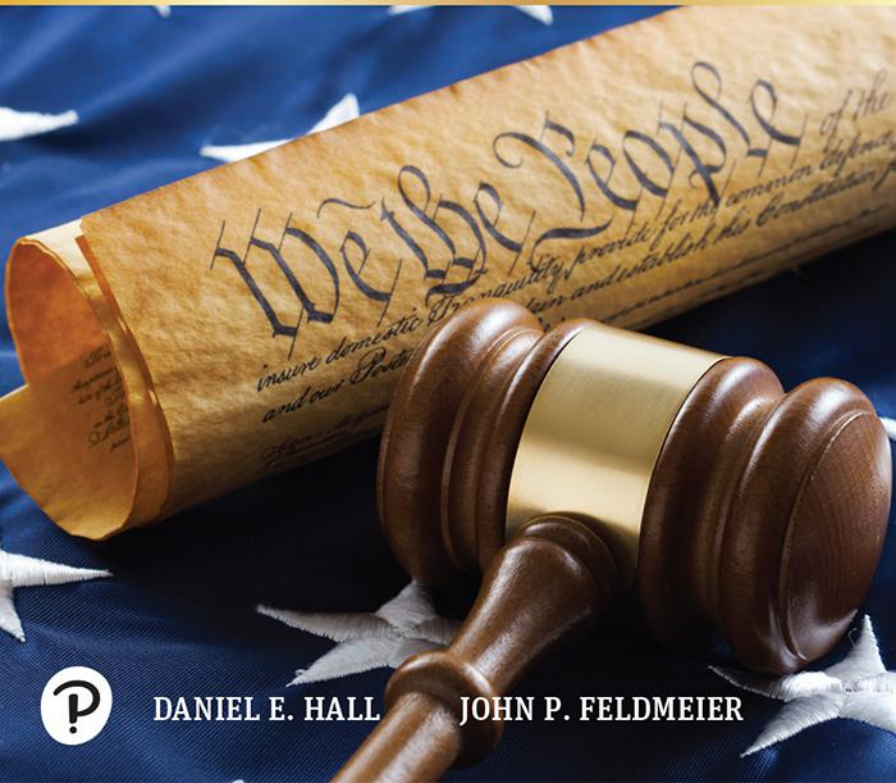
Constitutional Law

Governmental Powers and Individual Freedoms

PRINCIPLES AND PRACTICE

FOURTH EDITION



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Governmental Powers and Individual Freedoms

Fourth Edition

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Library of Congress Cataloging-in-Publication Data

Names: Hall, Daniel (Daniel E.), author. | Feldmeier, John P. (John Phillip) author.

Title: Constitutional law: governmental powers and individual freedoms: principles and practice / Daniel E. Hall, J.D., Ed.D., Miami University and Sun Yat-sen University, John P. Feldmeier, J.D., Ph.D., Wright State University.

Description: Fourth edition. | Hoboken: Pearson Education, [2022] |Includes bibliographical references and index. | Summary: "Having taught constitutional law courses to undergraduate students for a number of years, we have received many questions from students about matters that the U.S. Supreme Court has not yet addressed: Does the message on my t-shirt constitute fighting words? Can we begin our student government meetings with a prayer? Is our university's affirmative action policy constitutional? In most cases, we have found that students want definitive answers to these questions"—Provided by publisher.

Identifiers: LCCN 2019020947 | ISBN 9780135772577

Subjects: LCSH: Constitutional law—United States.

Classification: LCC KF4550 .H344 2022 | DDC 342.73—dc23

LC record available at https://lccn.loc.gov/2019020947

ScoutAutomatedPrintCode

ISBN 10: 0-13-577257-5

ISBN 13: 978-0-13-577257-7

Dedication

To Grace and Eva from Daddy, who, in spite of repeated attempts by their Father, don't yet appreciate that it's the Constitution that protects their toys from the Burgermeister. This is the fourth edition with this dedication, and neither has ever mentioned it. Now off in college and high school, time will tell if the fourth time is the charm. D.E.H.

To Melissa, who has inspired and supported me throughout my professional life. To Emma and Jack, who offered me many welcome breaks during the preparation of this book. J.P.F.

Brief Contents

Contents

Preface

Having taught constitutional law courses to undergraduate students for several years, we have received many questions from students about matters that the U.S. Supreme Court has not yet addressed: Can the president issue a specific Executive Order? Who is responsible for election rules—the federal government or the states? Does the message on my t-shirt constitute fighting words? Can we begin our student government meetings with a prayer? Is our university's affirmative action policy constitutional? In most cases, we have found that students want definitive answers to these questions. Much like the results received from computer searches or the numbers produced from mathematical formulas, students often expect certainty when it comes to addressing their constitutional questions. And in their view, such certainty is warranted, especially in a constitutional context, where much of "the law" (the Constitution) has remained textually unchanged.

The problem, of course, is that the Constitution is not written like an owner's manual for a car, where you can turn to the troubleshooting section to find the answers to many questions. Comparatively speaking, the Constitution is a relatively short, ill-defined, and vaguely written document that, at times, offers few clearly explained and universally accepted resolutions to constitutional dilemmas. As a result, the answers to constitutional questions often depend not so much on *which* question is asked but rather on to *whom* the question is directed. Just survey legal scholars and practitioners as to whether the Constitution allows a local government to erect a nativity scene during the holidays, protects a woman's right to have an abortion, or gives the president the ability to order domestic wiretaps without a warrant, and you will likely get varied and conflicting responses. Even members of the Supreme Court—-jurists who have received some of the finest and most substantial educations regarding the Constitution—often cannot agree on the Constitution's meaning.

In reality, we have found that constitutional law involves the application of human values. Whether turning to historical documents to determine the original intent of a constitutional provision or considering modern-day realities as informative of constitutional terms, those who interpret the Constitution make value judgments about how to determine the meaning of constitutional language. Just as some political scientists have come to define *politics* as "the authoritative allocation of values," we have found that constitutional law involves much the same enterprise. Judges and others with legal authority assign or allocate values to constitutional provisions in order to give them meaning and effect. As a result, we endeavor to help students appreciate that constitutional law is not divorced from the political process but, rather, is a continuation of this process. To this end, we have attempted to provide a text that enables students to understand the values that have been used to shape our current state of constitutional law and to assist them in developing their own constitutional values.

Text Features

We have written this book for use in undergraduate classes. It is **flexible in its design**, allowing use in split (governmental powers vs. civil liberties) and combined courses. The **writing style** and **language** are intended to challenge, but not overwhelm, the undergraduate student. When legalese is used, it is defined. A running **glossary** of terms reinforces learning of legal terms.

Excerpts of significant cases are embedded in the text. Although each case has been well edited, we have been careful to retain the material needed to accomplish our pedagogical objectives. These include reinforcing the black-letter law presented in our narrative, developing students' analytical skills, and giving students exposure to judicial writing. These excerpted opinions also provide briefing opportunities for those students who want to engage in this traditional practice used for legal research and writing projects. To remain true to our flexibility objective, we have designed the text so that the cases may be omitted without losing any black-letter learning. For those who want access to full-length opinions, the book provides links to many opinions on its companion website.

Illustrations, charts, and photos appear throughout the text. They are used to assist students in conceptualizing challenging subjects, to summarize complex topics, and to break up dense sections.

Your Constitutional Values is a special feature designed to make students aware that constitutional law occurs at all levels, branches, and areas of government—it is not just something that happens at the U.S. Supreme Court level. Consistent with the adage that "all politics is local," we have included excerpts of constitutional law cases that did not make it "all the way to the Supreme Court" but that nonetheless contain interesting issues and facts relevant to constitutional jurisprudence. These sections within each chapter allow students to consider and apply key constitutional principles and terms to constitutional disputes using their own constitutional values.

Modern Challenges is a feature appearing within each chapter that provides predictive observations regarding constitutional questions that courts might face in the next few years. These forward-thinking assessments seek to stimulate creative and analytical thinking among students and provide further opportunities for readers to appreciate the dynamic nature of constitutional law.

Each chapter also contains a **Summary** section that reviews the main points and outlines terms and concepts used

by today's practitioners in constitutional law. The terms are placerines found within the text of the chapter. This section allows students to assess whether they have captured the primary points and principles after reading the full-length materials. There are also **Review Questions** that appear at the end of every chapter that require a short answer or brief analytical response.

Constitutional Law in Action is a feature at the end of each chapter that provides students with real-life exercises and assignments that reflect the work of legal professionals when facing issues of constitutional law. This feature provides students with work assignments and tasks often faced by legal professionals in real cases involving constitutional questions. These assignments might include outlining an argument for an appellate brief, preparing a legal memorandum, identifying the courtroom rules for a given jurisdiction, or preparing a binder for an appellate argument. Students are then asked to complete the assignments within the parameters of the instructions given by a hypothetical supervisor within an office setting. These assignments require students to apply key constitutional principles to tangible situations using the knowledge they gained from the chapter.

There are three types of assignments provided in this feature. The first type of assignment is called **The Constitution in Your Community**, which contains assignments asking students to locate and apply the standards of constitutional law and civil liberties within their own state or local jurisdiction. This section allows students to tailor their general understandings of constitutional law and civil liberties to their own legal environment and courts. The second type of assignment is called **Going Federal**, which provides assignments based on more national issues and controversies facing the nation as a whole. It is designed to allow students to appreciate constitutional law on a much larger scale. These assignments might involve locating and reviewing an appellate brief or researching governmental policies on issues of federal funding, religion, affirmative action, and other constitutional issues. The last type of assignment is called **Moot Court**, which invites students to organize and prepare a five-minute oral argument on a constitutional issue that might be presented to the Supreme Court.

Chapter Topics and Organization

This book is divided into two parts. Part One focuses on the organization and authorities of the U.S. government and the government of the states. Part Two focuses on civil liberties and, consequently, limitations on the authorities of governments.

The first chapter provides the student with a brief historical framework from which to understand our Constitution. The Articles of Confederation, the Philadelphia Convention, and the ratification debates are featured in this chapter. The chapter also addresses the essence and process of "doing" constitutional law, which is grounded in the doctrines of judicial review and constitutional interpretation. The chapter then provides a historical overview of some of the trends and developments of constitutional interpretation over the years.

In Chapter 2, the text moves to a discussion of basic governmental structures. Federalism, separation of powers, and checks and balances are introduced. Essentially, this chapter explains that there are two basic divisions of power under the U.S. Constitution—the division between the federal and the state governments (federalism) and the division between and among the branches of government (separation of powers and checks and balances). These three primary constitutional dynamics—federalism, separation of powers, and checks and balances—are the primary structural backdrops for most of constitutional law.

Chapters 3, 4, and 5 are devoted to detailed discussions of the three branches of government. In Chapter 3, the book addresses the structure and power of federal courts, their roles in our nation, and the power of judicial review. This chapter also covers the jurisdiction of federal courts. Included in these chapters are discussions of how these principles apply to real cases with which the student may have knowledge. The chapter provides students with an overview of the different methods courts use to interpret and apply constitutional language.

In Chapter 4, the powers of Congress are addressed, featuring the core constitutional authorities under the Commerce Clause, the Necessary and Proper Clause, and the Tax and Spending Clause. This chapter also discusses some of the constitutional conflicts between Congress and other bodies of power, such as the president, the judiciary, and the states.

Chapter 5 discusses the explicit and implicit powers of the president under Article II. Included in this chapter are issues involving the commander-in-chief, appointment, and chief executive powers. The chapter also addresses the president's veto power under Article I and explores many of the constitutional debates surrounding modern presidential actions in the so-called war on terror.

Chapter 6 covers the importance of administrative agencies in the United States—the so-called fourth branch of government. Here, students examine the creation of agencies, the delegation of powers to agencies, and the presidential and congressional control of agencies, as well as other contemporary topics.

Finally, building on the discussion in Chapter 2, Chapter 7 examines federalism in greater detail through issues such as intergovernmental immunity and preemption. In addition, a complete discussion of the "revival" of state constitutional law is included.

Part Two of the book addresses individual liberties as protected by the First and Fourteenth Amendments to the Constitution. Chapter 8 discusses the nature of individual liberties, their possible sources, and the construction of the Bill of Rights. This chapter also explains how most liberties within the Bill of Rights are applied to state and local governments via the incorporation doctrine.

In Chapter 9, the book analyzes the freedom of speech as protected by the First Amendment. As part of this

discussion, the text distinguishes speech from conduct, identifies the various forms of expression—political, symbolic, commercial, sexual, and so on—and provides students with a framework for addressing future free speech controversies.

Chapter 10 reviews the religion clauses of the First Amendment by providing students with excerpts of the seminal cases in Establishment Clause and Free Exercise Clause jurisprudence and by identifying the various tests used by the Supreme Court to resolve religion-based constitutional disputes.

In Chapter 11, the book discusses constitutional protections for the rights of privacy, personal autonomy, and other bodily freedoms. As part of this discussion, the text reviews the constitutional origins for the right of privacy and the rights of due process that protect various forms of individual activity not specifically listed in the Constitution. Among other topics, this chapter covers the constitutional controversies over abortion, same-sex marriage, the right to die, and governmental restrictions on sexual activity.

Chapter 12 examines the notions of equality and due process as protected by the Fifth and Fourteenth Amendments. This chapter addresses cases involving school desegregation, affirmative action, sex-based discrimination, and voting rights. It also reviews governmental intrusions upon fundamental rights and economic liberties.

Chapter 13 addresses civil liberties in the criminal context. Specifically, the chapter discusses the right against unreasonable searches and seizure, the right against self-incrimination, the exclusionary rule, the right to counsel, the right against double jeopardy, the right to a fair trial, and the right against cruel and unusual punishment.

Appendices include the Constitution of the United States, the history of U.S. Supreme Court justices by seat, a special feature on how to brief a case, and selected Executive Orders and other memoranda.

Changes in This Edition

- COVID-19 captured the world's attention during the production of this revision. The constitutional issues resulting from the pandemic are already numerous, and, most likely, they will only grow in the months, if not the years, ahead. The most significant Supreme Court precedents, *Compagnie Francaise de Navigation a Vapeur v. Louisiana Board of Health*, 186 U.S. 380 (1902), and *Jacobson v. Massachusetts* (1905) are discussed, and several of the liberty and authority questions that are presented by the responses of the states and federal governments are also identified and discussed.
- The law has been updated throughout the text.
- Included in the updates are new edited cases and references to cases issued in the 2019–2020 term of the Supreme Court. Other updates include the following:
- In the first half of the text, the following Supreme Court decisions through the 2019-2020 term are discussed: President Trump's financial records decisions in *Trump v. Mazars* and *Trump v. Vance*, the tribal lands jurisdiction case *McGirt v. Oklahoma*, the faithless electors decision, *Chiafalo v. Washington,* the Appointments Clause decision, *Lucia v. SEC,* and the federalism decisions *Murphy v. NCAA* (commandeering), *South Dakota v. Wayfair* (Dormant Commerce Clause), and *Husted v. A. Philip Randolph* (federal/state regulation of elections and voting).
- Discussions of several issues that surfaced during the latter years of President Obama's and the first three years of President Trump's administrations, including many of Trump's Executive Orders, Obama's nomination of Judge Garland to SCOTUS, the appointment of Justice Kavanaugh, the Emoluments Clause controversy, President Trump's election via the Electoral College rather than the popular vote, Vice President Pence's vote to break the tie in the Senate to appoint Betsey DeVos, President Trump's refusal to provide his tax returns to the House of Representatives, the conflict between the administration and the sanctuary jurisdictions, and more.
- Historical background and anecdotes have been added to several sections to provide context.
- In the liberties half of the text, the Supreme Court's landmark ruling in *Bostock v. Clayton County* (2020), finding that Title VII of the 1964 Civil Rights Act prohibits employment discrimination based on sexual orientation and sexual identity has been added.
- The Supreme Court's decision in *Trump v. Hawaii* (2018) concerning the president's authority to restrict immigration via the use of travel bans
- The Supreme Court's ruling in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* (2018) undermining labor unions' abilities to receive "fair share" fees from nonmembers
- The Supreme Court's decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) regarding the religious freedom rights of a baker who refused to prepare a wedding cake for a same-sex couple
- The Court's rulings in *June Medical Services v. Russo* (2020) and *Whole Woman's Health v. Hellerstedt* (2016) concerning the states' abilities to regulate abortion clinics
- The Court's *Fisher v. University of Texas* (2016) ruling on affirmative action in higher education
- A variety of new cases and updates in the area of criminal procedure including an expanded section on the constitutionality of police using deadly force and the Court's opinions in *Carpenter v. United States* (2018), regarding the warrantless search of a person's cell phone records, *and Utah v. Strieff* (2016), concerning the attenuating circumstances exception to the exclusionary rule

In addition, new figures, photographs, and illustrations were added to illustrate the material, and a couple cases were removed and replaced with cases that better explain the law or are more up-to-date.

Student Resources

Within each chapter, notes in the margins assist readers with their organization and understandings of the material, and detailed endnotes refer readers to citations of full-length cases, court documents, legal resources, and other materials. End-of-chapter assignments incorporate engaging projects that allow students to experience constitutional law in practical and contemporary settings. These projects highlight the realities of working on cases involving constitutional questions. In addition, the companion website www.pearsonhighered.com/careersresources helps illustrate and explore the core practices of constitutional law and civil liberties in today's world. The companion website also contains links to **May It Please the Court**, a series of video and audio recordings of appellate oral arguments. These videos illustrate many of the modern-day constitutional debates facing courts today and demonstrate the practical realities of practicing constitutional law. Overall, the companion website provides students with many supplemental materials that allow the text to adapt with the ever-changing dynamics of constitutional law.

Instructor Resources

For the convenience of instructors, the following ancillary materials are provided:

Instructor's Manual with Test Bank. Includes content outlines for classroom discussion, teaching suggestions, and answers to selected end-of-chapter questions from the text. This also contains a Word document version of the test bank.

TestGen. This computerized test generation system gives you maximum flexibility in creating and administering tests on paper, electronically, or online. It provides state-of-the-art features for viewing and editing test bank questions, dragging a selected question into a test you are creating, and printing sleek, formatted tests in a variety of layouts. You can select test items from the test banks included with TestGen for quick test creation or write your own questions from scratch. TestGen's random generator provides the option to display different text or calculated number values each time questions are used.

PowerPoint Presentations. These presentations offer clear, straightforward outlines and notes to use for class lectures or study materials. Photos, illustrations, charts, and tables from the book are included in the presentations when applicable.

To access supplementary materials online, instructors need to request an instructor access code. Go to www.pearsonhighered.com/irc, where you can register for an instructor access code. Within 48 hours after registering, you will receive a confirming email that includes an instructor access code. After you have received your code, you can go to the site and log on for full instructions on downloading the materials you wish to use.

Alternate Versions

Print. The 4th edition is now available as an affordable, print-to-own option.

eBooks. This text is also available in multiple eBook formats. These are an exciting new choice for students looking to save money. As an alternative to the printed textbook, students can purchase an electronic version of the same content. With an eTextbook, students can search the text, make notes online, print out reading assignments that incorporate lecture notes, and bookmark important passages for later review. For more information, visit your favorite online eBook reseller or www.pearson.com/learner.

Acknowledgments

The Authors thank the following reviewers for their suggestions on revising the text for the new edition:

Reviewers Past and Present

Alvin L. McDonald, *New Mexico State University at Alamogordo*

Ann Lucas, *San Jose State University*

Brian J. McCully, *Fresno City College*

Charlotte A. Weybright, *Brown Mackie College, Fort Wayne*

Danielle Sapse, *John Jay College of Criminal Justice*

Richard Bergeman, *Berks Technical Institute* and *Lehigh Community Carbon College*

Sonia M. Gipson Rankin, JD, *University of New Mexico*

William E. Hirn, Jr., *Miami-Jacobs Career College*

Woodrow W. Colbert, *Vatterott College*

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Daniel E. Hall earned his bachelor's degree at Indiana University, his Juris Doctor at Washburn University, and his Doctor of Education in higher education curriculum and instruction at the University of Central Florida. He worked as an intern in the U.S. House of Representatives and at the Brookings Institution before attending law school and was law clerk to both the Honorable Gene E. Brooks, Chief Judge, U.S. District Court for the Southern District of Indiana, and the Supreme Court of the Federated States of Micronesia immediately following law school. He has practiced law in both the United States and in Micronesia, where he served as assistant attorney general following his judicial clerkship with the Supreme Court of the Federated States of Micronesia. In this capacity, he litigated some of the young nation's first cases, addressing important constitutional and traditional law issues. He has been a member of the faculties of the University of Central Florida, the University of Toledo, and Miami University, where he is currently a professor of Justice and Community Studies and Political Science and an affiliate professor of Global and Intercultural Studies. He is also a visiting professor of law at Sun Yat-sen University in Guangzhou, China. He is the author or coauthor of twenty-four textbooks, including revisions, and a dozen journal articles on public law subjects. He is blessed to have Grace, Eva, Aryana, and Thea in his life. Daniel welcomes your comments and suggestions for this book, which may be sent to hallslawbooks@gmail.com.

John P. Feldmeier earned his bachelor's degree in political science from Ohio Dominican College, his Juris Doctor from Capital University Law School, and his M.A. and Ph.D. in political science from Miami University. Before joining the academy, Dr. Feldmeier practiced law in Ohio, handling numerous cases involving important constitutional issues, including one case that reached the U.S. Supreme Court. Dr. Feldmeier has published several articles on constitutional subjects in law reviews and political science journals. He is currently a professor of Political Science at Wright State University and an adjunct Professor of Law at the University of Dayton School of Law. John resides in Cincinnati, Ohio, with his wife, Melissa, and their two children, Emma and Jack.

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Chapter 1
Introduction to Constitutional Law

Learning Objectives

At the end of this chapter you should be able to:

- **LO 1.1** Identify and discuss the important historical events and political philosophies that led to, and shaped, the U.S. Constitution.
- **LO 1.2** Define constitutional law as an academic field of study.
- **LO 1.3** Define judicial review, discuss its political and legal histories, explain how it is an important element of the U.S. rule of law, and contrast it with at least two other models from around the world.
- **LO 1.4** Identify the major eras of the Supreme Court in the context of its approach to federalism.
- **LO 1.5** Identify the basic architecture and style of judicial opinions.

An assembly of demi-gods.

THOMAS JEFFERSON, COMMENTING ON THE DELEGATES TO THE CONSTITUTIONAL CONVENTION

As the British Constitution is the most subtle organism which has proceeded from the womb and long gestation of progressive history, so the American Constitution is, so far as I can see, the most wonderful work ever struck off at a given time by the brain and purpose of man.

WILLIAM E. GLADSTONE (BRITISH PRIME MINISTER)

1.1 Constitutions and Rule of Law

Law is ubiquitous. You encounter traffic laws when you drive a car, employment and labor laws at work, health laws when you dine out, and Internet and communications laws when you surf the Internet, and the news media constantly remind us that there are criminal laws—and people who break them! In one study, it was estimated that more than 41,000 laws touch a restaurant hamburger by the time it is served.[1] That's a lot of laws. The Constitution of the United States may, however, appear more distant from your daily life than these laws. But it isn't. Every time you are stopped by a police officer, surf the Internet, travel, practice your religion, and attend a meeting, the Constitution is with you.

Before you begin your study of U.S. constitutional law, let's define what a constitution is and why it's important. A constitution is an expression of a nation's most fundamental political and legal values. These values vary considerably among nations. For example, several nations adhere to Islamic Law, known as Sharia. In these countries, the values of the Quran form the foundation of constitutional law. Like these nations, the U.S. Constitution is built out of a core set of values. But unlike Saudi Arabia or Iran, the United States doesn't incorporate religion into government or law. Instead, the U.S. Constitution is the result of the Framers' political experiences with Great Britain and the political philosophy of the Enlightenment. Rationality, empiricism, republicanism (the philosophy, not the political party), limited and restrained government, due process, and individual liberty framed the creation of the United States and its two Constitutions. The belief that centralized power (monarchs), which had dominated the world for hundreds of years, was both ineffective and a threat to liberty, drove them to favor a more egalitarian model. In his famous work *Common Sense* (1775), Thomas Paine wrote that "government, even in its best state, is but a necessary evil; in its worst state an intolerable one." British Lord Acton would later write that "power corrupts. Absolute power corrupts absolutely."

In spite of their concerns about government, the Framers were keenly aware that government is necessary. As James Madison wrote, "If men were angels, no government would be necessary."[2] But men aren't angels. Government is needed to protect people from one another, to regulate commerce, and to engage with the other nations. According to Harvard University professor Steven Pinker, the rise of the nation-state led to the largest decline in violence, through the state's control of violence among people, in human history.[3] As you will see later, the Framers struck a balance between liberty and security; they created a government that is limited in authority and that expressly protects individual liberty.

Social Compact
An implied agreement between members of a society that they will relinquish some freedom in exchange for security.

The idea that people exchange liberty in favor of security is known as the social contract, or **social compact**. The balance between liberty and security is not static. During times of peace and when the economy is sound, liberty reigns. But during war and crisis, the balance shifts. Consider the Coronavirus Pandemic of 2020. Every single American lived under some form of government-ordered quarantine or isolation, travel was restricted, courts stopped operating, and businesses were forced to close. In normal times, these mandates would have been invalidated by the courts within hours. But the significance of the health threat changed the constitutional equation in favor of national security. You will examine the social contract in greater detail in Chapter 8.

In addition to reflecting fundamental values, it is common for constitutions to be more stable than other forms of law. They are, for example, harder to change. This is true for a couple of reasons. First, fundamental values don't change as quickly as policy needs. COVID-19, for example, popped up out of nowhere, requiring a rapid response. This is possible with legislation, but not with changes to the Constitution. Second, law needs to be stable and predictable. This is particularly true of individual rights, which shouldn't ride the waves of public opinion. To change the tax on a purchase of a cell phone is one thing; deciding that the cell phone can be searched by police at any time, without probable cause, is another. As you will learn, the Framers established a couple of methods to amend the Constitution, and both are cumbersome. Consequently, there have been only 27 amendments since 1789, and the first ten, the Bill of Rights, were added in 1791. So, there have only been 17 amendments since 1791.

You will learn later that the power of the U.S. Constitution is much greater today than when it was adopted. This is particularly true of individual rights. The rights found in the Bill of Rights were once narrowly interpreted and they constrained only the federal government's powers. Yes, for a long time, the states didn't have to comply with the Bill of Rights. For over one hundred years there was no federally protected right to speak, to be free from unreasonable searches and seizures, or to a jury trial.

Your Constitutional Values

In each of the following chapters, you will find a special feature entitled *Your Constitutional Values*. In this feature you will find examples of constitutional conflicts that did not make it to the Supreme Court of the United States for resolution. These case studies illustrate that constitutional law occurs at all levels and in all branches of government. Consistent with the adage "all politics is local," these case studies illustrate that constitutional conflicts occur with relative frequency in communities all around the nation.

As your read *Your Constitutional Values*, consider the following:

1. What values are in conflict?
2. What is the state of the law? Does precedent adequately consider all the values at stake? If not, how can you distinguish this case from the existing precedent?
3. Has this or a similar case occurred in your community or state?

This is no longer the situation. Today, rights are interpreted to protect much more than in the past, and they apply to all governments; federal, state, and local.

The influence of the Constitution stretches beyond America's borders: The U.S. Constitution is the oldest and most frequently modeled written constitution in the world.[4] The U.S. Constitution is relatively short. The original document was written on four pages of parchment. Including its amendments, it is 7,591 words. Compare that to India's Constitution—which is more than 146,000 words. But it isn't a nation that holds the record for the longest constitution. It is the State of Alabama. Its constitution, the sixth in the State's history, has more than 300,000 words! Be glad that you aren't studying Alabama constitutional law.

The study of constitutional law is commonly broken into two parts; the architecture of government and individual rights. This book is organized in that way. Chapters 1–7 examine governmental structure and authority, and Chapters 8–13 dive into individual rights. For context, let's begin with a short history of the Constitution.

1.2 Articles of Confederation

What today is the continental United States had been visited by Europeans as early as the mid-1500s. After several failed attempts to establish permanent settlements by various European powers, the Spanish established the first permanent settlement in 1565. That settlement, St. Augustine, Florida, is a thriving city and popular tourist destination today. Following St. Augustine, many colonies were established by the Spanish and other European powers on the West Coast, in modern Texas, and, of course, in New England. Colonies that are well known to elementary school pupils in the United States, such as Jamestown (Virginia) in 1607 and Plymouth (Massachusetts) in 1620, were all established in the 1600s.

These small bands of immigrants lived independently in their early years. Each established its own laws and forms of governance and had differing relationships with their European home governments. Many had what today would be considered fundamental law. In what is likely the first, the Pilgrims executed the Mayflower Compact in 1620. Others include the Fundamental Orders of Connecticut of 1639; Fundamental Orders, or Original Constitution, of the Colony of New Haven of 1639; The Articles of Confederation of the United Colonies of New England of 1613; the Massachusetts Body of Liberties of 1641; and the Frame of the Government of Pennsylvania of 1682. These early expressions of fundamental law tended to focus on the structure of government and, in some cases, on the relationships among the colonies. Some, however, included protections of individuals' rights. The Massachusetts Body of Liberties, for example, contained a long list of rights that included equality between resident and foreigner and rights to be free from cruel punishments,

to notice that an act was a crime before it could be punished (later referred to as the principle of legality and, today, due process), to bail, to speedy trial, to be free of torture to elicit a confession (except in capital cases where co-conspirators are suspected, and even then, barbarous and inhumane tortures are forbidden), to have capital punishment convictions supported by two or more witnesses or the equivalent, and to have free speech. The Frame of Government of Pennsylvania of 1682 provided for indictment by grand jury, public trial by jury of one's peers, bail, and proportional ("moderate") fines.[5] These laws were heavily influenced by European laws, particularly the British common law.

By the late 1600s, there were twelve colonies: Virginia, Massachusetts, New Hampshire, Maryland, Connecticut, Rhode Island, Delaware, North Carolina, South Carolina, New Jersey, New York, and Pennsylvania. In 1732, Georgia was founded. The original thirteen states were established from the geographical boundaries of these colonies. Although the colonies were largely autonomous and self-governing, they remained, ultimately, governed by England. Each colony's governmental structure and relationship with England varied, but all shared common grievances with their mother country that led to the war for independence. Their Declaration of Independence was issued in 1776. Independence was won in 1781.

Even before independence was declared, the colonies had established a body to meet and address issues of national concern: the Continental Congress. The Continental Congress first met in Philadelphia on September 5, 1774. It operated from this date until 1781. This organization, although national in representation, did not have the authority to make binding laws. Its authority was primarily limited to raising an army and conducting diplomacy.

By the time the Declaration of Independence was adopted, there had been discussions in the Continental Congress concerning the adoption of a constitution to formally recognize a confederacy of the thirteen colonies. On June 7, 1776, Richard Henry Lee, a delegate to the Congress from Virginia, introduced a resolution that declared the "United Colonies" to be "free and independent states, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved." Additionally, the resolution called for the development of a plan of confederation to be submitted to the states.[6] The resolution was adopted on July 2, 1776, and was incorporated into the Declaration of Independence, which was largely drafted by Thomas Jefferson on July 4, 1776.

It was not until 1781 that the colonies adopted the Articles of Confederation and Perpetual Union, the first constitution of the United States. Under the Articles, the Continental Congress was disbanded and replaced by the Confederation Congress. Although the new Congress had more authority than its predecessor, the states continued to be the most powerful political entities. It was proclaimed in the Articles that "[e]ach state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not expressly delegated to the United States, in Congress assembled." Politically, the United States was a loose union of independent and sovereign states, and members of the Congress were little more than ambassadors representing their respective states. As expressly stated in the Articles, the states entered into a "firm league of friendship."[7]

Not many years passed before the league proved unworkable. The states were geographically distant from one another. In an age without modern travel and technological means to disseminate information, this was problematic. Compounding the problem was that the states were distant in more ways than miles: They differed in history, culture, and politics. The result was parochialism, localism, and an interest in empowering the states rather than the national government. In the end, the states proved to be too independent and powerful, and the national government too dependent and weak.

Under the Articles of Confederation, the national government was responsible for negotiating treaties with foreign governments. That authority, however, was thwarted by the authority of the states to tax imports and exports, regardless of any treaties negotiated by the national government. Although the national government had the authority to declare war, it had no authority to establish a standing army. If it declared war, it could enlist volunteers but lacked the power of conscription. It could request the assistance of state militias, but the states could refuse. Even more troubling, funding for war efforts came from the states.[8]

Also, each state could prohibit the export and import of goods. The consequence was inconsistent and often competing commercial laws among the states, not just from foreign nations, but from one another.

Jealousies among the states led to factionalism. Nine of the 13 states had their own navies. Territorial disputes, as well as disputes over the authority to control the nation's waterways, plagued the nation.[9] Many of the states were engaged in economic wars with one another, and there were concerns that a military civil war would destroy the union.

To add to these problems, the national government was financially subservient to the states. Specifically, it did not have the authority to raise revenues directly from its citizens. The Articles provided that the states were to make contributions to the national treasury. However, the contributions were to be raised by each state individually, and the national government lacked the authority to compel a state to contribute. Because many of the states were regularly in arrears in their payments, the national government could not pay its own debts to foreigners and citizens.

Governmental structure under the Articles was also problematic. There was no independent executive. The president of the Congress served as the body's highest executive officer, but the role of the president was not clearly defined, which resulted in confusion between legislative and executive authority. Many executive responsibilities were performed by legislative committees rather than by the president—a practice that proved to be ineffective.

There was no national judiciary, except that the Congress selected four judges to hear cases in the territory northwest of the Ohio River and that a Court of Capture heard appeals from the state courts in admiralty cases.[10] Otherwise, there was no national court to bring a national perspective to litigation or to develop a uniform national jurisprudence. Accordingly, cases involving national law were heard and decided by state courts, sometimes with differing interpretations of national law.

The private sector was also affected. Inflation was high, and the laws governing commerce differed from state to state. Inconsistent and often competing laws regulating interstate commerce impeded economic development. Again, the national government was virtually powerless to remedy these ills. Lack of confidence in the future of the nation resulted in little investment and a significant decrease in the value of land.

In 1786, the nation's economic problems provoked a group of radical farmers, many former soldiers of the Revolutionary army, in Massachusetts, led by Daniel Shays, to rebel against the local government. The rebels—angered by the poor state of the economy, the imprisonment of small farmers who could not pay their debts, and court-ordered land forfeitures—took control of several courts and prevented them from operating. There was no national authority to defeat the rebellion, and initially, many local authorities were reluctant to become involved. Eventually, **Shays' Rebellion** was quelled by a privately financed (merchants and creditors), state-legislature-authorized militia. Many insurgents were charged and convicted, and two were hanged. Daniel Shays, who went into hiding, along with many others, were eventually granted amnesty. Although unsuccessful, the rebellion is believed by many to have been the spark that ignited the decision to revise the Articles of Confederation.

Shays' Rebellion

Daniel Shays, a veteran of the American Revolutionary War, and a group of fellow farmers rebelled in protest of economic conditions. This incident was cited by many as justification for abandoning the Articles of Confederation, the theory being that a stronger national government could provide better economic conditions and that a national military would be most effective in defeating rebellions.

Federalist
(1) A person who supports a strong, centralized government. (2) A political party that advocates a strong, centralized government.

Anti-Federalist
(1) A person who opposes establishment of a strong, centralized government in favor of local control. (2) A party that opposes establishment of a strong, centralized government in favor of local control.

The inadequacies of the Articles became critical. James Madison stated that the "insufficiency of present confederation [threatened the] preservation of the union." He continued, "[W]e may indeed with propriety be said to have reached almost the last stage of national humiliation. There is scarcely anything that can wound the pride or degrade the character of an independent nation which we do not experience."[11] Madison was speaking for many. The mood of the nation was one for change in order to save the union. The proponents of change recognized the problem to be the weakness of the national government. However, the colonists had also learned a lesson about unchecked centralized power while under British rule: It can be unfair and arbitrary.

These two experiences—the excesses of British power and the inadequacies of the Confederation—resulted in a reserved and cautious attitude in favor of strengthening the national government. Some people, notably George Washington, Alexander Hamilton, James Madison, John Marshall, and John Hancock, favored a strong national government and thus are known as **Federalists**. There were also people who opposed the creation of a strong national government. This group, known as the **anti-Federalists**, had among its ranks Thomas Jefferson, Luther Martin, George Mason, and Patrick Henry.

1.3 Philadelphia Convention

The prevailing attitude was that a stronger national government would address the nation's problems. Years before Daniel Shays hatched his plot, members of Congress had called for an increase in national authority to cure the nation's ills. James Madison zealously fought for a constitutional convention. The highly respected George Washington bitterly complained of the impotence of the national government. But the states were reluctant to give up any power. And then an opportunity presented itself.

1.3(a) The Delegates and Their Mandate

In 1786, a group of prominent Americans met in Annapolis, Maryland, to discuss interstate commerce issues. The meeting had been urged by the Virginia state legislature and was supported by many politicians from other states. However, little occurred, as only five states were represented. One important product did result from this meeting, however. Alexander Hamilton submitted, and the body approved, a recommendation to the Continental Congress that a convention be held to examine the problems of the nation and its constitution. The Continental Congress consented.

The congressional resolution approving of the convention read, in part, "Resolved that … on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation." There was no mandate to the delegates to create a new constitution. Besides this, they were representatives of the states and, arguably, not the people. In spite of this, they chose to act as representatives of the people. Consequently, they chose to begin the new constitution with "We the People," rather than with the suggested "We the States."

Philadelphia was an appropriate location for such an auspicious gathering. It was the city where the first Continental Congress met, where George Washington was appointed Commander of the Continental Army by the Second Continental Congress, and where two important documents—the Declaration of Independence and the Articles of Confederation—had been signed. Philadelphia would add the new constitution to its impressive list.

Figure 1-1 The states' delegates to the constitutional convention of 1787

Connecticut
Oliver Ellsworth
Roger Sherman
William Samuel Johnson

Delaware
Richard Bassett
Jacob Broom
Johnson Dickinson
George Read
Gunning Bedford Jr.

Georgia
Abraham Baldwin
William Houston
William Pierce
William Few

Maryland
Daniel Carroll
Daniel of St. Thomas Jenifer
James McHenry
Luther Martin
John Francis Mercer

Massachusetts
Elbridge Gerry
Nathaniel Gorham
Rufus King
Caleb Strong

New Hampshire
John Langdon
Nicholas Gilman

New Jersey
David Brearley
Jonathan Dayton
William Churchill Houston
William Livingston
William Paterson

New York
Alexander Hamilton
John Lansing Jr.
Robert Yates

North Carolina
William Blount
William Richardson Davie
Alexander Martin
Richard Dobbs Spaight
Hugh Williamson

Pennsylvania
Benjamin Franklin
George Clymer
Thomas Fitzsimons
Jared Ingersoll
Thomas Mifflin
Gouverneur Morris
Robert Morris
James Wilson

Rhode Island
None

South Carolina
Charles Pinckney
Charles Cotesworth Pinckney
Pierce Butler
John Rutledge

Virginia
George Washington
James Madison
George Mason
Edmund Randolph
John Blair
James McClurg
George Wythe

In total, seventy-four delegates were selected to attend the convention (see Figure 1-1), although only fifty-five actually attended. The reasons for not attending varied—some personal, others political. Patrick Henry rejected his appointment because he "smelt a rat."[12] He correctly foresaw what the convention would produce: not a revision of the Articles but a whole new constitution creating a whole new government. Later, during the ratification debates in the states, he would prove to be a vocal and vehement opponent of the new constitution.

The delegates who attended were the who's-who of colonial life. They were among the most respected men of politics, law, and business. It is said that Thomas Jefferson, who was in Paris during the convention, remarked that it was "an assembly of demi-gods" when he learned who was in attendance. George Washington, Benjamin Franklin, Alexander Hamilton, James Madison, and George Mason were among the ranks of the delegates.

Of the attending delegates, one-half were college graduates, most were attorneys, and all were part of America's political or economic aristocracy.[13] Eight were foreign-born, and eighteen had worked or studied abroad. Some were obviously influenced by

Sidebar

Where Was Thomas Jefferson?

Thomas Jefferson, lead author of the Declaration of Independence, third President of the United States under the new Constitution, and a man whose political philosophy significantly influenced the development of America, did not attend the Constitutional Convention. Where was he? Jefferson was in France, serving in the nation's diplomatic corps. Mr. Jefferson had great respect for the delegates. When he learned the identities of the membership, he commented that it was "[a]n assembly of demi-gods."

Wasin Pummarin/123RF

Independence Hall, Philadelphia, Pennsylvania

what they had learned from the political experiences of other peoples in other nations. A few delegates were clergymen, but this did not affect the secular atmosphere of the convention.[14]

The convention was scheduled to open on May 14, 1787. Because of the absence of a quorum, though, the proceedings did not begin until May 25. They continued until September 17 with only two breaks, two days to celebrate Independence Day and another work-related, ten-day recess.

Of the thirteen states, all but one were represented at the convention. Rhode Island refused to send delegates. Two matters were immediately considered and agreed upon. First, with little discussion, George Washington was selected to chair the convention. Second, the delegates decided that what was to transpire was to remain secret until the final document was completed. Although there were small leaks during the convention, the rule was generally respected.

The absence of information from the delegates led to speculation and rumor about what was transpiring inside the hall. So wild was one rumor, to the effect that the delegates were considering a monarchy, that they issued a statement on August 15 to the contrary. Interestingly, there were a few delegates who supported the establishment of some form of monarchy. Alexander Hamilton, for example, proposed an "elective monarchy." Under this system, the president would have been elected for life, as would the Senate. Hamilton advocated for an English-like government, equating the House of Representatives to England's House of Commons, the Senate to the House of Lords, and the president to the Crown. Edmund Randolph admitted to preferring the English system, but he also recognized that the people of the United States would never accept such a government.[15] Hamilton's and Randolph's feelings did not represent those of most of the delegates. As a whole, they were faithful to republican (representative democratic, if you will) principles and were mindful not to place too much authority in any one person's or group's hands.

1.3(b) The Debates

Details of what transpired at the convention are not known. An official journal was kept and provides some insights. More thorough than the convention journal are the notes of James Madison, who was so diligent in his record keeping that he never left the convention for more than an hour. In total, his notes occupy three volumes. These items, as well as the personal notes and correspondence of all the delegates, give us an idea of what the delegates discussed and debated during that hot summer of 1787.

On the second day of the convention, Edmund Randolph, governor of Virginia, presented the Virginia Plan, which was in large measure the work of James Madison. Although the Virginia Plan was not the only proposal presented to the convention,[16] it was to be the most influential. The Virginia Plan, or Virginia Resolves, set the tone for the convention and controlled the issues that would be considered. Many of the plan's initial concepts were made a part of the Constitution, in whole or in part. Although the Virginia Plan claimed to be a revision of the Articles of Confederation, it was clear to the delegates that it was more than that: It was a proposal to replace the existing confederation with a strong, centralized, and supreme national government. The convention took up the plan resolve by resolve. Some of the issues debated at the convention are discussed here.

The nature of the national legislature, Congress, was of particular importance to the delegates. What would be each state's representation in the new Congress? How would its members be selected? What powers would it possess? These are all issues that were considered, debated, and resolved by the delegates.

General Charles Pinckney objected to the discussions and reminded the delegates that they were authorized only to revise the Articles of Confederation, not to replace them. Later, Edmund Randolph commented, "[W]hen the salvation of the Republic is at stake … it would be treason to our trust not to propose what we find necessary."

The Virginia Plan called for a separation of powers: legislative, executive, and judicial. Madison, Hamilton, and other delegates were influenced by the theories of European Renaissance and Enlightenment philosophers, such as John Locke and Charles de Montesquieu, who had written extensively about the importance of dividing the functions and powers of government to preserve liberty. As stated by Madison, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands may justly be pronounced the very definition of tyranny."[17] There was little discussion about the concept, as it was generally accepted. Additionally, all agreed, as evidenced by the final product, that few decisions should be made by one branch alone. The branches should check one another to maintain a balance of power.

As for a national legislature, the Virginia Plan provided for a bicameral Congress. There appears to have been little disagreement with this idea. However, the remaining questions were not so easily answered. Concerning each state's representation, the plan called for state representation to be based upon each state's number of free people or, in the alternative, based upon each state's contribution to the national treasury. The small states opposed the proposal, as they were accustomed to being treated as equals under the Articles of Confederation. These states were convinced that the larger states would always have their will, unless all were equals in Congress. They particularly feared the West, which represented potentially large and wealthy states in the future. Roger Sherman commented, "The smaller states will never agree to the plan on any other principle than an equality of suffrage in this branch." The larger states objected to equal representation, contending that this would devalue the franchise of their citizens.

Ultimately, an agreement known as the "Great Compromise" was reached. Representation in the lower house, the House of Representatives, would be based on population (the number of free persons, excluding Indians that were not taxed, and three-fifths of others); representation in the upper house, the Senate, was to be equal. Initially, the delegates agreed that each state would be entitled to one representative to the Senate, but later this was changed, with no debate, to two. Included in this compromise was the resolution of another troubling issue: whether slaves were to be part of the equation for deciding representation. Because the delegates had decided, after debate, that the national government's taxes were to be based upon the same equation, the issue was doubly important.

This issue divided the delegates. Philosophically, the division was geographic, North versus South, over whether slavery should be permitted. But the delegates did not seriously debate this issue. However, the division over whether to count slaves for the purpose of representation and taxation transcended the North/South divide. The South would pay more in taxes if slaves were counted. At the same time, the added numbers could increase its representation. Some of the southern delegates contended that southern white citizens would never accept being placed on a one-to-one basis with slaves.

Northern delegates were also split. Some contended that because slaves were property, they should not be included. Others insisted that all people should be included in the census. The two sides compromised and allowed three-fifths of slaves to be counted in determining both taxation and representation. The drafters of the Constitution were careful not to use the term *slave*, calling them "other persons" instead.

The number of representatives was thus set, but how were they to be selected? This proved to be another hotly debated issue. Delegates such as Elbridge Gerry and Roger Sherman believed that the people could not be trusted to choose their own representatives. To them, the people were an uninformed mass, subject to being "duped" by unscrupulous, charismatic politicians. They proposed that the state legislatures be empowered to appoint the representatives.

George Mason wanted the power to rest with the states, not because he distrusted the people but because he was a states' rights advocate. "Whatever power may be necessary for the national government, a certain portion must necessarily be left in the states.... The state legislatures also sought to have some means of defending themselves against encroachments of the national government.... And what better means can we provide than to make them a constituent part of the national establishment[?]" John Dickinson felt similarly. He contended that direct election would result in the total annihilation of the states as political entities.

Others believed that the people should directly elect their representatives. This issue was central to the convention. Were they creating a government of the states or of the people? George Mason and James Madison were proponents of the direct election of at least one chamber of Congress. Mason pointed out that under the Articles of Confederation, the national government represented the states, which then represented the people. He contended that the states should not stand between the people and the national government because the interests of the states are sometimes at odds with the people's interests. Oliver Ellsworth warned that the "people will not readily subscribe to the national constitution if it should subject them to be disfranchised." The decision went to the heart of how to define this new democratic republic.

Again, the ideas of John Locke, Charles de Montesquieu, and Thomas Hobbes, including natural law theory, were a part of the delegates' collective political ideology. If the authority to create a constitution emanates from the people, some delegates wondered how the people could be disenfranchised. Again, a compromise was reached. The members of the House of Representatives would be elected directly; senators were to be selected by the state legislatures. This method for selecting senators remained until the adoption of the Seventeenth Amendment in 1913, which provides for direct election.

The delegates also tackled the issue of qualifications to vote. There was discussion of limiting the right to vote to landowners. There were concerns that the less wealthy would sell their votes. This idea was defeated, and the franchise was extended to all free men.

There was little debate over the powers that should be possessed by Congress. These were spelled out in the first article of the Constitution. The Framers intended for the national government to be a limited government. Said another way, the national government possesses no authority that is not specifically granted through the Constitution. However, in the enumeration of its powers, Congress was granted the authority to regulate interstate commerce and to make all laws "necessary and proper" for enforcing its other enumerated powers. These clauses, matched with

Sidebar

Roger Sherman: The Record Holder

Of all the Framers, Roger Sherman stands out as having signed the greatest number of the founding documents. He signed the Articles of Confederation, the Continental Association of 1774, a boycott of British goods and the primogenitor of the Declaration of Independence, the Declaration of Independence, and, as a delegate from Connecticut, the Constitution.[18]

social, political, and technological changes, have proven instrumental to the growth of the national government and are concomitantly responsible for decreasing the authority of the states.

Another thorny issue for the delegates was the Virginia Plan's resolve that provided the national Congress with veto power over state laws. The original proposal allowed the legislative veto of state laws that were in conflict with the national constitution. Later in the convention, this was extended to all laws that Congress found improper. Madison supported the idea, as did Pinckney. They contended that it was an effective and necessary means of keeping the states from encroaching upon the national sphere. There were strong objections. Elbridge Gerry argued that through such power, the national government could "enslave the states." It was suggested that the new constitution could enumerate the instances when Congress could exercise the power, but that idea was rejected, as was the entire proposal. The legislative veto was dead. Madison was not happy but was consoled by the fact that the judiciary would apparently have the authority to protect the national government from the excesses of the states.

What were the Framers' thoughts on the executive branch? Under the Virginia Plan, the executive power would have rested in one person, who was to be limited to one term and selected by Congress. George Mason thought there should be three coequal executives. It was decided, with little debate, that executive authority should reside with one person. Nevertheless, the Framers feared a monarchy and were careful not to create one. The title *President* was chosen over other more regal titles, such as *His Highness,* to avoid the appearance of monarchy.

One of the hardest decisions for the delegates to reach was the method of selecting the president. For the same reasons discussed earlier in regard to selecting members of Congress, direct election was not seriously considered. It was proposed that Congress make the selection. However, there was general agreement that this would place too much authority with the legislature and create too much executive dependence on the legislature. Others wanted greater state involvement in the process. Perhaps the state legislatures should select the highest executive? Most agreed that this process would be too political and too regional, likely resulting in each state supporting one of its own. There was intense debate over the issue. The result was the Electoral College. Under the Electoral College system, each state has a number of electors equal to the total number of national Congress members (members of the House and Senate) it possesses. These persons constitute the Electoral College. The president is selected by this Electoral College. Alexander Hamilton said of this system:

> It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any preestablished body, but to men chosen by the people for the special purpose, and at the particular conjuncture.
>
> It was equally desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation.[19]

The delegates agreed that, in the event of a tie in the Electoral College, the House of Representatives would choose between the candidates. The Senate was originally considered, but the delegates felt that they had already significantly empowered the Senate and that, in the interest of balance, this responsibility should be placed with the House of Representatives.

In regard to presidential responsibilities, the delegates agreed that the president should be the commander-in-chief of the military, negotiate and make treaties, and nominate the cabinet members, members of the national judiciary, and other government officials, with the advice and consent of the Senate. They also decided to give the president the power to veto legislation but checked that power by providing that Congress could override the veto with a two-thirds vote. Edmund Randolph believed that the total grant of authority to the president was excessive and characterized it as the "fetus of monarchy."

The final issue to be discussed concerning the executive also concerns the judiciary. It was proposed that a council be established comprising the president and several justices of the Supreme Court to review acts of Congress for constitutionality. Under the proposal, acts contrary to the Constitution could be declared void or revised by the council. Gerry opposed the measure because he believed it to be superfluous, as the judiciary has the power to nullify laws contrary to the Constitution. James Madison agreed, "A law violating a constitution established by the people themselves … would be considered by judges as null and void." Rufus King also opposed the council. He contended that because it was the responsibility of the courts to review the laws before them and to nullify those repugnant to the Constitution, it would be an improper mixing of functions to have judges participate in revising or voiding laws with the executive. Still another voice was heard in this vein. Luther Martin stated, "[A]s to the Constitutionality of laws, that point will come before the judges in their proper official character. In this character they have a negative on the laws." The measure was defeated, but the president was given the veto power, subject to override.

Interestingly, the delegates did not specifically mention, in the Constitution, the power of the judiciary to declare the acts of its coordinate branches or the states unconstitutional. However, the Supreme Court has determined that such a power is implicit in the judicial function. (This issue is discussed again in Chapter 3.)

Another issue the delegates debated was the role the national judiciary should play in the new United States. Some contended that they should create a system of national courts through the new constitution. Others feared, however, that if they created national courts, state courts would be displaced and divested of their authority. The compromise agreement was that the Supreme Court of the United States would be created by the new constitution along with "inferior Courts as the Congress may from time to time ordain and establish." Without a system of lower national courts, many delegates feared that national laws would go unenforced. To remedy this problem, the delegates included a provision in the new constitution requiring state courts to enforce national laws. This is embodied in Article VI, and reads, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof: and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of any State to the Contrary notwithstanding.

This compromise satisfied the delegates who wanted to control the size of the national government and also ensured that national laws would be enforced. Congress exercised its power to create inferior national courts when it enacted the Judiciary Act of 1798, which established thirteen district and three circuit courts.

There was little debate concerning the jurisdiction of the national judiciary by the delegates. This issue is examined more closely in Chapters 3 and 4.

1.3(c) Individual Rights and Slavery

To many people, there were two glaring problems with the Constitution. First, it did not explicitly set out individual rights. Second, it did not address slavery.

First, it must be pointed out that the delegates did not totally ignore issues of individual liberty. The Constitution does contain a number of provisions intended to protect civil rights. For example, Article I, Section 9, provides for writs of **habeas corpus**. Section 10 prohibits Congress from passing any **bills of attainder** or **ex post facto laws**. Article III, Section 3, provides that no person shall be convicted of treason except upon the testimony of two witnesses to the same act or upon a confession in open court. And the basic architecture of the government itself, e.g. the separation of powers and federalism, were intended to guard against tyranny.

In spite of this, the first ten amendments, commonly known as the Bill of Rights, were added to ensure that the government would not encroach upon civil liberties. At the Constitutional Convention, George Mason argued for the inclusion of a bill of rights, and Elbridge Gerry moved for such a bill to be included in the Constitution. Alexander Hamilton saw no need to include a bill of rights because the government lacked the authority to encroach upon an individual's liberty: "Why declare that things shall not be done, which there is no power to do[?]"

Hamilton did not foresee the significant change that would come to the United States. Industrialization, a huge growth in population, and a specialization of functions have led to increased interdependence among people. Today, few persons live so remotely that their activities do not affect others, and few supply their own food, clothes, and other necessities. Contemporary life in the United States involves continuous and frequent contact with other people. As human contact increases, so do conflicts and, accordingly, rules to regulate conduct. We look to government to establish and enforce most of these rules. To protect ourselves from an overzealous government, which we have entrusted with an ever-increasing amount of authority, we need a bill of rights.

Hamilton's view prevailed. The delegates decided not to include a bill of rights in the original document because they simply did not believe the government had the authority to legislate in the areas a bill of rights would cover. After the convention voted ten to zero to exclude it, Gerry moved that the freedom of the press should at least be included. For the same reason—that the delegates did not believe the government had the authority to regulate the press—this motion was also defeated. There was no bill of rights in the original Constitution.

Nevertheless, the absence of a bill of rights was troubling to the nation. A few states, such as New York and Virginia, attached to their resolutions of approval of the Constitution proposals to amend the new constitution to add a bill of rights. In total, more than 200 amendments to the constitution were discussed in the state ratifying conventions.[20] It was a popular idea, and only three years after the Constitution was ratified, the Bill of Rights was ratified.

Slavery was a divisive issue. The issue arose in the context discussed previously: taxation and representation. It was at that juncture that many delegates voiced their objections to slavery. Some of the objectors, were slave holders themselves. George Washington, for example, referred to slavery as repugnant. Luther Martin asserted that the slave trade was "inconsistent with the principles of the revolution and dishonorable to the American character to have such a feature in the Constitution." On the other side were economic interests. The abhorrent practice had been relied upon in the southern states. In the interest of preserving the union and successfully enacting a new Constitution, objectors backed away from abolition.

But slavery was debated in the context of the importation of slaves. Under the new constitution, this was an area under national jurisdiction, but many delegates representing the southern states did not want the national government to interfere with the importation of slaves. Again, some delegates who were opposed to slavery believed that the document should include a provision prohibiting the importation of slaves into the United States. George Mason, himself a slave owner, opposed slavery and wanted to include such a provision in the new constitution.

Habeas Corpus

Latin term for "you have the body." A writ whose purpose is to obtain immediate relief from illegal imprisonment by having the "body" (i.e., the prisoner) delivered from custody and brought before that court. A writ of habeas corpus is a means for attacking the constitutionality of the statute under which, or the proceedings in which, the original conviction was obtained. There are numerous writs of habeas corpus, each applicable in different procedural circumstances. The full name of the ordinary writ of habeas corpus is *habeas corpus ad subjiciendum*.

Bill of Attainder

A legislative act that inflicts capital punishment upon named persons without a judicial trial. Congress and the state legislatures are prohibited by the Constitution from issuing bills of attainder.

Ex Post Facto Law

A law making a person criminally liable for an act that was not criminal at the time it was committed. The Constitution prohibits both Congress and the states from enacting such laws.

Sidebar

Constitution Day and Citizenship Day

Does your college or university celebrate Constitution Day? If it receives financial support from the federal government, it must.

In 2004, Senator Robert Byrd attached an amendment to the Omnibus Spending Bill that recognized September 17, the day the Constitution was signed, as Constitution Day and Citizenship Day. The law requires all educational institutions that receive federal support to provide constitutional education on that day. In addition to constitutional education and celebration, the day is designated Citizenship Day, an opportunity to recognize America's naturalized citizens. Schools and colleges around the nation have embraced the day, many offering programming and events beyond the day; for example, Constitution Week is common.

There were also delegates who opposed slavery but believed that the constitution should not prohibit it. Roger Sherman was in this group. He thought the states were moving toward abolition and that this movement should be permitted to run its course. Charles Pinckney warned that South Carolina would not accept any constitution that forbade the importation of slaves. He voiced what all the delegates feared: factionalism. They did not want to include a provision so repugnant to any particular region that ratification would be jeopardized. Benjamin Franklin, president of the Pennsylvania Society for the Abolition of Slavery, refused to present a petition from the group to the convention, fearing that it would drive an irreparable wedge among the states.

A compromise was reached. First, as discussed earlier, three-fifths of slaves were included in the initial determination of representation and taxation. As to the importation of slaves, the delegates agreed that Congress could not prohibit the importation of slaves until 1808 and capped the tax on each slave at $10. On January 1, 1808, Congress prohibited the importation of slaves. This did not, however, end slavery. It took a civil war to make that happen.

Subsequent to the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments and federal legislation were enacted to extend legal protections and equality to all persons, regardless of color, race, or ethnicity. You will learn more about this subject later in this text.

1.3(d) Women and the Franchise

Women were not extended the right to vote by the new constitution. In fact, it appears that there was no discussion of the issue at the Constitutional Convention. Women were not excluded entirely from political processes during this period, however. For example, the New Jersey Constitution of 1776 extended the right to vote to women who owned property (African Americans were also allowed to vote). This was changed, however, in 1807, when the New Jersey Constitution was amended to restrict suffrage to "men."[21]

The women's suffrage movement can be traced back to Abigail Adams, wife of President John Adams. Later, feminists such as Elizabeth Cady Stanton and Susan B. Anthony led the women's suffrage movement that resulted in the Nineteenth Amendment (1920), which extended the right to vote to women. You will learn later that the Fourteenth Amendment's Equal Protection and Due Process clauses, as well as federal legislation, have since been interpreted to ensure equal protection under the law in many instances beyond voting.

1.4 Ratification

James Madison, Alexander Hamilton, Gouverneur Morris, and Rufus King were responsible for the actual drafting of the Constitution. Although it was Madison who brought many of the ideas to the convention that were eventually adopted, it was

Gouverneur Morris who wrote most of the text, including the entire preamble. A local clerk was hired to actually pen the document. It took him forty hours to write the 4,400 words on a four-page parchment made of either calf or lamb skin. He was paid $30 for this task.

The signing occurred on September 17, 1787. Consequently, September 17 was later recognized by federal statute as Constitution Day. Subsequently, the law was amended to add a celebration of citizenship, and today September 17 is known as Constitution and Citizenship Day. Thirty-nine delegates signed the final product. Three delegates, George Mason, Edmund Randolph, and Elbridge Gerry, refused to sign. Edmund Randolph was the delegate who introduced the Virginia Plan, from which the Constitution was constructed. He, like Mason and Gerry, was concerned that too much power had been vested in the national government. Later, however, during the Virginia Ratification Convention, Randolph supported the Constitution to avoid dividing the nation.[22] Mason and Gerry, in contrast, later opposed the Constitution in their state conventions. Mason commented that he would rather cut off his hand than see the Constitution ratified.

The delegates transmitted a copy to the Congress, where it was received on September 20, 1787. Richard Henry Lee opposed sending the Constitution on to the states for ratification, and there was discussion of sending it on with objections. The Congress decided to do neither. Instead, it was transmitted to the states without any comment whatsoever.

The delegates had debated the method of ratification. Special conventions won out over state legislatures. Further, the delegates decided that it should take only nine states to ratify the document, rather than the total of thirteen, and that ratification would be effective only among the ratifying states. All thirteen states would have at least one ratification convention. The state conventions were limited to ratifying or rejecting the document; no revisions or conditional ratifications were allowed. However, concerns were voiced during the ratification process, and at least one, the absence of a bill of rights, was so serious that the Framers promised to immediately add the protections after ratification in order to secure the support needed to ratify the document. The conventions began in November 1787 and ended in May 1790.

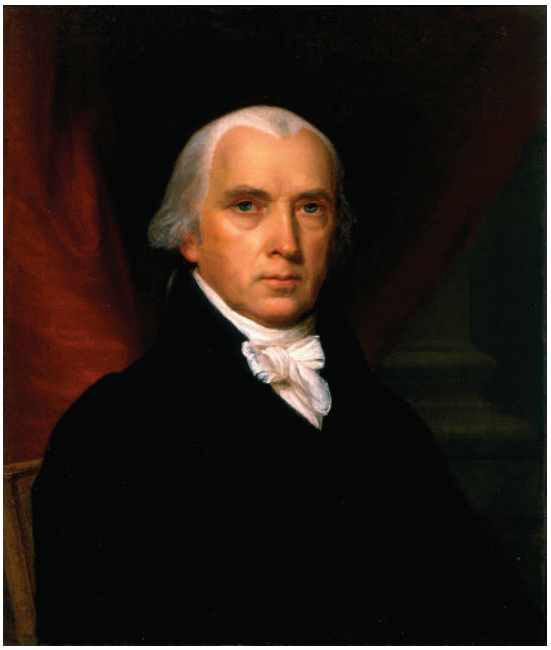
Sidebar

Ratification of the Constitution

Article VII of the Constitution of the United States reads, in part, "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." The delegates had decided that ratification would occur through conventions to be conducted in each state. Further, it took nine states' approvals before the Constitution could be ratified, and then it would apply only among the ratifying states. It took two and a half years, but eventually all thirteen states accepted the Constitution. The order of state approval was as follows:

December 7, 1787	Delaware
December 12, 1787	Pennsylvania
December 18, 1787	New Jersey
January 2, 1788	Georgia
January 9, 1788	Connecticut
February 6, 1788	Massachusetts
April 28, 1788	Maryland
May 23, 1788	South Carolina
June 21, 1788	New Hampshire (ratifying state)
June 25, 1788	Virginia
July 26, 1788	New York
November 21, 1789	North Carolina
May 29, 1790	Rhode Island

Rhode Island, which had refused to send delegates to the Convention, remained obstinate. Congress voted to sever the new nation's commercial relations with Rhode Island, which helped push that state to approval. Finally, on May 29, 1790, Rhode Island gave its approval and the entire nation was united under the Constitution.



The Artchives/Alamy Stock Photo

James Madison, one of three authors of the *Federalist Papers* and the fourth president of the United States

During this period, numerous articles were published in magazines and newspapers, pamphlets were distributed, and speeches were made, arguing the pros and cons of the new constitution. The most influential writings were those of James Madison, Alexander Hamilton, and John Jay, who published a series of eighty-five articles under the pseudonym *Publius.* Today, we know these as the *Federalist Papers.* Through these articles, these men made forceful arguments in support of the Constitution. The anti-Federalists had their outlet as well. Another series of articles, entitled the *Federal Farmer*, was published in opposition to ratification.

During the debates in the state conventions, three common objections were made to the Constitution. First, it was missing a bill of rights. Second, it emasculated the sovereignty of the states. Third, the delegates had exceeded their authority in replacing the Articles of Confederation. Delegates Luther Martin, Elbridge Gerry, and George Mason passionately opposed ratification.

Delaware was the first state to approve the Constitution, doing so on December 7, 1787. New Hampshire approved it on June 21, 1788. It was the critical ninth state to approve, so the Constitution was then ratified and the Articles of Confederation superseded, and a new government could be formed. The Continental Congress set March 4, 1989, as the date the new government would begin operating. During the formation of the new government, the state conventions continued. By the time North Carolina ratified on July 26, 1788, every state but Rhode Island had joined the Union, and the nation's first Electoral College had selected George Washington to be the first president under the Constitution. In April of that year, Congress had its first meeting. John Jay was selected as the nation's first chief justice during 1789.

John Jay, one of three authors of the *Federalist Papers* and the first chief justice of the United States

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1.5 Amendments

The Framers of the Constitution lived in an era when changes to government came either by edicts of kings or by revolution. They desired to have a more fair and civil method. At the same time, they did not want to empower Congress to amend the Constitution. After all, the Constitution is fundamental law, intended to restrict the power of government in many instances.

The Framers devised two methods to amend the Constitution. They are found in Article V. The first method is initiated by Congress. With a two-thirds vote in both houses, Congress may propose an amendment to the states. In the alternative, two-thirds of the state legislatures may call for a convention to make proposals. Congressional initiation is the only method of proposal that has been used to date.

A proposal is then ratified either by the legislatures of three-fourths of the states or by conventions in three-fourths of the states. Congress designates the ratification method. Thomas Jefferson believed that this process realized the dream of providing for bloodless change by the people. He said,

> [h]appily for us, that when we find our constitutions defective and insufficient to secure the happiness of our people, we can assemble with all the coolness of philosophers, and set them to rights, while every other nation on earth must have recourse to arms to amend or to restore their constitutions.[23]

Although the states were given only two alternatives in regard to the Constitution (adoption or rejection), many states attached lists of proposed amendments to their adoption resolutions anyway. A few states, such as Virginia and New York, called for a bill of rights. Eight states called for an amendment protecting the sovereignty of the states. According to James Madison, thirty-nine rights were identified in the state ratification conventions.

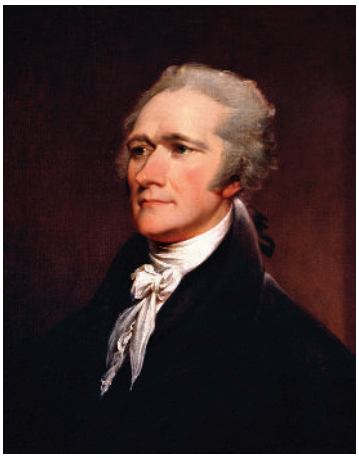
The absence of a Bill of Rights was a serious concern to many people. The issue was debated in the Convention and ultimately resolved in favor of excluding a bill. Alexander Hamilton explained the absence in Federalist No. 84, where he points out that habeas corpus and other protections of liberties are included in the Constitution. Additionally, he wrote:

> I go further, and affirm that bills or rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power.…

During the Pennsylvania ratification debates, James Wilson made a similar argument:

> In a government, consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a constitution, is an enumeration of the powers reserved. If we attempt an enumeration, every thing that is not enumerated, is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete. On the other hand; an imperfect enumeration of the powers of government, reserves all implied power to the people; and, by that means the constitution becomes incomplete; but of the two it is much safer to run the risk [of not enumerating government powers]; for an omission in the enumeration of the powers of government, is neither so dangerous, nor important, as an omission in the enumeration of the rights of the people.… But in a government like the proposed one, there can be no necessity for a bill of rights, for, on my principle, the people never part with their power. Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing.…[24]

But the absence of express protections of individual liberties threatened to derail ratification. To satisfy these concerns, it was agreed that a bill of rights would be added immediately after the original Constitution was ratified. James Madison initially suggested a single general statement affirming that the source of all governmental power is derived from the people. This was rejected, and he eventually composed a bill of seventeen amendments. Most of the thirty-nine rights identified by the delegates in the state conventions were incorporated into Madison's proposal, with multiple rights found in each of several of his amendments. After House of Representatives and Senate revisions, twelve rights remained. Ten of the twelve were ratified on November 3, 1791. They have become known as the Bill of Rights. The Bill of Rights includes protections of individual rights and liberties and a provision intended to preserve the integrity of state sovereignty. The two provisions that were not ratified concerned the number of representatives in the lower house and compensation for members of Congress. See Chapter 9 for a more thorough discussion of this topic.



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Alexander Hamilton, one of three authors of the *Federalist Papers*

1.5(a) Original Copies of the Constitution and Bill of Rights

The original Constitution and many other documents, including the original Virginia Plan and ratification documents, are on exhibit in the Rotunda of the National Archives in Washington, DC.

On September 28, 1789, the Speaker of the U.S. House of Representatives, Frederick Muhlenberg, and Vice President of the United States, as the head of the Senate, signed the original twelve amendments to the U.S. Constitution. Shortly thereafter, thirteen additional copies were written. President George Washington sent one each to the thirteen states for ratification. The original document had remained in the nation's seats of government, New York, Philadelphia, and Washington, DC, and were saved for a short period during the War of 1812 when the British attacked and burned the capital. The original Constitution and the Bill of Rights can be found in the National Archives, where they are on permanent display. Eight states have possession of their 1789 copies of the Bill of Rights: Connecticut, Massachusetts, New Hampshire, New Jersey, Rhode Island, North Carolina, South Carolina, and Virginia. North Carolina's copy was stolen during the Civil War but was recovered by a Federal Bureau of Investigation raid on an antiques dealer in 2005 and returned to the state.[25] Unlike the other states, which sent separate documents announcing their ratification, Delaware affixed the state seal to its copy and returned it to the federal government. That copy has remained in federal custody, and like the original Constitution and Bill of Rights, it is in the possession of the National Archives, which frequently loans it to Delaware for exhibition. The other four copies remain lost.[26]

Today, there are a total of twenty-seven amendments. Ratification of the Twenty-Seventh Amendment, which provides that changes in the compensation of members of Congress shall not be implemented until there has been an intervening election of the House of Representatives, traveled an interesting road. It was one of the two amendments proposed by Madison that was not ratified as part of the original Bill of Rights. Ratification restarted in 1978. Ultimately, it was ratified in 1992, two hundred and one years after it was proposed.[27] The ratifying state, Michigan, did not exist at the time the amendment was proposed. The final proposal that was part of the original twelve concerns how seats in the House of Representatives are to be apportioned among the states. Like the amendment ratified in 1992, it does not have a **sunset provision**, so it is still active. However, only eleven states have ratified it. There are three other amendments pending before the states: an 1810 proposal that forbids U.S. citizens from holding titles of nobility from other nations, an 1861 proposal to forbid the federal Constitution from authorizing Congress to interfere with slavery and other matters in the states, and a 1926 proposal to delegate the authority to regulate child labor to Congress. Two other proposals, the Equal Rights Amendment and the District of Columbia Voting Rights Amendment, failed to be ratified in the states and are no longer active.

Sunset Provision

A time limit within which a proposed law must be approved or it expires.

One amendment was enacted to repeal another: The Twenty-First Amendment repealed the Eighteenth Amendment's prohibition of alcohol. Several amendments were enacted to reverse Supreme Court interpretations of the Constitution, or at least had that effect. The Eleventh Amendment removed lawsuits from citizens of one state against another state from federal court jurisdiction, reversing *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). This amendment was introduced, passed, and ratified by the states in a little more than a year.

The Thirteenth and Fourteenth Amendments, which forbid slavery and extended citizenship to African Americans, respectively, reverse the Supreme Court's infamous *Dred Scott v. Sandford*, 60 U.S. 393 (1857), decision that slaves of African descent are not citizens and, accordingly, not fully protected by the Constitution. The Sixteenth Amendment's delegation of taxing authority to Congress reversed *Pollock v. Farmers'*

Loan and Trust Co., 157 U.S. 429 (1895). The Twenty-Sixth Amendment, which set the voting age at eighteen, reversed *Oregon v. Mitchell*, 400 U.S. 112 (1970), which permitted the states to set their own voting ages for state elections; the Nineteenth Amendment's guarantee of the vote to women reversed *Minor v. Happersett*, 21 Wall. (88 U.S.) 162 (1875).

Although the number of amendments that have been passed by the House of Representatives and sent to the states is relatively small, the number of proposals to amend the Constitution that have been proposed in Congress is staggering. By 2004, the number of proposals introduced in Congress exceeded 11,000.[28] The proposed amendments span the spectrum in subject matter. You will learn more about the amendments, with an emphasis on the rights protected by them, in the second part of this book.

1.6 Values, Politics, and Constitutional Law

The remainder of this book examines how the Constitution has been applied and interpreted. Examining the decisions of the courts of the United States, particularly of the U.S. Supreme Court, is the most common method of learning this subject. Be aware, however, that the judiciary does not exist in a vacuum. Its coequal branches (president and Congress) interpret the Constitution, apply its principles, and, in certain ways, influence the judiciary's interaction with and interpretation of the Constitution.

For example, administrative agencies are largely responsible for the administration of government in this nation. They are the front line of government. To function, administrative agencies must interpret the law, often before any court has had an opportunity to address objections to that law. In some cases, a party may obtain pre-enforcement judicial review of a law, and in such instances the agency's role is diminished. When pre-enforcement review is not sought or is unavailable, the agency's role becomes more significant. In instances when a law is valid as written but the agency's method of enforcement is questionable, the agency's role is again emphasized.

The perceived constitutionality of a bill may also affect legislative decision making. A bill that is seen as unconstitutional may not make it out of committee. Individual legislators may oppose proposed legislation that seems unconstitutional. This is not always the case, however. For political reasons, legislators may support a bill known to be unconstitutional. For example, the Supreme Court invalidated a Texas statute that protected the U.S. flag from desecration by a political protester in the 1989 case of *Texas v. Johnson*.[29] The Court reasoned that the protester's right to political expression under the First Amendment outweighed Texas's interest in protecting the integrity of the flag. One year later, the Congress enacted similar legislation even though it clearly contradicted the Supreme Court's ruling in *Texas v. Johnson*. For that reason, the new law was quickly invalidated as well.

Also, Congress possesses considerable authority over the jurisdiction of the federal courts. Political concerns could, therefore, cause legislators to limit the jurisdiction of the judiciary over certain issues.

Many of the petitions filed with the Supreme Court are filed by the United States through the solicitor general of the United States. Such filings are examined with special care by the Court when it determines to hear the appeals. The executive branch therefore influences the Court by its partial control over the issues presented to the Court. Besides the Supreme Court, the Justice Department and the many U.S. Attorneys file and defend cases that involve constitutional issues in the lower federal courts.

Although the Supreme Court is generally insulated from politics, it is likely that politics and public opinion play at least minor roles in influencing the Court's decision making. Because the Court has no method of enforcing its orders, it relies on the executive branch. This unenforceability, some contend, keeps the Court's decisions within the bounds of reason—that is, within a range the public will tolerate and the executive will enforce.

Politics also plays a role in the selection of Article III judges. Supreme Court justices and judges of federal district and appellate courts are selected by the political branches of government—the president nominates and the Senate must confirm. In recent years, the process has been criticized as being too political, focusing on the political and ideological beliefs of nominees rather than on other qualifications, such as education, employment experience, prior judicial experience, intellectual ability, and the like. The confirmation hearings of Robert Bork (nominated by President Reagan and rejected by the Senate), Clarence Thomas (nominated by President George H. W. Bush and confirmed by the Senate), and Brett Kavanaugh (nominated by President Trump and confirmed by the Senate) are used to illustrate this point. Because lower courts are bound by the precedent of higher courts although the Supreme Court is the final word on the Constitution's meaning, Supreme Court justices are more likely to resolve policy and value-laden question with a national, binding consequence. For this reason, senators are more likely to investigate the values and philosophy of a Supreme Court justice nominee than those of a nominee to a lower court. Once appointed, an Article III judge maintains his or her position until one of three occurrences: retirement, death, or impeachment. The power to impeach a judge rests with Congress. Congress may impeach for high crimes and misdemeanors. This is, therefore, another limitation upon the judiciary by an external force. Congress has been true to the purpose of impeachment and has not used the power to achieve political objectives.

When possible, the authors recognize and refer to political or social influences, as well as to other actors, that influence constitutional law. However, it is the judiciary that is charged with interpreting the law, and since 1803 the Supreme Court of the United States has had the final word on what the Constitution means. Judicial review, as it is known, goes to the heart of the U.S. version of rule of law: It is fundamental to U.S. constitutionalism.

1.7 Judicial Review

What is a court to do when faced with applying a statute (or other law or action) that is contrary to the Constitution? What is a court to do when it is hearing a criminal case for which the government has used unfair techniques to obtain evidence or to prove its case? Must courts defer to the other branches' (or states') determinations of the constitutionality of their actions? The Constitution is silent on these matters, but the questions were answered by the adoption of judicial review by the Supreme Court.

The doctrine of judicial review provides that the judiciary may invalidate the actions of other governmental actors that are violative of the Constitution. The Constitution does not expressly grant this authority to the judiciary. The power extends from the judiciary's authority to interpret and declare the meaning of law. (See Figure 1-2 for a summary.)

1.7(a) Historical Basis

Recall that one of the functions performed by courts in the United States is protecting individual liberties. Through judicial review, the courts act to control the government and thus protect individual rights.

Figure 1-2 Summary of judicial review

JUDICIAL REVIEW—A SUMMARY

Defined: The authority of the judiciary to review the acts of its coequal branches (and possibly its co-sovereign) for constitutionality. An unconstitutional act is declared void.

Structure: Diffused. With the exception of a few local courts, all courts in the United States, both federal and state, possess the power of judicial review.

Source (federally): Not expressly provided for in the Constitution. Implicit in the general grant of judicial power in Article III. *Marbury v. Madison* is the landmark case on judicial review.

Impact: Less than 1 percent of all federal statutes are invalidated by the Supreme Court.

In the early years of the British monarchy, the Crown was sovereign and virtually unchecked. However, theories of **natural law** and **natural rights** eventually led the Crown to acknowledge that certain laws and rights are fundamental and superior to the monarch's imperative. See Chapter 9 for further discussion of natural law. This occurred in 1215, when the feudal nobles of England coerced King John into signing the Magna Carta, a document that recognized particular natural rights. Although a landmark in law, the Magna Carta did not declare rights for all Englishmen and was hardly what contemporary Western societies would consider a comprehensive declaration of human rights.

Natural Law
A term referring to the concept that there exists, independent of manmade law, a law laid down (depending upon one's beliefs) by God or by nature.

Natural Right
A right existing under natural law, independent of manmade law.

However, natural law theories were later used by philosophers, such as John Locke and Charles Montesquieu, to advance theories of representative government, separation of powers, and use of the judiciary to protect individuals from governmental abuse. These philosophers advanced the theory that sovereignty rests not with the monarch but with the people. Natural law theories were the foundation of both the French Declaration of Rights and the French Revolution and their U.S. counterparts.

England, from which the United States got its common law, does not have a unified written constitution. Nor is there an independent judiciary. Parliament is the highest body (except for the symbolic role the Crown continues to play) in the nation.

Generally, parliamentary law is supreme. Many British insist, however, that they have a constitution—that is, a body of fundamental law. What could be supreme to parliamentary law in a system in which Parliament is supreme?

English fundamental law is not found in one written document. Instead, there are a number of laws that, taken together, make up the British "constitution." First, certain common law principles and customs are so sacred that they are considered part of England's fundamental law. Second, several acts of Parliament are considered fundamental. For example, the Bill of Rights of 1689 established that the monarch must be Protestant, that the Crown could not raise an army without parliamentary approval, that Parliament was the supreme lawmaker, and that Protestant subjects possessed a right to petition the Crown and bear arms. It also prohibited excessive fines and cruel and unusual punishment. The Act of Settlement of 1701 is also considered part of England's fundamental law. Through this act, the proposition that the Crown ruled through Parliament was furthered. For example, it provides, in part, that the Crown must have the consent of Parliament to remove judges.

In spite of apparent parliamentary supremacy, the idea that Parliament is limited by a higher form of law (natural law) can be found as early as 1610. In *Dr. Bonham's Case*, Lord Coke wrote, "[W]hen an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul [sic] it, and adjudge such Act to be void."[30] Regardless of this famous statement by Lord Coke, which was made during a period when natural law theory was popular, judicial

review did not take hold in England. In fact, Parliament immediately reenacted the law that the Coke court challenged, and Coke was removed from the bench, in part because of the *Bonham* decision.[31]

That judicial review has not developed in England can be attributed, in part, to Parliament's self-restraint. It has not attempted, in recent times, to abrogate any fundamental freedoms, such as the freedom of the press. If it did, the issue of parliamentary supremacy might be reconsidered by the people. The Framers of the U.S. Constitution were heavily influenced by natural law and natural rights theories. Natural law was the foundation of the Declaration of Independence and the American Revolution. The Framers believed that certain matters were beyond the control of government and that certain rights were inalienable. Further, they believed in the role of the courts as guardians of freedom. It is not surprising, considering this history, that eight of the thirteen states had expressly adopted judicial review even before the Constitution was written. A number of statements by delegates during the Constitutional Convention indicate that they intended the judiciary to possess the power. For example, the delegates considered establishing a council comprised of the president and a number of justices of the Supreme Court to review legislation for constitutionality. The proposal was opposed and rejected as unnecessary because it was thought that the judiciary possessed the power to nullify unconstitutional laws. Again, natural law was the foundation of this belief. James Madison stated at the convention, "[A] law violating a constitution established by the people … would be considered by judges as null and void." The proposal was thus rejected.

The same argument was made by delegates who opposed giving Congress the authority to veto laws that are contrary to the national constitution. It was argued that the interests of the national government would be adequately guarded by the national judiciary, which possesses the power to negate state laws that contravene the national constitution. Alexander Hamilton later wrote in the *Federalist Papers*, "[W]here the will of the legislature declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws." Further, he stated that the power to declare unconstitutional legislative acts void belonged to the judiciary.[32] John Marshall stated, "[I]f they [Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void." Luther Martin, James Wilson, and others made similar statements.[33]

There is also evidence that judicial review was practiced in state courts before 1789. In *The American Doctrine of Judicial Supremacy*,[34] Haines traces the history of the doctrine back to state and colony courts. The idea that legislative enactments were to be limited by natural law, natural rights, or a written constitution is found in the state efforts to create constitutional tribunals. These groups were known as *councils of censors* and *councils of revision* and existed in Pennsylvania, New York, and Vermont. The Pennsylvania Constitution of 1776 provided that the Constitution was not to be violated and established a council, composed of persons chosen from each city and county, charged with overseeing the constitutionality of executive and legislative branch actions. In addition, this body was delegated the authority to pass public censures, to order impeachments, to recommend that unconstitutional laws be repealed, and to call constitutional conventions.

Vermont's Council of Censors was nearly identical in structure to Pennsylvania's. New York, in contrast, did not elect laymen to sit on its Council. Rather, the governor, chancellor, and justices of the state Supreme Court sat together on a council of revision, which reviewed bills for constitutionality before they became law. The group possessed veto power, but its vetoes could be overridden by a two-thirds majority vote in the state legislature.

All three councils were eventually abolished. They are important to constitutional history, however, because they illustrate that the Framers did not embrace the English concept of legislative supremacy.

There is additional, more direct evidence of support for judicial review. In several cases that predate the Constitution, judicial review was either exercised or recognized. For example, *Holmes v. Walton*,[35] a 1780 decision from New Jersey, involved a statute that provided for a six-man jury. The defendant objected, claiming that a twelve-man jury was required by the state constitution. The court agreed and invalidated the statute. There are other examples.[36]

In summary, the concept of judicial review was not new when the Supreme Court first invoked it to nullify a law in 1803. However, there is also evidence that the Framers did not intend the judiciary to possess the power. After all, if the Framers had intended it, why was it not explicitly provided for in the Constitution? Possibly, they did not specifically mention judicial review because they believed it to be inherent in the judicial power, which they granted wholly to the judiciary in Article III. In the end, the evidence is inconclusive about whether the Framers intended for the courts to possess the authority of judicial review.

1.7(b) Congressional Action

The power of judicial review can be traced to decisions of the Supreme Court as far back as 1796.[37] However, the landmark case of *Marbury v. Madison* was where the Court first used judicial review to invalidate federal action.

An understanding of the political context, the facts that gave rise to the dispute, and the major players will enrich your understanding of *Marbury v. Madison*. Two political philosophies, each represented by a political party, are central to the story. The Federalists, founded by Alexander Hamilton and others, advanced the notion of a strong national government, the creation of a national bank, and good relations with England, among other policies. The Federalists were fiercely opposed by the Republicans (also known as Democrat-Republicans), led by Thomas Jefferson. James Madison was another prominent founder to fall into these ranks. The Republicans opposed having a strong federal government and deepening the nation's ties with England. Interestingly, both Hamilton and Jefferson served in important capacities in George Washington's administration, the former as Secretary of the Treasury and the latter as Secretary of State.

An independent with Federalist leanings, President George Washington attempted to keep the peace between Jefferson and Hamilton, but the growing divide between the men and their political parties reached a fevered pitch during the election of 1796.

The controlling constitutional provision of the time provided that the candidate with the largest number of Electoral College votes for president assumed the presidency and that the candidate with the second highest number of votes assumed the vice presidency. In a very close and acrimonious race in 1796, John Adams, who had served two terms as vice president under George Washington, closely defeated Thomas Jefferson for President. This left Jefferson, as the runner-up, vice president to Adams. This was a difficult situation that is difficult to imagine today. The **Alien and Sedition Acts** provide an excellent example. The Adams administration and the Federalist-controlled Congress enacted four laws in 1798 that are collectively known as the Alien and Sedition Acts. The laws were created in response to increased anxiety about a possible war with France. They required registration and permitted increased tracking of aliens, empowered the president to deport aliens deemed dangerous, and, most controversially, enabled the prosecution of any person who spoke or wrote maliciously, scandalously, or falsely about the federal government. The laws were used to persecute Republicans who opposed Federalists and Federalist policies. Jefferson, Adams's vice president, was so opposed to the laws that he, along with Madison,

Alien and Sedition Acts

Four federal laws that were enacted in 1798: Naturalization Act, Alien Friends Act, Alien Enemies Act, and Sedition Act. Enacted in anticipation of war with France, the laws required alien registration, empowered the president to deport all aliens from nations that were at war with the United States, empowered the president to deport any alien deemed dangerous, and made it a crime for any person to speak or write falsely, maliciously, or scandalously about the federal government or its high officers. Enacted during the Adams administration and supported by Federalists, including Alexander Hamilton, the acts were controversial and bitterly opposed by Republicans, including Thomas Jefferson and James Madison. The Naturalization Act was repealed and the other acts sunset early in the 1800s. Jefferson pardoned everyone convicted under the laws, most of whom were newspaper editors with Republican political views.

worked with the legislatures of Kentucky and Virginia to enact state laws invalidating the federal acts, under the theory that each state had the authority to invalidate unconstitutional federal legislation. Later, as president, Jefferson pardoned everyone who had been convicted under the Sedition Acts. Having opponents serve together in these capacities proved to be so unworkable that in 1804, the Twelfth Amendment was adopted; it provides for separate votes for president and vice president, enabling electors to vote for a "ticket" with a president and vice president of the same party.

The John Adams presidency, which was accompanied by a Federalist-controlled Congress, was successful in enacting Federalist legislation, thereby establishing the foundation for a strong federal government. Ironically, even though Adams was successful in advancing many of Hamilton's ideas, Hamilton was a vocal opponent of Adams. Faced with opposition from Hamilton and other Federalists as well as from Republicans, he lost his 1800 reelection bid to Thomas Jefferson and Aaron Burr (they actually tied in the electoral college, and it took thirty-six votes in the House of Representatives before Jefferson prevailed). In addition to losing the presidency, the Federalists lost their majority in Congress.

To extend the influence of the Federalist Party beyond Adams's administration, Congress and President Adams attempted to fill as many judicial appointments,

Sidebar

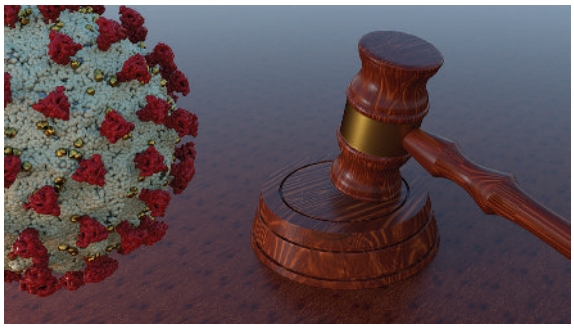
Covid-19 & the Constitution

Disease and contagion are part of the human condition. Two of the worst pandemic episodes were the Black Death of the fourteenth century, which killed 17 percent of the world's population, and the Spanish Flu of 1919, which infected one-third of the people of the world and ultimately killed more than 50 million. Recent outbreaks of infectious disease include SARS, MERS, HIV, Bird Flu, and the Swine Flu. And, of course, SARS-COV-2, commonly known as the Novel Coronavirus or COVID-19.

Modern attempts to control the spread of infectious diseases often involve separating people, isolating or quarantining the infected, mandating vaccinations, eradicating vermin and other causes, and other conducting measures; nearly all encroach upon liberties. Sacrificing liberty in the interest of security, during war and contagion, isn't new. The old Common Law recognized the need for severe protective measures in such times. British jurist Sir William Blackstone wrote about the extensive public health authority of the British government to control the spread of disease. This authority included the imposition of harsh measures and punishments, including death for violating quarantine.

America's colonies were well acquainted with communicable diseases, being ravished by them periodically. Local governments often turned to the British Common Law as support for the imposition of Draconian practices to control the spread of disease and to punish people who disobeyed public health orders.

During the period when the colonies were evolving into a nation, Yellow Fever, Small Pox, and other diseases continuously plagued the land. In one three-month period in 1793, 10 percent of Philadelphia's population was lost to Yellow Fever. By the mid-1800s, cities were petri dishes of contagion.



Limbitech/Shutterstock

Gavel Law Hammer with Coronavirus Covid-19 3D image

Sewage flowed in city streets, insects and vermin were ubiquitous, and as international ports, cities were gateways to diseases from around the world. According to the Shattuck Report (1849), the average life expectancy in U.S. cities in the mid-1800s was about 25 years, while it was about 35 years in rural areas.

So, the authority of governments to act aggressively in times of pandemic has a long history. On the other hand, public health countermeasures often challenge U.S. notions of individualism, liberty, and rule of law. Orders to stay at home, socially distance, close businesses, and wear masks give rise to a plethora of constitutional questions. The constitutional law in this area is not well developed, largely because there had not been a serious pandemic since the Spanish Flu Pandemic of 1918. Many of the constitutional questions presented by the government's response to the coronavirus will be addressed in the following chapters. Where possible, they will be answered. In others, the question will be raised, and possible analyses will be discussed.

which survive changes in administrations, with Federalists. Sixteen new circuit judge positions were created by Congress (previously, justices of the Supreme Court and district judges sat as circuit judges). The size of the Supreme Court was decreased by one to prevent the new administration and Congress from replacing retiring Associate Justice William Cushing. Chief Justice Oliver Ellsworth retired early so that Adams could nominate his replacement. President Adams nominated his Secretary of State, John Marshall, to become the new (third) chief justice. The Senate quickly confirmed Marshall's nomination. Congress also created forty-two new justices of the peace for the District of Columbia.

The final days of the Adams administration were hurried and hectic. Adams's nominations for the justice of the peace positions were confirmed only one day before the new president was to be inaugurated. President Adams signed the commissions late into the night of his last day in office (the judges have become known as the midnight judges) and gave them to John Marshall, who was then still Secretary of State, for delivery. Marshall, however, was unable to deliver four of the justice of the peace commissions before the Jefferson administration assumed power. President Jefferson ordered his Acting Secretary of State, Levi Lincoln, and eventually Secretary of State James Madison not to deliver the commissions. William Marbury was one of the four men who did not receive their commissions. Marbury filed suit against James Madison in the Supreme Court, seeking an order (a writ of mandamus) compelling delivery of the commissions.

The suit was filed in 1801, but no decision was rendered until 1803 because the new administration effectively canceled the 1802 term. This was first accomplished by changing the two terms of the Court, beginning in 1802, from February and August to June and December. Then in April 1802, before the Court held its first session, Congress again changed the Court's term to every February. Therefore, the Court did not meet from December 1801 to February 1803. In addition, the new Republican Congress repealed the circuit judgeships created by the lame-duck Federalist Congress.

Although highly controversial, both politically and constitutionally, these actions were never judicially reviewed. By the time the case was heard by the Supreme Court, John Marshall had assumed the position of chief justice. In fact, he authored the Court's opinion.

Marbury v. Madison

5 U.S. (1 Cranch) 137 (1803)

Chief Justice Marshall delivered the Court's decision. [Vote: 4–0–2. Cushing and Moore did not participate.]

In the order in which the court has viewed the subject, the following questions have been considered and decided.

1st. Has the applicant a right to the commission he demands?

2ndly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3rdly. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is, 1st. Has the applicant a right to the commission he demands?

His right originates in an act of congress passed in February 1801, concerning the district of Columbia … [which provides] "that there shall be appointed … such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time think expedient, to continue in office for five years."

It is therefore, decidedly the opinion of the court, that when a commission has been signed by the president [after confirmation by the Senate], the appointment is made, and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state. . . .

Mr. Marbury, then, since his commission was signed by the President and sealed by the secretary of state, was appointed: and as the law creating the office gave the officer a right to hold for five years independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of this country.

To withhold his commission[,] therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which 2ndly if he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.

[The Court found that the President and his immediate subordinates are entitled to immunity from the judicial process when performing certain discretionary functions, but not necessarily when performing ministerial functions.] … But where a specific duty is assigned by law and individual rights depend upon the performance of that duty, it seems, equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.

It is then the opinion of the court. [T]hat, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether 3rdly. He is entitled to the remedy for which he applies. This depends on, 1st. The nature of the writ applied for, and, 2ndly. The power of this court.

1st. The nature of the writ. [The Court explained that at common law, writs of mandamus could be used to compel government officers to take actions required by law.]

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired.

Whether it [the writ of mandamus] can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme … court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate, the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect, and therefore such a construction is inadmissible, unless words require it.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerate its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take the original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate, in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable the court to exercise appellate jurisdiction. …

It is an essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States, but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their operation, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion, nor can it, nor ought it to be frequently repeated. The principles, therefore, so established,

are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited, and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must lose their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And when they open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared [in the constitution] that “no tax or duty shall be laid on articles exported from any state.” Suppose a duty on the export of cotton, of tobacco, or of flour; and suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares that “no bill of attainder or ex post facto law shall be passed.”

If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

“No person,” says the constitution, “shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.”

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of the *courts,* as well as of the legislature.

Why otherwise does it direct judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, "I do solemnly swear that I will administer justice without respect to persons, and do equally right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as, according to the best of my abilities and understanding, agreeably to *the constitution*, and laws of the United States."

Why does a judge swear to discharge his duties agreeable to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the United States generally, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principles, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts,* as well as other departments, are bound by that instrument.

The rule must be discharged.

The facts of *Marbury v. Madison* have all the intrigue and politics of a suspense novel. Some of the country's most prominent citizens were involved, some in ways that would not be permitted today. For example, using contemporary ethics standards, Chief Justice Marshall would have been expected to recuse himself from deciding the case because of his involvement in the dispute. In fact, he had already been appointed to the Supreme Court but was still acting as Secretary of State when he began delivering the midnight judges commissions.

Marshall carefully constructed this opinion. He did not want a confrontation with President Jefferson, for fear that the judiciary as an institution would be harmed. At the same time, Marshall wanted both to establish the Court's authority and to announce that President Jefferson's actions were unlawful. He accomplished this by ruling against Marbury, due to a lack of jurisdiction, and thereby avoiding a direct confrontation with the executive. But he simultaneously declared that the judiciary can check the actions of the other branches for constitutionality and that President Jefferson had acted improperly. How exactly did he reach these conclusions?

First, he found that Marbury had been properly appointed and that President Jefferson (through his Secretary of State, James Madison) had wrongly withheld his commission. To avoid a potentially harmful confrontation with the executive, however, the Court did not order Jefferson to deliver the commission. Rather, the Court concluded that it could not issue the writ of mandamus because it lacked jurisdiction over the case. Congress had included a provision in the Judiciary Act of 1789 that provided the Supreme Court with original jurisdiction to issue writs of mandamus against public officials. Marshall found that the Constitution's statement of original jurisdiction was exclusive, could not be extended by Congress, and did not provide for original jurisdiction in mandamus cases. Therefore, that provision of the Judiciary Act was unconstitutional.

Marshall then had to address the issue of whether the Court had the authority to invalidate (by not enforcing) a coequal branch's actions. For a number of reasons, he concluded that the judiciary possesses such authority. Marshall posed the problem: What is the judiciary to do when faced with applying a statute that is repugnant to the Constitution? Because the Constitution is the higher form of law, it, and not the statute, must be followed. This does not address the central issue, however—that is, why is the Supreme Court the final word on the meaning of the

Constitution? Why should it not defer to the legislature's interpretation? Marshall concluded that it is the responsibility of the judiciary to declare the meaning of the law. In his words, "[i]t is emphatically the province and duty of the judicial department to say what the law is." If two laws conflict, it is a court that must decide which governs a case. "This is of the very essence of judicial duty," said Marshall. Because the Constitution is the highest form of law in the land, a court must choose to apply it over any other law.

In support of his conclusions, Marshall pointed to several provisions of the Constitution. Recall that there is no express delegation of judicial review in the Constitution. First, Article III, Section 2, provides that the "judicial Power shall extend to all Cases … arising under this Constitution." Implicit in this assertion is the belief that the judicial power includes being the final arbiter of the meaning of the Constitution. After all, could not the judicial power extend to all cases arising under the Constitution even though the judiciary defers to the legislature's interpretations of the Constitution?

Second, Marshall pointed to particular provisions in the Constitution to establish that the Framers intended the courts to independently determine the meaning of the Constitution, regardless of legislation. For example, the treason provision requires the testimony of two witnesses to the same overt act, or a confession, before a person may be convicted of treason. Marshall reasoned that the Framers would not want a court to enforce a law that allowed conviction for treason upon the testimony of one person. Therefore, Marshall concluded that the Framers intended the Constitution to bind the judiciary, as well as the other branches. This being so, courts must independently interpret, comply with, and enforce the Constitution.

One other constitutional provision was relied upon by Marshall. The Supremacy Clause of the Constitution declares that the laws of the national government are the supreme laws of the United States. Marshall noted that, in declaring what laws are supreme, the Framers mentioned the Constitution first. He deduced from this that the Constitution is paramount to statutes and other law.

Finally, Marshall noted that judges are required to take an oath of office. Through that oath, judges swear to uphold the laws of the nation, including the Constitution. In order to uphold the Constitution, he asserted, it must be interpreted and treated as paramount law.

For these reasons, Marshall concluded that Congress had improperly conferred original jurisdiction upon the Court and that the Court therefore lacked the authority to issue the mandamus. For the first time, judicial review was used to nullify federal action—particularly, an act of Congress. In addition to concluding that the judiciary can review congressional actions, Marshall stated that executive actions can be reviewed. This statement was **dictum**, however, because the Court had determined that it lacked jurisdiction to issue the mandamus. Regardless, the power has since extended over the executive branch as well.

Dictum (Obiter Dictum)
Expressions or comments in a court opinion that are not necessary to support the decision made by the court; they are not binding authority and have no value as precedent. If nothing else can be found on point, an advocate may wish to attempt to persuade by citing cases that contain dicta.

1.7(c) Executive Action

The Burger Court reiterated in the *Nixon* tapes case what the Marshall Court had stated in *Marbury v. Madison* 171 years earlier: It is the duty of the judiciary to say what the law is. This does not mean that the executive and legislative branches should not make their own interpretations; it simply means that the judiciary is the final word on the subject. Consider the sensitivity of issuing an order to a coequal branch. Consider further the enforcement aspect of such an order. The Court has no method of enforcing its orders—it is the duty of the executive to enforce court orders. As such, it is uncomfortable to courts to order the executive branch to do something the executive opposes.

President Nixon complied with the order, thereby averting a constitutional crisis. Even though he supplied all the tapes, the eighteen-minute erasure remains a mystery. Impeachment looming, President Nixon resigned on August 9, 1974, thus becoming the only president ever to resign. Additional litigation later resulted from the Watergate affair. Some of the other prominent cases are discussed further in Chapter 6, which discusses the role, authority, and responsibilities of the president.

United States v. Nixon

418 U.S. 683 (1974)

[On June 17, 1972, members of President Richard Nixon's committee for reelection were caught burglarizing the Democratic National Headquarters in the Watergate Hotel in Washington, DC.

Archibald Cox, the special prosecutor appointed to investigate the Watergate affair, asked President Nixon to produce documents and audiotapes recorded by Nixon of conversations in the Oval Office. President Nixon refused to provide the documents and recordings to the special prosecutor. Cox then sought and obtained court orders compelling Nixon to produce the requested documents and tapes.

Enraged, President Nixon ordered the Attorney General to fire the special prosecutor. The Attorney General resigned rather than comply. President Nixon then ordered the second highest official in the Department of Justice to discharge the special prosecutor. That official also resigned. Finally, Solicitor General Robert Bork acquiesced and fired the special prosecutor, in what became known as the "Saturday Night Massacre." A new special prosecutor, Leon Jaworski, was appointed. He continued the Watergate investigation, eventually obtaining indictments against several White House officials. President Nixon was not indicted but was named as a coconspirator in the indictments. At this point, impeachment was being considered by Congress.

Both Congress and Jaworski insisted that President Nixon produce the previously requested tapes and documents. Special Prosecutor Jaworski sought and obtained a subpoena compelling complete production by President Nixon. President Nixon responded by producing the documents and edited versions of the audiotapes, one of which included an eighteen-minute period that appeared to have been erased. Additionally, on May 1, 1974, President Nixon moved to quash the subpoena, claiming executive privilege. The district court denied the motion. Because of the significance and sensitivity of the case, the Supreme Court granted certiorari before the court of appeals heard the appeal.]

Chief Justice Burger delivered the opinion of the Court. [Vote: 8–0–1. Justice Rehnquist did not participate.]

[W]e turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce." The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena *duces tecum*.

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison* (1803) that "it is emphatically the province and duty of the judicial department to say what the law is."

No holding of the Court had defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential Presidential communications for use in a criminal prosecution, but other exercises of power by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution.

Notwithstanding the deference each branch must accord the others, the "judicial power of the United States" vested in the federal courts by Art. III, Sec. 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case.

In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.

Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere insulates the President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communication, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arise[s]. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. II. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

. . . To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the judiciary from according high respect to the representations made on behalf of the President.

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers. . . .

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of the facts, within the framework of the rule of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. . . .

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. . . .

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, [it] cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

We have no doubt that the District Judge will at all times accord to Presidential records that high degree of deference suggested in *United States v. Burr*, and will discharge his responsibility to see to it that until released to the Special Prosecutor no in camera material is revealed to anyone. This burden applies with even greater force to excised material; once the decision is made to excise, the material is restored to its privileged status and should be returned under seal to its lawful custodian. Since this matter came before the Court during the pendency of a criminal prosecution, and on representations that time is of the essence, the mandate shall issue forthwith.

Although judicial review is established law, most recent presidents have asserted their authority to interpret the Constitution independent of the judiciary. Under a theory known as Departmental Review or Coordinate Review, all three branches have the authority to be the final interpreter of the Constitution. Under this theory, conflicts in interpretation among the branches would be resolved through established political processes, such as elections, impeachment, and amendment of the Constitution. Although this theory is as old as the Constitution, nearly all presidents in the past twenty-five years, Republican and Democrat, have asserted some version of constitutional independence, often cast as the theory of Unitary Executive Power, in varying degrees. It has manifested itself in different forms in different contexts. For example, presidents have questioned judicial decisions that limited executive authority, and in other cases, presidents have questioned the legitimacy of congressionally created "independent administrative agencies" where presidential authority to oversee their operations is limited.

1.7(d) State Action

As previously discussed, the federal judiciary exercises constitutional review over the actions of its two coequal branches. Does it possess the same power over the states?

The Supreme Court answered this question for the first time in 1810, when it declared a Georgia statute unconstitutional.[38] Six years later, the Supreme Court issued *Martin v. Hunter's Lessee*, wherein it asserted the power of judicial review over the decisions of the states' high courts.

Martin v. Hunter's Lessee

14 U.S. (1 Wheat.) 304 (1816)

Justice Story delivered the opinion of the Court. [Vote 6–0–1. Chief Justice Marshall did not participate.]

[Denny Martin, a citizen and resident of England, inherited a 300,000-acre tract of Virginia land in 1781 from his uncle, Lord Fairfax, who had been living in the United States. However, a Virginia statute forbade "enemies" of the United States from inheriting property. Therefore, Virginia took possession of the property and began selling it. The state sold some of the land to Hunter. Simultaneously, Martin began selling the property. One tract of the land was sold to Chief Justice John Marshall and his brother. For this reason, Marshall did not participate in this case.

Martin contested the state's assertion that he had no interest in the land. Martin prevailed at the trial level; however, that decision was reversed by the Court of Appeals of Virginia, the court of last resort in Virginia. The decision of the Virginia appellate court was appealed to, and reversed by, the Supreme Court of the United States. The Supreme [C]ourt held that the Virginia statute was unconstitutional because it conflicted with the Treaty of Paris. The Virginia Court of Appeals was ordered to enforce the decision by recognizing Martin's interests.

The Virginia Court of Appeals refused to comply with the order. Further, it concluded that the provision of the Judiciary Act of 1789 that endowed the Supreme Court with appellate jurisdiction in the case was unconstitutional and, hence, void. The Virginia Court of Appeals was asserting, in essence, that it was not subordinate to the Supreme Court and that it had the authority to independently interpret the Constitution of the United States. Martin again appealed to the Supreme Court for relief.]

The questions involved in the judgment are of great importance and delicacy. Perhaps it is not too much to affirm, that, upon their right decision, rest some of the most solid principles which have hitherto been supposed to sustain and protect the constitution itself. The great respectability, too, of the court whose decisions we are called upon to review, and the entire deference which we entertain for the learning and ability of that court, add much to the difficulty of the task which has so unwelcomely fallen upon us. It is, however, a source of consolation, that we have had the assistance of the most able and learned arguments to aid our inquires; and that the opinion which is now to be pronounced has been weighed with every solicitude to come to a correct result, and matured after solemn deliberation.

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the bar.

The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain the powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The constitution was not, therefore necessarily carved out of existing state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by the respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the constitution, which declares, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the *states* respectively, or *to the people*."

The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require.

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to … consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. . . .

If the constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the constitution, be exclusive of state tribunals. How otherwise could the jurisdiction extend to *all* cases arising under the constitution, laws, and treaties of the United States, or to *all* cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to *all*, but to *some*, cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this not only when the *casus foederis* [federal cause of action] should arise directly, but when it should arise, incidentally, in cases pending in state courts. This construction would abridge the jurisdiction of such court far more than has been ever contemplated in any act of Congress.

On the other hand, if, as has been contended, a discretion be vested in congress to establish, or not to establish, inferior courts at their own pleasure, and congress should not establish such courts, the appellate jurisdiction of the supreme court would have nothing to act upon, unless it could act upon cases pending in state courts. . . .

It must, therefore, be conceded that the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to extend. . . .

It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments, and the spirit of the constitution. That the latter was never designed to act upon state sovereignties, but only upon the people, and that if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts. We cannot yield to the force of this reasoning, it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake [to assert] that the constitution was not designed to operate upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. The tenth section of the first articles contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the constitution does not act upon the states. The language of the constitution is also imperative upon the states as to the performance of many duties. It is imperative upon the state legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of president and vice-president. And in these, as well as some other cases, congress have a right to revise, amend, or supersede the laws which may be passed by state legislatures. . . .

The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of state judges. . . . In respect to the powers granted to the United States, they are not independent, they are expressly bound to obedience by the letter of the constitution; and if they should unintentionally transcend their authority, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of state sovereignty.

It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts; first, because state judges are bound by an oath to support the constitution of the United States, and must be presumed to be men of learning and integrity; and, secondly, because congress must have an unquestionable right to remove all cases within the scope of the judicial power from the state courts to the courts of the United States, at any time before final judgment, though not after final judgment. As to the first reason—admitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States, (which we very cheerfully admit,) it does not aid the argument. It is manifest that the constitution has proceeded upon a theory of its own. . . . The constitution has presumed (whether rightly or wrongly we do not require) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states . . . it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals . . . In respect to other enumerated cases—the cases arising under the constitution, laws, and treaties of the United States . . . reasons of higher and more extensive nature, touching the safety, peace and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution.

Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws[,] the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states.

On the whole, the court[s] are of the opinion, that the appellate power of the United States does extend to cases pending in state courts.

It is the opinion of the whole court, that the judgment of the court of appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the district court, held at Winchester, be, and the same is hereby affirmed.

Today, the power of the federal courts to review state actions is well established. All federal courts, whether district, appellate, or the Supreme Court, possess the constitutional power of judicial review. Federal courts may review the actions of any governmental entity (local, state, or national) for compliance with the Constitution, provided the Court has jurisdiction and there is not some other limiting doctrine.

State courts also exercise judicial review as to both state and federal laws. Under the Supremacy Clause of Article VI, state courts must apply federal law, even if contrary to their own state's laws. This includes nullifying state laws that are violative of the U.S. Constitution. A state's attempt to limit the jurisdiction of its courts to hear federal cases violates the Supremacy Clause unless the rule is neutral and established

as part of a larger administrative scheme. A state may not decide that a certain class of cases that are recognized by federal law cannot be heard by state courts. For example, frustrated by the large number of frivolous lawsuits filed by inmates, New York divested its trial courts of jurisdiction over the cases in favor of having all the cases heard by a court of claims. The change also eliminated attorney's fees awards, punitive damages, and injunctive relief. The new law applied to all inmate claims, state and federal. The Supreme Court found the law to be contrary to the Supremacy Clause in *Haywood v. Drown*, 556 U.S. 729 (2009).

Because state judges must hear federal cases, they also have a responsibility of reviewing federal laws for constitutionality. Of course, the decision will have precedential effect only within each particular court's geographical jurisdiction. Through its appellate jurisdiction, the Supreme Court eventually will have an opportunity to review state court decisions interpreting the Constitution. In some instances, review by a lower federal court, or removal of cases involving federal law, is possible as well.

1.7(e) Shield or Sword?

Although the power of judicial review is well established today, the debate over whether the Framers intended the judiciary to have the exclusive power, or whether it ought to have that power, continues. Is judicial review a shield with which the judiciary protects the individual, minorities, and the integrity of our system, or is it a sword used by judges to maintain a judicial supremacy over the coordinate branches and the states?

The frequency of invocation of the judicial review power by the Supreme Court is informative. Since 1790, the Supreme Court has declared approximately 1,500 acts of local, state, and federal government unconstitutional.[39] This may appear significant, but it represents only a small fraction of a percentage of the total laws enacted. Congress enacted more than 60,000 laws from 1790 to 1990, and the Supreme Court declared less than 1 percent unconstitutional.[40]

Former federal Judge Robert Bork, whose nomination to the Supreme Court by President Reagan was not confirmed, asserted that the Court is continually deferring less to the decisions of the states and its coordinate branches. For example, he points out that during the ninety-three-year period from 1803 to 1896, the Court declared 19 acts of Congress and 167 state laws unconstitutional. In the twenty-seven years from 1897 to 1924, the Court declared 28 acts of Congress and 212 state laws unconstitutional. Between 1940 and 1970, the Court held about the same number of acts of Congress unconstitutional, but the number of state laws invalidated increased to 278. According to Judge Bork,

> With each successive case, the Court shrinks the sphere of legislative decision making and expands the role of the judiciary: We observe … the increasing importance of the one counter-majoritarian institution in the American democracy.… What is worrisome is that so many of the Court's increased number of declarations of unconstitutionality are not even plausibly related to the actual Constitution. This means that we are increasingly governed not by law or elected representatives but by an unelected, unrepresentative, unaccountable committee of lawyers applying no will but their own.[41]

Later, Bork summarized his concerns by referring to contemporary judicial activism as "politics masquerading as law."[42] It is generally agreed by constitutional scholars that the Court is playing a larger role than it had in the past. But Judge Bork's other assertions—that the Court is doing this at the expense of legislative power and therefore is undermining democracy and freedom, and that many of the Court's decisions are not well grounded in the Constitution—are the subject of considerable and ongoing debate.

The theory that there is a negative correlation between the authority of the Court and its coordinate branches and the states assumes that the power of government as a whole has not changed since 1789: that governmental power is a zero-sum game. However, it is possible that the authority of the Court has increased concomitantly with the increased power of government. Today, government regulates the personal and commercial lives of its citizens to a much greater degree than it did just one hundred years ago. Therefore, possibly, the enlargement of the role of the Court has not meant a decrease in the power of legislatures. Judge Bork's assertion that the Court's decisions are not "plausibly related" to the Constitution is also easier understood when one knows his constitutional ideology: He is an originalist.

In any event, the total number of laws invalidated by the Court remains small. In instances in which the Court has nullified a law, it has generally been successful in protecting the individual from arbitrary and unreasonable governmental actions and in helping its coordinate branches, the states, and the federal government maintain the delicate balance of power conceived by the framers.

In addition, the Court has created several rules and doctrines governing its decision making that are intended to respect the integrity and independence of the other branches as well as of the states. Some of these have been discussed, such as the presumption that legislation is constitutional and the rule requiring the Court to construe a statute as constitutional, if reasonable. Also, through the political question doctrine, the Court refuses to adjudicate cases that are inherently political in nature or involve disputes that are best resolved by the executive or legislative branch. Therefore, it appears that the Court can serve the "guardian and protector" function while not excessively interfering with the functions of its coordinate branches or of the states.

The judiciary plays its role in the system through its administration of justice. That is, federal courts do not make rules on their own initiative; rather, they make decisions of law within the context of adjudication of cases. Importantly, the authority of the federal courts to hear cases, which is referred to as *jurisdiction*, is limited. The jurisdiction of the federal courts is examined in Chapter 4.

1.7(f) A Diffused Model

Recall that all courts, state and federal, are called upon to interpret the Constitution. Through Article VI of the Constitution, state courts have an obligation to apply federal law even if contrary to their own state's laws. Section 2 of Article VI reads:

> This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Hence, the power of judicial review is diffused to all state and federal courts (except that certain limited jurisdiction courts, such as traffic courts, may not possess this authority). Every day, every judge stands as a barrier between potentially oppressive government conduct and the citizen.

Although a few nations have followed the model used in the United States,[43] this model of judicial review remains one of the most extreme in the world. Consider, for example, that there is no judicial review whatsoever in some nations; nations with a socialist legal system usually fall into this category. In others, judicial review is concentrated in one tribunal or court. For example, the Constitutional Council in France is the only body in that nation that may declare a law unconstitutional, and that body falls outside the judiciary. Germany also employs a concentrated model of judicial review. Unlike France, however, the power is held by a judicial entity, the *Bundesverfassungsgericht*.[44] The scope of review authority differs among nations as well. In some, constitutional tribunals

Figure 1-3 Comparison of judicial review models

JUDICIAL REVIEW—COMPARATIVE MODELS	
Structure	***Nation/legal family***
Diffused review	• United States—power held by nearly all courts • Mexico—power held by federal courts
Concentrated review	• France—power held by Constitutional Council (nonjudicial tribunal composed of political leaders) • Germany—Bundesverfassungsgericht, a judicial tribunal
No review	• Socialist nations • Most Islamic nations

are limited to reviewing proposed legislation. This is true of France's Constitutional Council. In others, standing is much more limited than in the United States. Again, looking to France, standing to challenge legislation is limited to certain political leaders. The composition and term of appointment of constitutional judges also vary around the world. In many nations with constitutional tribunals, the judges are political appointees or retired political leaders. In many cases, the individuals serve fixed terms, very different from the lifetime appointment of U.S. federal judges.

A comparison of judicial review around the world evinces that the United States (and the nations with similar models) has the most diffused system in many ways. Not only may legislation be challenged, but so may executive and judicial actions. Standing is also diffused. Any person who is affected by a law or government action may invoke the authority of judicial review. Even our structure—for example, lifetime tenure and review authority by all courts—has the effect of reinforcing judicial review. These points illustrate the significance of judicial independence and review in the United States (see Figure 1-3). Simply stated, judicial review is an important part of American legal culture.

Of course, a court's authority of judicial review is limited by stare decisis. If a higher court has already interpreted the Constitution in a particular manner, a lower court may not render a conflicting reinterpretation. Recall, however, that a court may distinguish a case under review from a prior binding case. To do so, the court must determine that the facts of the prior case are so dissimilar as to make it useless as precedent. Also, in certain rare instances, a lower court will interpret a case in a manner that is inconsistent with a precedential case. Finding that a precedential case is so old that its law is no longer viable is an example. Such decisions may, of course, be reviewed by higher courts.

As a practical matter, judges in lower courts are less likely to declare laws unconstitutional than are judges of higher courts. Similarly, state judges are less likely to declare acts of Congress or the president unconstitutional than are federal courts. Although federal trial courts and state courts both hear cases involving federal issues, various procedural and substantive laws increase the likelihood that a case of national significance will first be resolved by a federal court or, in rare circumstances, by the Supreme Court.

1.7(g) An International Model

Although nearly singular in its breadth and depth, the U.S. model of judicial review has been a model for the world, particularly in the past seventy years. According to William E. Nelson, several Latin American nations adopted some form of judicial review before 1920, and Austria, Germany, and Czechoslovakia were the first European nations to do so, each around 1920.[45]

But it was in the post–World War II years that judicial review saw its greatest expansion. Japan, Germany, and Italy adopted it, in part because of the U.S. influence on the redevelopment of the political and legal systems of the Axis nations. Similarly, many of the Pacific Islands that had been freed from Japan following the war were united in the Trust Territory of the Pacific Islands. With the United States acting as trustee with the obligation of assisting the islands in working toward political, legal, and economic independence, it is no surprise that judicial review found its way into the legal fabric of those islands, often along with a recognition of their customary law. The Federated States of Micronesia (FSM) and the Commonwealth of the Northern Marianas Islands are examples. Judicial review has taken hold in islands outside of the FSM as well.

India adopted judicial review in 1947 following its independence from Great Britain. As you have already learned, constitutional councils have been instituted in many nations, particularly in Europe. Although functionally different and not as powerful as the diffused U.S. model, they nonetheless represent the idea of legislative inferiority to larger legal, and sometimes political, principles. Also, the European Union's tribunals exercise review of member states in some circumstances.[46] Other nations, including Ireland, Scotland, and Hong Kong, also empower their courts, in varying degrees, to review the acts of government officials for constitutionality. According to the United Nations Development Programme, judicial review is spreading in Arab nations, through both constitutional councils and courts. This includes Algeria, Egypt, Kuwait, Lebanon, Morocco, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.[47] Indeed, constitutionalism has been one of the United States's greatest exports. Nearly all nations of the world have adopted a written constitution, many using the U.S. Constitution as the model from which they constructed their own. As you have read, the idea of rule of law, as actualized through judicial or other forms of constitutional review, has taken hold around the world.

1.8 Judicial Eras

Just as judicial review is the hallmark of U.S. constitutionalism, the Supreme Court is constitutionalism's icon. At the top of the judicial hierarchy sits the Supreme Court of the United States. Accordingly, it is a major player in U.S. constitutionalism. Scholars have discovered that the Court's decisions often follow the ideologies of the justices. There have been several significant "eras" in the history of the Supreme Court. These eras are marked by particular ideologies that were dominant on the Court. These often, but not always, coincide with chief justice terms. The respective powers of the national and state governments are the primary points of reference for the periods discussed below. You will learn more about the relationship of state and federal authorities, about lower courts, and the jurisdiction of all courts later in this book.

1.8(a) Early Court: The Least Dangerous Branch

Even though the Constitution was intended to centralize governmental authority more than existed under the Articles of Confederation, state authority, especially judicial authority, was much greater in 1789 than it is now. As a result, the status of the Supreme Court was uncertain for many years. The early years of the Court were characterized by resignations for other positions that today would be less desirable. John Jay, one of the three authors of the *Federalist Papers* and the nation's first chief justice, assumed office in 1789 and resigned in 1795 to run for governor of New York. John Rutledge was also nominated by President Washington and confirmed in 1789, but he never appeared for duty. He resigned in 1791 and was later nominated to replace John