Constitutional Law

Seventh Edition

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The Constitution of
the United States

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

Section 2. [1] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2] No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least One Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.
[4] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. [1] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

[2] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5] The Senate shall chuse their other Officers, and also a President pro temпоore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. [1] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators.

[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. [1] Each House shall be the judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

[2] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

[3] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy;
and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. [1] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. [1] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevents its Return, in which Case it shall not be a Law.

[3] Every Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. [1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2] To borrow money on the credit of the United States;

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
[5] To coin Money, regulate the value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
[6] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
[7] To establish Post Offices and post Roads;
[8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
[9] To constitute Tribunals inferior to the supreme Court;
[10] To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;
[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
[13] To provide and maintain a Navy;
[14] To make Rules for the Government and Regulation of the land and naval Forces;
[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
[16] To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenal, dock-Yards, and other needful Buildings; — And

[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. [1] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.
[2] The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.
[3] No Bill of Attainder or ex post facto Law shall be passed.
[4] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.
[5] No Tax or Duty shall be laid on Articles exported from any State.
[6] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.
[7] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.
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[8] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. [1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

[3] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

Section 1. [1] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

[2] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[3] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote, a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be
the Vice President. But if there should remain two or more who have equal Votes, the Senate shall choose from them by Ballot the Vice President.

[4] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[5] No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

[6] In case of the removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[8] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

Section 2. [1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprees and Pardons for Offenses against the United States, except in Cases of Impeachment.

[2] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, to the Courts of Law, or in the Heads of Departments.

[3] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.
Section 4. The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. [1] The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3] The trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. [1] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the
executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. [1] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

[1] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2] 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.

[3] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.
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ARTICLE VII

The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth.

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

AMENDMENT I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II [1791]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III [1791]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due
process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII [1791]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X [1791]

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.

AMENDMENT XI [1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII [1804]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same
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state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. — The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII [1865]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State,
or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV [1870]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XVI [1913]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII [1913]

[1] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years, and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

[2] When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive
thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

[3] This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

AMENDMENT XVIII [1919]

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XIX [1920]

[1] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

[2] Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX [1933]

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.
Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT XXI [1933]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XXII [1951]

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which the Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

AMENDMENT XXIII [1961]

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.
AMENDMENT XXIV [1964]

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXV [1967]

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a Majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

AMENDMENT XXVI [1971]

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.
Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXVII [1992]

No law varying the Compensation for the services of the Senators and Representatives shall take effect, unless an election of Representatives shall have intervened.
The Constitution and the Supreme Court

This chapter deals with the creation of the American Constitution and with the role of the Supreme Court in enforcing the Constitution. As you read the material that follows, consider the extent to which these two topics are linked. On the one hand, does the Constitution have binding force — is it really a constitution — if no court is available to enforce its requirements? On the other hand, if the Supreme Court or other political actors enforce requirements not contained in the written Constitution as ratified in 1789 and amended since, should these requirements nonetheless be considered part of the Constitution?

With regard to the first question, consider the fact that the Constitution purports to bind members of Congress, the executive branch, and state government as well as Supreme Court justices. It therefore imposes on them responsibility to obey constitutional requirements whether or not a litigated case deals with the question. With regard to the second question, consider the fact that countries like the United Kingdom, which do not have written constitutions, nonetheless have long-standing traditions, customs, and texts that are treated as having constitutional status. Consider as well that in the United States, much constitutional “law,” especially with regard to foreign affairs, consists of informal accommodations and historical practices within and among the various parts of the government.

A. INTRODUCTION: CREATING A CONSTITUTION THAT BINDS THE FUTURE

Many constitutions are born in paradox. They purport to bind the future, but they begin by rejecting the binding force of the past.

The United States Constitution provides an example of this paradox. Article VI section 2 proclaims that the Constitution is "the supreme Law of the Land," but the Constitution's framers rejected the binding force of the Articles of Confederation, which was the law of the land at the time the Constitution was adopted.
Whereas the Articles required that the state legislatures of all thirteen states ratify any amendments, the framers instead provided that an entirely new form of government would go into effect when the Constitution was ratified by state conventions in nine of the thirteen states. Constitutional obligation rests on the duty to obey the "law of the land." How does this duty arise when the Constitution itself is grounded on rejection of the law then in force?

Note: Why (and How) Does the Constitution Bind?

1. The problem of constitutional evil. If a constitution contained only provisions that the people of the United States today thought wise, the problem of constitutional obligation would never arise. The people would then follow constitutional commands because of an independent judgment that they would reach even if there were no constitution. The problem of obedience becomes acute only when constitutional commands depart from these independent judgments.

For an example illustrating the problem, consider the fact that the Constitution, as originally drafted, had many provisions that protected the rights of slave holders at the expense of enslaved individuals. Article I, section 2, clause 3 inflated the representation of slave states in Congress by counting three-fifths of all slaves as persons for purposes of congressional apportionment. Article I, section 9, clause 1 prohibited Congress from outlawing the slave trade until 1808. Article IV, section 2, clause 3 required free states to return enslaved persons who had escaped to their territory. Citing these provisions, Supreme Court Justice Thurgood Marshall once wrote that he did not "find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the [start]." Marshall, Commentary: Reflections on the Bicentennial of the United States Constitution, 101 Harv. L. Rev. 1, 2 (1987). Why should anyone have felt obligated to obey provisions in the original Constitution that protected slavery?

Of course, the modern, amended Constitution outlaws, rather than protects slavery. See U.S. Const. amend. XIII. Still, even as amended, the Constitution contains provisions that many think anachronistic, foolish, or morally questionable. See generally S. Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It) (2006).

For example, article II, section 1, clause 5 requires the President to be a "natural born Citizen" of the United States. Suppose a substantial majority of the people of the United States believe that a particular naturalized citizen would make the best President. Why should the text of the Constitution prevent the election of this person? Consider the following possibilities:

2. Links to the old regime. Sometimes, constitution makers attempt to ground the legitimacy of their work on the legitimacy of the regimes they displace. For example, as communist regimes collapsed in Central and Eastern Europe, informal "round tables" were created in which representatives of the failing governments negotiated with representatives of opposition groups to create interim constitutions, some of which were in place for many years. Similarly, in Egypt, transition to the new regime has involved negotiations with military officials who had backed the previous regime. As South Africa moved away from apartheid, negotiations between the government in place and the opposition produced an interim constitution. That constitution contained a list of basic
constitutional principles, and created a constitutional court. It gave the constitutional court the power to review the proposed final constitution, and to set aside provisions that were inconsistent with the basic principles. The interim constitution also provided for the election of a new legislature, with nondiscriminatory suffrage rules. That legislature drafted the final constitution. The constitutional court held that some provisions, including important aspects of the protection of individual rights, were inconsistent with the basic constitutional principles. The constitutional court approved the final constitution after the legislature rewrote it to meet the court's objections.

Is the need for continuity and nonviolent transition a sufficient reason to give binding force to constitutional documents produced under these circumstances? Once the prior regime is completely displaced, why should anyone respect decisions reflecting the (illegitimate?) power the regime previously exercised?

3. Popular sovereignty. As already noted, the American Constitution was in important respects illegal under the previous regime. The first three words of the document nonetheless claim that it is legitimate because it is the work of "We the People." Can popular sovereignty make the text of a new constitution binding?

The American constitutional text was widely debated in what amounted to a national symposium on constitutional theory and ratified by popularly elected state conventions. For the definitive account, see P. Maier, Ratification: The People Debate the Constitution, 1787-1788 (2010). Do these facts create a duty to obey the Constitution?

Although the ratification process was relatively democratic by the standards of the time, African Americans, American Indians, women, and most people who did not own property were excluded from the process. Even aside from these deficiencies,

the ratification project lacked democratic legitimacy in several ways. [Behind] the closed doors of the Philadelphia convention, some Founders referred to democracy in disparaging terms — "the worst . . . of all political evils," according to Elbridge Gerry. Madison opposed a second convention specifically on the ground that the People, at least at that moment, were neither well enough informed nor sufficiently dispassionate to participate responsibly in making a constitution. In Massachusetts, Federalists were horrified at the idea that the state ratifying convention should be adjourned in order to enable delegates to consult their constituents. In Congress, some Federalists were so distrustful of the People that they preferred to close the House galleries before debating possible amendments to the Constitution.


Notice also that "the People" never speak directly. Their voice is mediated by various institutions and rules (e.g., the institution of a convention or constitutional assembly or of various media that help form public opinion; the rules by which the various conventions function or that allocate ownership of media). These institutions and rules cannot, themselves, be justified by popular sovereignty because they are the means by which popular majorities are formed and measured. What, then, makes them legitimate?

4. Constitutional moments. Constitutional theorist Bruce Ackerman has built on the popular sovereignty approach to propound a "dualist" theory of constitution making. On this view, there are occasional "constitutional moments" during which people devote concentrated attention to fundamental issues of democratic government. In those moments, they subordinate their more narrowly partisan
concerns to a more disinterested consideration of what is in the long-term public interest, and they deliberate about the reasons for adopting policies instead of bargaining over them. The resulting constitutional provisions are more likely to reflect the authentic popular will than the preferences people express during periods of what Ackerman calls ordinary politics. Ackerman identifies three constitutional moments in American history — the founding period, the Civil War period, and the New Deal period. Importantly, he believes that during constitutional moments, the people can override legal requirements of the existing regime in order to change the Constitution. See generally B. Ackerman, We the People (1991, 1998).

Does Ackerman’s account romanticize “constitutional politics”? Consider Klarman, supra, at 570: “The contest over ratification of the Constitution featured a veritable smorgasbord of interest group conflict. The Founders talked a great deal about virtuous subordination of individual self-interest to the public good of the community, but their actions largely belied their ideals.”

5. The dead hand problem and Ulysses contracts. Even if the Constitution was supported by mobilized popular majorities in the late eighteenth century, no one alive today voted to ratify it. Are “We the People” who wrote the original constitution the same “People” as those supposedly bound by it in the early twenty-first century? Why should the “dead hand” of the framers control people alive today? Consider in this regard Thomas Jefferson’s insistence that “[t]he earth belongs in usufruct to the living; the dead have neither powers nor rights over it,” and that “one generation is to another as one independent nation to another.” Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 6 The Works of Thomas Jefferson 3–4, 8–9 (1904).

Sometimes, constitutions are justified on the theory that one aspect of freedom is the ability of a people to bind itself in the future. According to ancient myth, Ulysses had his men bind him to the mast so that he could listen to the song of the Sirens without succumbing. So, too, perhaps constitution makers, fearful of their own future weakness, bind themselves to behave in certain ways. Perhaps the ability to make these decisions is part of what it means for a people to be free and to exist as a continuing entity. See generally J. Elster, Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints (2000). Consider also Chief Justice John Marshall’s claim in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803):

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected.


Democratic self-government is . . . something that exists, if it exists at all, only over time. . . . [D]emocracy consists not in governance by the present will of the governed, or in governance by the atemporal truths posted by one or another moral philosopher, but rather in a people’s living out its own self-given political and legal commitments over time — apart from or even contrary to popular will at any given moment.

Consider the extent to which the United States “commitments over time” have involved resistance to, as well as embrace of, constitutional obligation. For example, some of our most revered Presidents have exhibited at best an
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ambivalent attitude toward constitutional obligation. Thomas Jefferson negotiated the Louisiana Purchase despite his belief that he lacked the constitutional power to do so. Explaining his actions years after he left office, Jefferson wrote that “[a] strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation.” Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 1 The Works of Thomas Jefferson 146 (1905). Abraham Lincoln defended the constitutionality of many (but, importantly not all) of his actions at the beginning of the Civil War, but also made clear that he thought those actions were justified even if they violated the Constitution. See Abraham Lincoln, Special Session Message (July 4, 1861), in 7 A Compilation of the Messages and Papers of the Presidents 3226 (1917) (“Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?”). See also Barron and Lederman, The Commander in Chief at the Lowest Ebb, 121 Harv. L. Rev. 689, 997–1008 (2008). Franklin Roosevelt believed that the Constitution was “a layman’s document, not a lawyer’s contract,” Roosevelt, Address on Constitution Day, Washington, DC (Sept. 19, 1937), in 1 The Public Papers and Addresses of Franklin D. Roosevelt 359 (1941), and in his first inaugural address provided clear hints that he was prepared to go beyond commonly understood limits on executive authority if necessary to meet the emergency created by the Great Depression. See Franklin D. Roosevelt, First Inaugural Address, available at http://www.bartleby.com/124/pres49.html (“It is to be hoped that the normal balance of executive and legislative authority may be wholly adequate to meet the unprecedented task before us. But it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure.”).

6. Amendments and supermajorities. Perhaps the Constitution is entitled to respect because if the people disapprove of specific constitutional commands, they can change them through the amendment process. Note, though, that the requirements to amend the United States Constitution are extraordinarily arduous. Article V provides that amendments can be proposed by two-thirds of both Houses of Congress or by application for a constitutional convention proposed by two-thirds of the states. In either event, proposed amendments must be approved by three-fourths of the states. What makes the requirements of article V legitimate?

Does the very difficulty of amendment, as well as the supermajority requirements for initial ratification, provide a built-in guarantee that constitutional provisions are wise? Consider McGinnis and Rappaport, Originalism and the Good Constitution, 98 Geo. L.J. 1693, 1696 (2010):

[Supermajority] rule helps assure the bipartisan consensus that facilitates the widespread allegiance of citizens and guarantees rights for minorities. [Supermajority rule] also improves the erratic judgment of legislators about entrenchment by restricting the agenda of proposals and creating a veil of ignorance that promotes disinterested decision making.

Notice, though, that supermajority requirements can also give a relatively small group veto power over the entire constitution and therefore create the potential of constitutionalizing narrow, special interest provisions. For example, as noted above, delegates to the constitutional convention from slave states made
clear that they would not vote for the new constitution unless slavery was granted constitutional protection.

7. The good (enough) constitution. Is constitutional obligation justified on the ground that, for the most part, the Constitution is substantively sound and that it is worth putting up with its suboptimal features given the risk of chaos or tyranny if it were ignored? One’s reaction to this suggestion depends on how deficient one thinks the Constitution is on the one hand, and on how great one thinks the risk of chaos or tyranny would be if provisions were ignored on the other. In this regard, consider:

   a. the fact that the Constitution as currently written allows for the election of a President who loses the popular vote and gives wildly disproportionate representation to small states in the Senate;

   b. the fact that we have in the past ignored some clear constitutional provisions without obvious adverse consequences. For example, article I, section 3, clause 2 provides that all senators, except for the first set of senators, are to serve for six years, yet even since Vermont was admitted as the first new state in 1791, one senator from new states has always served less than six years so as to provide for the staggered election of senators.

8. Modern acquiescence. The framers of the Constitution have no actual power over us. If the Constitution is obeyed today, it is because of the consent of living people who could disregard it if they chose to do so. Can constitutional obligation be grounded on modern acquiescence? See Dorf, Book Review: The Undead Constitution, 125 Harv. L. Rev. 2011, 2015–2016 (2012) (“The Constitution is not law today simply because its provisions were adopted by the People in 1789, 1791, 1868, and so forth. The Constitution is law today because it continues to be accepted today.”) But if the Constitution’s legitimacy rests on this ground, “[h]ow do we know [it] is accepted today? Is the absence of a revolution sufficient to legitimate the Constitution?” Id. at 2016. Moreover, if the acquiescence is founded on the belief that there is an obligation to obey, but the obligation to obey rests on acquiescence, the argument is circular. If modern acquiescence is the basis for obligation, does it follow that particular provisions of the Constitution should not be enforced when public opinion (measured how?) opposes enforcement?

9. The relevance of the question. For better or worse, constitutional obligation is generally taken to be an axiom of our system. See, e.g., Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353, 383–384 (1981) (“The authoritative status of the written constitution is a legitimate matter of debate for political theorists interested in the nature of political obligation. [For] purposes of legal reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration.”).

Note, however, recent polling data showing that 76 percent of the American people think that justices of the Supreme Court at least sometimes decide cases because of their personal or political views rather than because of legal analysis. See Results of New York Times/CBS Poll, available at http://www.nytimes.com/interactive/2012/06/08/us/politics/08scotus-poll-documents.html?ref=politics.

Moreover, although justices on the Supreme Court, presidents, and members of Congress rarely or never question constitutional obligation, constitutional law is dominated by debate about what the Constitution consists of and how it should be interpreted. Contending sides in this debate regularly make claims that various forms of constitutional interpretation are inconsistent with true obligation.
B. The Origins of the U.S. Constitution

Much of the rest of this book investigates these claims. As you evaluate them, it is useful to think about how much obligation should matter to us. Suppose, for example, that a particular Supreme Court decision seems inconsistent with the text of the Constitution as understood at the time of the framing or with the intent of the people who wrote the text. As we shall see, there is debate about whether departure from original meaning and original intent disqualifies a decision as a legitimate interpretation of the Constitution. Even if it does, though, one needs to confront the further question of whether this fact should matter to us.

To put this question in the broadest form, should constitutional law be about fidelity to a particular text or about substantive justice? If it is about substantive justice untethered from the textual obligation, then how should we deal with disagreement about what substantive justice requires?

Of course, the Supreme Court rarely or never confronts these questions explicitly and in this very general form. Constitutional doctrine is much more fine-grained, and ultimate issues about justice and obligation are beneath rather than on the surface. The questions are nonetheless crucial and deserve attention. As you read the materials that follow, consider the extent to which disagreement about constitutional issues is grounded in disagreement about how a particular text should be interpreted, about the requirements of substantive justice, or about the nature and importance of constitutional obligation.

B. THE ORIGINS OF THE U.S. CONSTITUTION

The Declaration of Independence was signed in 1776. Hostilities with England substantially ceased in 1781 after the Yorktown campaign; the American Revolution was formally completed in 1783 with the signing of a final peace treaty with England. In February of 1781, the thirteen colonies ratified the Articles of Confederation, under which they lived for seven years. The Constitution was written in 1787 and ratified in 1789. Two years later the bill of rights was added.

Why did the states find it necessary to adopt a new Constitution? What were the problems for which the Constitution was supposed a remedy? Views about the Constitution and its framers span a wide range. Some see the framers as intellectual giants, equipped with extraordinary foresight, vision, and faith in democracy and self-rule, who were able to rise above the squabbles of the day in order to institute into law principles that are timeless or at least enduring. See J. Fiske, The Critical Period of American History (1888). To others, the Constitution is best understood as a series of ad hoc compromises, designed to resolve very specific issues over which the young country was divided. See M. Farrand, The Framing of the Constitution of the United States (1913). A third strand in American historical thought treats the Constitution as a product of aristocratic conservatives who, far from trusting the people and believing in self-rule, intended to protect private property, and the position of the well-to-do, from the workings of democratic politics. See W. Holton, Unruly Americans and the Origins of the Constitution (2007); C. Beard, An Economic Interpretation of the Constitution of the United States (1913). There are, of course, numerous variations on these general approaches. For discussion, see G. Wood, The Creation of the American Republic, 1776–1787 (1969); G. Wood, ed., The Confederation and the Constitution (1978); G. Wood, The Radicalism of the

To understand the Constitution and the surrounding debates on its purposes and effects, it is useful to have some understanding of the Articles of Confederation, which the Constitution replaced. The Articles were adopted shortly after the Revolution in order to ensure some unification of the states regarding common foreign and domestic problems, but the overriding understanding was that the states would remain sovereign. The first substantive provision of the Articles announced that “each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.” A number of powers were, however, conferred on “the United States in Congress assembled.” These powers included “the sole and exclusive right and power of determining on peace and war”; the authority to resolve disputes between the states; the power to regulate “the alloy and value of coin struck by their own authority, or by that of the respective states”; and the authority to control dealings with Indian tribes, to establish or regulate post offices, and to appoint naval and other offices in federal service.

But at least by modern standards, there were conspicuous gaps. Two of the most important powers of the modern national government were missing altogether — the power to tax and the power to regulate commerce. Moreover, two of the three branches of the national government were absent. There was no executive authority. There was no general national judicial authority; the only relevant provision authorized Congress to establish a national appellate tribunal to decide maritime cases. Of course, there was no bill of rights (though it should be noted that the absence of a bill of rights was not in any way the impetus behind the Constitution and indeed the federalists thought, at the time of ratification, that a bill of rights did not belong in the Constitution at all).

As experience under the Articles of Confederation accumulated, some leading political figures became dissatisfied with the performance of the government it created. Among the complaints were that states refused to provide money owed to the federal government, refused to comply with treaties entered by the United States, interfered with the commerce of other states, forgave debts, and issued inflated paper currency. These grievances came in the context of economic decline, which produced a general sense of unease.

In 1786, state representatives met in Annapolis to discuss problems that had arisen under the Articles; they adopted a resolution to hold a convention in Philadelphia to remedy those problems. But the nation’s charge to the framers was much narrower than the ultimate product would suggest. The framers, chosen by state legislatures, were instructed “to meet at Philadelphia [to] take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union.” The limited character of this charge proved a serious embarrassment to the framers, whose product reflected their view that it was necessary to provide not “further provisions” but an entirely new governing document whose character was not clearly proportionate to the weaknesses of the Articles.

There is therefore a sense in which the Constitution was itself an unlawful act. As noted above, the Convention disregarded the amending procedure set out in
B. The Origins of the U.S. Constitution

the Articles, which required approval by all thirteen state legislatures. The Constitution was instead sent to Congress, with a request that it be sent in turn to state legislatures. The state legislatures would then send it to popularly elected state ratifying conventions.

The Constitution changed the framework set up by the Articles of Confederation in a number of ways. Among the most important changes were the creation of an executive branch; the grant to Congress of the powers to tax and to regulate commerce; and the creation of a federal judiciary, including the Supreme Court and, if Congress chose, lower federal courts. The tenth amendment, added two years later, was a pale echo of the first provisions of the Articles of Confederation, deleting the word “expressly,” and it was countered by the clause granting Congress the authority to make “all laws necessary and proper” to effectuate the enumerated powers of the federal government.

1. The Arguments over the New Constitution

Was there an underlying theory that justified this expansion of federal power? Some historians have concluded that the new Constitution was motivated by nothing more than interest-group politics advanced under the cloak of high political theory. State legislators had favored the interests of farmers and taxpayers against the interests of creditors and the commercial class. The latter group responded by attempting to change the structure of government so as to disadvantage the former group. See generally W. Holton, Unruly Americans and the Origins of the Constitution (2007).

Still, even if it were true that the actual motivations for favoring or opposing the Constitution were crass and material, there can be no doubt that the struggle over ratification produced an outpouring of justificatory political theory. As you read the material that follows, consider the extent to which this theory should influence contemporary constitutional interpretation.

At the root of the dispute was disagreement over the implications of classical republican theory. Republican theorists relied on civic virtue — the willingness of citizens to subordinate their private interests to the general good. Politics thus consisted of self-rule, but it was self-rule of a particular sort. Self-rule was a matter not of pursuing self-interest, or of aggregating “preferences,” but instead of selecting the values that ought to control public and private life. Dialogue and discussion among the citizenry were critical features in the governmental process. In a republic, political participation should be active and frequent and not limited to voting or other similar statements of preference. Civil society was to operate as a sort of teacher, inculcating virtue, and not merely as a regulator of private conduct. The model for government was the town meeting, a metaphor that played an explicit role in the conception of politics put forth primarily by the proposed Constitution’s opponents. Consider in this regard Thomas Jefferson’s suggestion that the Constitution should be amended in every generation, partly in order to promote general attention to public affairs; this suggestion was a natural one for those who saw frequent participation and virtue as important ingredients in democratic self-government. See Letter to Samuel Kercheval, July 12, 1816, in The Portable Thomas Jefferson 557–558 (M. Peterson ed., 1975).

For republican theorists, government’s first task was to ensure the flourishing of the necessary public-spiritedness. Some believed in decentralization, for only in
small communities would it be possible to find and develop the unselfishness and devotion to the public good on which genuine freedom depends. "Brutus," writing in opposition to the proposed Constitution, emphasized the need for homogeneity: "In a republic, the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be continually striving against those of the other." 2 The Complete Antifederalist 369 (H. Storing ed., 1980).

The Constitution's opponents, referred to as "antifederalists," were especially hostile to a dramatic expansion in the powers of the national government. A decentralized society could achieve the sort of homogeneity and dedication to the public good that would prevent the government from degenerating into tyranny from the center or a mere clash of private interests. A powerful national government would be inconsistent with the spirit of civic virtue, creating heterogeneity and distance from the sphere of power, both of which would undermine deliberative processes and the citizens' willingness to subordinate their private interests to the public good. Closely connected to this view was the antifederalists' desire to avoid extreme disparities in wealth, education, and power.

It should not be difficult to see why the antifederalists would have had at best an ambivalent attitude toward a system in which decisions were made by representatives of the people rather than by the people themselves — certainly if the representatives were not close to the people. According to one strand of republican thought, all decisions should be made in small communities or even during a face-to-face process of deliberation and debate. Such a process would inculcate civic virtue in the public at large, virtue from which the process itself would simultaneously benefit.

By 1787, though, all agreed that representation was necessary at both the state and the national levels. The size of both governments made it impossible to conduct political affairs on the model of the town meeting. The proposed Constitution's opponents believed that it would undermine the system of decentralization on which true liberty depended. It would prevent citizens from having effective control over their representatives and deprive them of an opportunity to participate in public affairs. It would thus pose a severe threat to the underlying principle of civic virtue. Rule by remote national leaders would attenuate the scheme of representation, rupturing the alliance of interests between the rulers and the ruled. It would create a class of quasi-aristocrats, charging them with the task of directing a huge national government. The antifederalists foresaw a system in which the people would be effectively excluded from the world of public affairs and in which national leaders, only weakly accountable, would have enormous discretion to make law and policy.

The antifederalists were also skeptical of the emerging interest in commercial development that played a prominent role in the decision to abandon the Articles of Confederation. In the antifederalists' view, commerce was a threat to the principles underlying the Revolution, for it gave rise to ambition and avarice and thus to the dissolution of communal bonds. Insofar as the proposed Constitution was designed to promote commerce and commercial mores, it would undermine the Revolution itself. Montesquieu, an important source for federalists and antifederalists alike, had said that "in countries where the people are actuated only by the spirit of commerce, they make a traffic of all the humane, all the moral virtues; the most trifling things, those which humanity would demand, are there done, or there given, only for money." Montesquieu, The Spirit of Laws bk. XX, ch. ii (spec. ed. 1984) (1751).
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In sum, the antifederalists attacked the proposed Constitution on the ground that it was inconsistent with the underlying principles of republicanism. The removal of the people from the political process, the creation of a powerful and remote national government, and the new emphasis on commerce — all of these threatened to undermine the purposes for which the Revolution had been fought.

The antifederalist objections to the proposed Constitution provoked a theoretical justification that amounted in many respects to a new conception of politics — in Gordon Wood’s words, a “political theory worthy of a prominent place in the history of Western thought.” G. Wood, The Creation of the American Republic, 1776–1787, at 615 (1969). That conception consisted of a reformulation of the principles of republicanism — a reformulation that attempted to synthesize elements of traditional republicanism with an emerging theory that welcomed rather than feared heterogeneity, and that understood the reality that self-interest would often be a motivating force for political actors.

Much of that reformulation can be found in The Federalist Papers — essays attempting to defend the proposed Constitution to the country against antifederalist attack. The Federalist Papers were published under the name “Publius,” but were in fact written by James Madison, Alexander Hamilton, and John Jay. Although the papers are often consulted as a means of understanding the theory underlying the Constitution, and the “intentions” of its drafters, it is important to keep in mind that the essays were in many respects propaganda pieces, designed to persuade the ambivalent. Nonetheless, The Federalist Papers count among the classic works in the theory of democracy and constitutionalism.

The Federalist No. 10 (Madison)
(1787)

TO THE PEOPLE OF THE STATE OF NEW YORK:

Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. [The] instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. [Complaints] are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true. [The] distresses under which we labor [must] be chiefly, if not wholly, effects of the unsteadiness and injustice with which a factious spirit has tainted our public administrations.
By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions, concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for preeminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With
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equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves, the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail. Shall domestic manufacturers be encouraged, and in what degree, by restrictions on foreign manufacturers? Are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good.

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.

The inference to which we are brought is, that the causes of faction cannot be removed, and that relief is only to be sought in the means of controlling its effects.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful.

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic
politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. . . .

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people. The question resulting is, whether small or extensive republics are more favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations:

In the first place, it is to be remarked that, however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that, however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to that of the two constituents, and being proportionally greater in the small republic, it follows that, if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to center in men who possess the most attractive merit and the most diffusive and established characters.

It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the
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Preposterous are the ideas of a republic and of the Constitution of the United States of America. The Constitution, however, was drafted by men who were concerned with the preservation of the rights of citizens and the orderly functioning of government. The Constitution was drafted to ensure that the rights of citizens would be protected and that the government would function in a manner that would maintain order and justice. The Constitution was designed to create a government that was representative of the people and that would be responsive to their needs.

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The Federalist No. 10 turned the antifederalist understanding on its head. For Madison, and for many other federalists, factions were an inevitable product of liberty, which would produce inequality in the ownership of property. Therefore, the problem could not be solved by the traditional republican means of education and inculcation of virtue. Moreover, the problem of faction was likely to be most, not least, severe in a small republic. It was in a small republic that a self-interested private group would be most likely to be able to seize political power in order to distribute wealth or opportunities in its favor. Indeed, in the view of the federalists, this was precisely what had happened in the years since the Revolution. In that period, factions had usurped the processes of state government, putting both liberty and property at risk.

Consider in this regard Madison’s rejection of Jefferson’s proposal of frequent constitutional amendment on the ground that such a proposal would produce “the most violent struggle between the parties interested in reviving and those interested in reforming the antecedent state of property.” M. Meyers, ed., The Mind of the Founder 232 (1969). For Jefferson, by contrast, turbulence is “productive of good. It prevents the degeneracy of government, and nourishes a general attention to the public affairs. I hold that a little rebellion now and then is a good thing.” Letter to Madison, Jan. 30, 1787, in The Portable Thomas Jefferson 416–417 (M. Peterson ed., 1975). For Madison, ongoing processes of self-government produced not the promise of genuine self-determination but instead the danger of factional warfare.

Madison believed that self-interest as an inevitable force in political behavior. The federalists did not, however, suppose that self-interest was all there was to human beings. “The supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude,” wrote Hamilton in The Federalist No. 76. And in No. 55, Madison made the same point, claiming that “[as] there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature, which justify a certain portion of esteem and confidence.” In any case, the specter of faction was sufficient to justify rejection of the antifederalist understanding that in a small republic the problem of faction could be overcome. But it was in developing a solution that Madison was particularly original. The solution began with the insight that in a direct democracy the problem posed by factions is especially acute, for a “common passion or interest will, in almost every case, be felt by a majority of the whole” and there will be no protection for the minority. But safeguards would be found in a large republic. There, the diversity of interests would reduce the risk that a common desire would be felt by sufficient numbers of people to oppress minorities. In this respect, the likelihood of factional tyranny contained a built-in check in a large republic.

On this view, heterogeneity — Brutus’s fear — was a positive good. It would work against factionalism and parochialism. At the same time “differences of opinion, and the jarrings of parties [would] . . . promote deliberation and circumspection; and serve to check the excesses of the majority.” The Federalist No. 70. Differences and disagreement were not harmful to a deliberative republic. On the contrary, they were indispensable to its successful operation.

Nor were these the only virtues of size. The other feature of the large republic was that the principle of representation would serve in that setting as a substantial solution to the problem of faction. The central phrase here is Madison’s suggestion that that principle would “refine and enlarge the public views, by passing
them through the medium of a chosen body of citizens, whose wisdom may best
discern the true interest of their country, and whose patriotism and love of justice
will be least likely to sacrifice it to temporary or partial considerations." This is so
in part because in a large republic the dangers produced by undue attachment to
local interests would be reduced.

This conception of representation appears throughout The Federalist Papers
and indeed throughout Madison's work. In No. 57, Madison urges that "the aim
of every political constitution is, or ought to be, first to obtain for rulers men who
possess most wisdom to discern, and most virtue to pursue, the common good of
society; and in the next place, to take the most effectual precautions for keeping
them virtuous while they continue to hold the public trust." Elsewhere he sug-
gests that "wisdom" and "virtue" will characterize national representatives.
Where the antifederalists accepted representation as a necessary evil, Madison
regarded it as an opportunity for achieving governance by officials devoted to a
public good distinct from the struggle of private interests.

For these reasons, Madison favored long length of service and large election
districts — precisely what the antifederalists most feared. Thus, the federalists
spoke most favorably of the presidency, highly of the Senate, and less favorably
of the House — precisely the opposite of the valuations of the antifederalists.
Thus, the antifederalists sought a "right to instruct" representatives as part of
the bill of rights — a right successfully resisted by the federalists on the theory
that deliberation required representatives to be free from commitments, under-
taken in advance, to their constituents.

In the Madisonian account, representatives were to have the time and tem-
perament to engage in a form of collective reasoning. They were not to be mere
"transmission belts" for the will of the various constituencies, much less to be a
mechanism for aggregating interests. The hope, in short, was for a genuinely
national politics. The representatives of the people — not the people them-

selves — would be free to engage in the process of discussion and debate from
which the common good would emerge. Consider the fact that the first Congress
rejected a right to instruct, by which constituents would be authorized to give
binding instructions to representatives. Those who opposed this right contended
that it would be inconsistent with the point of the legislative meeting: public-spirited
deliberation among people with different points of view.

This, then, is the account offered in The Federalist No. 10. But there is some
evidence that Madison had a greater influence on posterity than he did on his
contemporaries. On one view, the framers were generally "deaf to Madison's
theory," see Kramer, Madison's Audience, 112 Harv. L. Rev. 611, 677 (1999),
and "the Founding may have been a more conventional intellectual event than
we have come to believe." Id. at 673. Kramer argues that to the extent that "the
Constitution embodies Madison's theory, it has come to do so only in our own
century, as a reflection of our present intellectual tastes." Id. On this view, Madi-
son's quite fundamental rethinking of governmental structure was less central to
the founding than "the successful distillation and application of already familiar
ideas about separating and balancing power, together with some undeniably
impressive political maneuvering." Id. at 673. For a contrary view, see Rakove,
The Great Compromise: Ideas, Interests, and the Politics of Constitution Mak-
ing, 44 Wm. & Mary L.Q. 424 (1987).

Even if The Federalist No. 10 is taken to set out some central themes in the
new Constitution, it is far from the entire story. The Constitution embodies a set
of structural provisions designed to bring about public-spirited representation, to
provide safeguards in the event that it is absent, and to ensure an important measure of popular control. The various systems of representation in the different branches of the national government were designed to promote deliberation in government and to control possible abuses. Recognizing that sovereignty lay in the people, the framers designed a system in which no branch could speak authoritatively for the people themselves. On this view, the Constitution's structural provisions can be seen as a kind of bill of rights, designed to protect against tyranny.

Bicameralism — the division of Congress into the House and the Senate, with two-year and six-year terms, respectively — was intended to ensure that some representatives would be relatively isolated from the people and that others would be relatively close to them. The fact that the houses of the legislature were divided in this way would combine political accountability (on the part of the House) with a degree of independence (on the part of the Senate), enabling the Senate to serve a kind of “cooling” function. Indirect election of representatives played a far more important role at the time of ratification than it does today. Only the House of Representatives was to be directly elected. The original Constitution provided that Senators would be chosen by state legislatures, and envisioned an electoral college whose members would deliberate over the choice of the president. These features provided additional insulation from political pressure and factional tyranny.

Perhaps most important, the system of checks and balances was designed with the recognition that even national representatives may be prone to the influence of “interests” that is inconsistent with the public welfare. In The Federalist No. 10 itself, Madison recognizes that “[enlightened] statesmen will not always be at the helm.” The Federalist No. 51 is the most celebrated elaboration of this point.

The Federalist No. 51 (Madison)

(1788)

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. [Some] difficulties, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the
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legislature in this particular, their independence in every other would be merely nominal.

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other — that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

But it is not possible to give to each department an equal power of self-defence. In republican government, the legislative authority necessarily predominates. The remedy for this inconvenience is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature appears, at first view, to be the natural defence with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department?

There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view.

First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each
subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority — that is, of the society itself, the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method [is] but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States, oppressive combinations of a majority will be facilitated; the best security, under the republican forms, for the rights of every class of citizens, will be diminished; and consequently the stability and independence of some members of the government, the only other security, must be proportionally increased.

[In] a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government, within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will
not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practical sphere, the more duly capable it will be of self-government. And happily for the republican cause, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the federal principle.

Publius

Note: Madisonian Republicanism and Checks and Balances

The system of checks and balances within the federal structure was intended to prevent both factionalism and self-interested representation. If a segment of rulers was influenced by interests that diverged from those of the people, other national officials would have both the incentive and the means to resist. The result is an additional protection against tyranny. We might also think of the system as one in which the sovereign people can pursue a strategy of divide and conquer. Rather than undemocratically limiting majority will, the distribution of national powers might be seen, at least in part, as a way of maximizing the power of the public by fragmenting the power of the governors. See, on this and related questions, Sunstein, Constitutionalism after the New Deal, 101 Harv. L. Rev. 421, 430–437 (1989). Of course, this view is controversial. The fragmentation allows the status quo to remain undisturbed, and many have argued that this effect insulates existing practices, including distributions of wealth, from democratic control. This was a particular theme in the New Deal period, when President Franklin Delano Roosevelt succeeded in concentrating power — including lawmaking and law interpreting power — in the executive branch. See id.; 2 B. Ackerman, We the People: Transformations (1998).

The federal system, too, would act as an important safeguard. The “different governments will control each other” and ensure stalemate rather than action at the behest of particular private interests. The jealousy of state governments, and the attachment of the citizenry to local interests, would provide additional protection against the aggrandizement of power in national institutions. The federal system would allow flexibility, experimentation, accountability, and diversity and permit a measure of self-determination through the classically republican institution of small governmental units. At the same time, the power of individual citizens to move from one state to another would operate as a check on governmental tyranny. The right of “exit” would deter local oppression, as people could vote with their feet.

The result is a complex system of checks: National representation, bicamerality, indirect election, distribution of powers, and the federal-state relationship would operate in concert to counteract the effects of faction in spite of the inevitability of the factional spirit. And the Constitution itself, enforced by disinterested judges and adopted at a moment in which that spirit had perhaps been temporarily extinguished, would prevent majorities or minorities from usurping government power to distribute wealth or opportunities in their favor.

There has been no discussion thus far of private property, freedom of contract, and the various issues raised by governmental redistribution of resources. The protection of property and contractual liberty were principal interests of the framers, and one of their principal targets was debtor-relief legislation. Some
of the framers saw a close practical relationship between the desire to protect private property (along with other forms of private liberty) from governmental intrusion and devices to guard against the dangers posed by faction. For the framers, the problem of faction lay partly in the danger that a self-interested group would obtain governmental power in order to put rights of property at risk. The experience under the Articles of Confederation, in which popular majorities had operated as factions in state legislatures, confirmed the existence of this danger.

In this respect, the federalists may be contrasted with their antifederalist opponents, whose generally weaker objections to laws redistributing property coexisted easily with their preference for decentralized democracy. Indeed, many of the antifederalists approved of debtor-relief laws and saw economic equality as indispensable to a republic. As “Centinel” wrote, a “republican, or free government, can only exist where the body of the people are virtuous, and where property is pretty equally divided; in such a government the people are the sovereign and their sense or opinion is the criterion of every public measure; for when this ceases to be the case, the nature of the government is changed, and an aristocracy, monarchy, or despotism will rise on its ruin.” The Antifederalist 16 (H. Storing ed., M. Dry abr. 1985).

Moreover, the federalists’ hospitable view toward lengthy deliberation and government inaction may be associated with a desire to protect property rights. Inaction, of course, preserves the existing distribution of wealth. For a discussion with some provocative claims about how to rethink the separation of powers and with reference to comparative materials, see Ackerman, The New Separation of Powers, 113 Harv. L. Rev. 33 (2000).

The picture that emerges is in an important sense one of a government that was intended to engage in deliberation. But politics was to be deliberative in a special sense. Representatives were to be accountable to the public; their deliberative task was not disembodied. The framers were thus careful to create political checks designed to ensure that representatives would not stray too far from the desires of their constituents. The result was a kind of hybrid conception of representation, in which legislators were neither to respond blindly to constituent pressures nor to undertake their deliberations in a vacuum. (Note also the restrictions on who would do the deliberating: The framers appeared comfortable with many limits on the franchise; women and slaves, among others, could not vote. It is worthwhile to ask whether these exclusions were essential to their kind of republicanism or instead a betrayal of its basic principles.)

Where does judicial review fit into this framework? Notice that the Constitution does not explicitly authorize judicial review, but at least in some form it appears to have been widely anticipated. To a large degree, the Court was intended to enforce the lines of division set down in the Constitution, in order to ensure that the areas marked off from politics would not be subject to political revision. The boundaries set in the Constitution, and thus by “We the People,” were to be irreversible by electoral majorities—a safeguard that would buttress the other institutional checks. In this sense, judicial review would ensure the supremacy of the Constitution, embodying the will of the sovereign public, against temporary majorities. This idea responded to the distinction drawn by the framers between “law” — the realm of judgment — and “politics” — the realm of will, or personal preference. See The Federalist No. 78, infra. The existence of a realm of “law” immune from “politics” fits securely within a system intended to protect both the public good and private rights from perceived majoritarian excesses.
B. The Origins of the U.S. Constitution

Note finally that this entire framework reflects a new conception of sovereignty, which lay with the people, not with any king, and not with any branch or set of rulers. One of the most important contributions of the new Constitution consisted in the rejection of the monarchical legacy in favor of this new understanding of where sovereignty could be found. See G. Wood, The Radicalism of the American Revolution (1993).

Note: Madisonian Republicanism and Contemporary Constitutionalism

The foregoing materials raise a large set of questions; we will be exploring them at many places in this book. Here are a few problems that might be kept in mind at the outset.

1. The complexity of history versus the simplifications (?) of theory. The account that we have offered — of a particular understanding of Madisonian republicanism — is an attempt to reconstruct the founders’ views, but any such attempt is bound to be controversial. Some people think that an account of the kind offered here downplays the framers’ belief in individual rights, operating as checks against politics — even deliberative politics. Others think that the framers offered a highly complex set of ideas not reducible to any single “account.” Still others think that deliberation was a theme in the founding generation but not an entirely central one; in their view the framers were well aware of the importance of interest groups, and they did not place a great premium on political deliberation. For discussions, see W. Bessette, The Mild Voice of Reason (1994); Flaherty, History “Lite” in Modern American Constitutionalism, 95 Colum. L. Rev. 523 (1995); Powell, Reviving Republicanism, 97 Yale L.J. 1703 (1988).

2. Republican and liberal theory. At least since the late 1970s there has been considerable interest — in history, political theory, and law — in “republican” theories of the Constitution. But the word “republican” is ambiguous. Sometimes the term refers to some version of classical republicanism, that is, enthusiasm for small-scale democracy, civic virtue, and participation in government. Sometimes this version of republicanism is opposed to “liberalism,” which is said to be focused on rights, self-interest, and side constraints on government rather than on civic virtue and democratic self-determination. On the asserted tension between liberalism and republicanism, see, e.g., Habermas, Three Models of Democracy, 1 Constellations 1 (1994); Horwitz, History and Theory, 96 Yale L.J. 1825, 1831–1835 (1987). For an important general discussion showing the American progression in the early period from monarchy to republicanism to democracy, see G. Wood, The Radicalism of the American Revolution (1993).

3. Republican theory and judicial review. What does republicanism, Madisonian or otherwise, have to offer to people currently assessing American constitutional law? With respect to judicial review, republican thought might argue in favor of a deferential rather than an aggressive judicial role. After all, it was the antifederalists who were least favorably disposed toward a powerful Supreme Court. In addition, if democratic self-determination is the end, a powerful judiciary hardly seems the means. Consider the opposing view, that under modern circumstances the Supreme Court provides one of the few sites where true deliberation over the public good remains possible. See generally Michelman, Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4 (1986).
4. Problems with deliberation and direct democracy. Is the deliberative conception of representation elitist or worse? The question assumes considerable importance in light of the fact that many people have argued in favor of a larger role for popular referenda, in which decisions are made on particular issues not by representatives but instead by popular vote. It might be urged that the process of referendum is far more democratic than the process of decision by representative bodies.

In recent years, popular referenda in the states have both grown out of and produced constitutional confrontations. Consider recent proposed or actual referenda calling for an end to affirmative action; for exclusion of children of unlawful aliens from public services, including health and education; for bans on laws providing for same-sex marriage or forbidding discrimination on the basis of sexual orientation. Uses of the Internet and discussions of “electronic town meetings” have heightened interest in more direct forms of democracy; modern technologies make direct popular input far more feasible.


Consider as well the view that the republican commitment to “deliberation” is unrealistic. “As a descriptive matter, there is abundant evidence that all too often politics is just the way the pluralists describe it: ceaseless compromissces between competing factions, none of which would pay a nickel to advance the common good, even if they could identify it. (In) the face of this massive volume of special interest politics, how can republicanism be thought to describe the dominant patterns of political discourse?” Epstein, Modern Republicanism — Or the Flight from Substance, 97 Yale L.J. 1633, 1637—1638 (1988). Might the commitment to deliberation also be empty, since it tells us nothing about what goes into deliberative processes or what might come out of them?

5. Adapting or living with an old constitution. Serious questions are raised by efforts to adapt the original constitutional framework to modern government. In some ways, the original commitments have been severely qualified in the nineteenth and twentieth centuries. For example, the national government engages in many tasks originally thought to be within the province of the states — a phenomenon that can be attributed in large part to the Civil War and Franklin Roosevelt’s New Deal, which saw a huge expansion in federal power. The system of checks and balances has been altered by the grant of broad adjudicatory and policymaking power to the President and regulatory agencies. The American conception of constitutional rights has come to include rights of political participation, of freedom of expression, of antidiscrimination on the basis of race and sex, and of “privacy” that were either unanticipated by the founders or are far broader than what they expected. On some of these issues, see T. Lowi, The Personal President (1985).

6. “Constitutional moments” revisited. Recall Ackerman’s argument that we have a “dualist democracy” where constitutional change occurs at “constitutional moments” involving popular mobilization. B. Ackerman, We the People: Foundations (1991), argues that there have been three such moments: the founding period, the Civil War era, and the New Deal period. In his view, much of the work of the Supreme Court can be understood as efforts to synthesize the commitments of these three different republics. Ackerman’s arguments are controversial, but as we will see, both the Civil War period and the
New Deal did help inaugurate major changes in constitutional law, not all of which can be explained by changes in the Constitution’s text. See also M. Tushnet, The New Constitutional Order (2003), for an argument that the constitutional arrangements that prevailed in the United States from the 1930s to the 1990s have ended. Tushnet suggests that the nation’s new constitutional order is characterized by divided government, ideologically organized parties, and subdued constitutional ambition.

C. THE BASIC FRAMEWORK

Marbury v. Madison
5 U.S. (1 Cranch) 137 (1803)

[William Marbury had been appointed a justice of the peace by the defeated incumbent Federalist President, John Adams, in the closing stages of the Adams administration. The Federalist-controlled Senate confirmed the appointments of Adams’s last-minute appointees, including Marbury, on March 3, 1801. The formal commissions had not been delivered when Thomas Jefferson, the Republican President, assumed office several days later. Jefferson refused to deliver the commissions of the justices appointed by Adams. Marbury and others sought a writ of mandamus to compel Madison, Jefferson’s Secretary of State (replacing John Marshall, Adams’s Secretary of State), to deliver the commissions. (The underlying controversy is set out in more detail in a historical note that follows the opinion.)]

Opinion of the Court [by MARSHALL, CHIEF JUSTICE].

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to show cause why a mandamus should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No case has been shown, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

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

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

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

3dly. 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...