

CONSTITUTIONAL LAW

2025-26

Volume 1 of 2
(Sections I-III)

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A Note About These Materials

Welcome to constitutional law!

For several years, I taught this course from a commercially available casebook, supplemented with a hodgepodge of extra readings. Starting with my spring 2024 class, I decided to compile my own materials instead. With the help of a stellar team of teaching fellows and research assistants, I re-edited all of the cases to better emphasize what I think is most worth reading and fill in some potholes that have often tripped students up in the past. I've also written introductions and interstitial notes that should help you make the most of the reading and the class discussion that will follow.

In addition to saving you some money, I've found that this approach yields a more coherent and ultimately more rewarding experience in the class. There's nothing in these materials that isn't assigned, and I don't expect to assign anything apart from these materials. Your assignment for each class is the next unit in the table of contents, where a "unit" is a heading that has a page count attached.

In general, in editing the cases, I've prioritized coherence over concision. Casebooks sometimes hack up opinions into so many bits—in the interest of removing every unnecessary word—that they become hard to follow. With more of the original text preserved, you get the benefit of the author's original efforts to make their opinion readable: roadmaps, transitions, and the like. Often, in fact, including more of the text actually makes the opinion faster to read—or at least to read well—because you aren't left puzzling over how each sentence relates to the next. This approach also conveys more of the original themes and tone of the author's writing—what you might call the "music" of the opinion*—which can help you to pick up on and think critically about the author's animating concerns, the compromise that the opinion might reflect, and the like. In the interest of readability, I've generally avoided ellipses (" . . . ") and have instead signaled the omission by putting brackets around the next word.

Finally, I want to thank the wonderful team of former students who have made this project feasible and contributed in so many ways to its success: Andrew Cogut, Sam Koenig, Olivia Siemens, Leah Smith, John Martin Weed, Justin Xu, and especially Kelly Murphy. I also want to acknowledge the casebooks that have most shaped my approach here: the Feldman-Sullivan casebook that I taught from for my first several years; the Brest-Levinson casebook that I used as a student and have returned to often since;

* Cf. PAUL W. KAHN, MAKING THE CASE: THE ART OF THE JUDICIAL OPINION xiii (2016) ("I like to think of a successful reading as getting the opinion to sing. There is music in the law. Its players are the judges, and its audience is the well-trained lawyer. Unless you have a trained ear, you will not hear the melody.").

and the Friedman-Mortenson casebook, which inspired my framing of some of the executive power issues in section III. The decision “line-up” graphics that accompany the cases were produced using data that Oyez makes available under a Creative Commons license.* Formatted copies of many of the cases were generated with Case Viewer (www.caseviewer.app), which generally retrieved the underlying text from Google Scholar.

—BE

P.S. If you spot typos, please e-mail one of the TFs so that we can correct them for next year. And if, as you read these materials over the course of the semester, you find that you might be interested in getting involved in further revisions, please get in touch with me about that at the start of the summer!

* See <https://www.oyez.org/license>. The script for generating the images themselves is available at https://caseviewer.app/get_oyez.php.

The Constitution of the United States of America

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. 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.

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.

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.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

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

SECTION 3. 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.

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.

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.

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

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

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.

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. 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 Places of chusing Senators.

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. 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.

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

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.

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. 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.

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 encreased 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. 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.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become 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 prevent its Return, in which Case it shall not be a Law.

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. 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;

To borrow Money on the credit of the United States;

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

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

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;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

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;

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, Arsenals, dock-Yards, and other needful Buildings;—And

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. 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.

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.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

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.

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.

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. 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.

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 Controul of the Congress.

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. 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

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.

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 chuse from them by Ballot the Vice President.

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.

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.

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.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased 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.

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. 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 Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

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, in the Courts of Law, or in the Heads of Departments.

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. 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.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be 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.

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. 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.

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 attainted.

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. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

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.

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. 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.

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

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.

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.

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.

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.

* * *

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 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 or 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]

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.

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.

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]

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.

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 this 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 until an election of Representatives shall have intervened.

I. FOUNDATIONS



[Watch Video: Introduction](#)

A. Judicial Review and the Authority of the Supreme Court

(21 PAGES)

INTRODUCTION TO *MARBURY*

Marbury v. Madison (1803) is one of the most famous cases in American constitutional law. For the first time, the U.S. Supreme Court asserted and exercised the power of “judicial review”—the power to pronounce a law (or executive action) unconstitutional and deny it effect. *Marbury*’s significance in its own time has probably been overstated: the basic idea of judicial review was not novel by the time of the Court’s decision, and the canonical status afforded to the *Marbury* opinion (and its author, Chief Justice John Marshall) appears to trace to a concerted rhetorical campaign in defense of judicial review many decades later. Still, there is no question that *Marbury* is now the preeminent symbol and most influential statement of the courts’ authority to pass on the constitutionality of duly enacted federal laws.

The concrete dispute in *Marbury* arose out of a partisan tug-of-war over the judiciary in the wake of the election of 1800. President John Adams, a Federalist, lost that election to Vice President Thomas Jefferson, a Democratic-Republican, and many Federalists in Congress lost their seats to Democratic-Republicans as well. In an effort to retain their party’s grip on power, the outgoing Federalist-dominated Congress created a slew of new judgeships for Adams to fill. One of Adams’s appointees was William Marbury. The Senate quickly confirmed Marbury’s appointment, Adams signed his commission, and Secretary of State John Marshall (whom Adams would soon make Chief Justice) affixed the “seal” of the United States to it. But Marshall did not manage to actually deliver the commission to Marbury before the end of the administration.

When President Jefferson took office, he told *his* Secretary of State, James Madison, to simply treat Marbury’s undelivered commission (and other similar ones) as void, on the theory that a presidential appointment does not legally vest until the commission is actually delivered. Marbury then filed a lawsuit against Madison in the Supreme Court, requesting a “writ of mandamus”—a kind of court order mandating that an official (or lower court) perform some nondiscretionary duty—that would instruct Madison to deliver his commission. Although the Court did not immediately grant that relief, it did order Madison to “show cause” (i.e., to explain) why Marbury was *not* entitled to the relief he claimed. Madison chose not to respond to that directive at all.

While Marbury's case was pending, the new Congress restructured the judiciary again, including repealing many of the Federalists' new judge-ships (although Marbury's office, a "justice of the peace" position for D.C., was not affected). The Republicans also adopted a new schedule for sittings of the Supreme Court, with the effect of delaying the Court's next term—when Marbury's case would be resolved, and when the constitutionality of the new repeals might be challenged—by almost a year. Some have described that forced vacation as "a warning shot across the bow that signaled to the Federalist judiciary [that] they should quickly adjust to the new political order of things"; if they did not, "their Republican adversaries might well move to impeach and remove them from office."^{*}

As you read Chief Justice Marshall's opinion in *Marbury*, try to keep several related questions in mind, each of which we'll touch on in class. First, how does Marshall understand the judiciary's role vis-à-vis the Executive Branch? (Interestingly, it was actually Marshall's assertions about this issue that provoked the most controversy at the time.) Second, what interpretive judgments does he make along the way to concluding that § 13 of the Judiciary Act is unconstitutional—and are those judgments sound? Third, what exactly does the power of judicial review that he claims for the Court amount to? Fourth, how convincing are his arguments that the Court does (or should) possess this power? Finally, *Marbury* is often said to have demonstrated a kind of tactical brilliance or statesmanship in navigating the Court through a moment of peril; how so?

Marbury v. Madison

1 Cranch (5 U.S.) 137 (1803)[†]



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

At the last term [an order] was granted in this case, requiring the Secretary of State to show cause why a mandamus should not issue, directing him

^{*} Brest, Levinson, Balkin, Amar, and Siegel, *Processes of Constitutional Decisionmaking* 116 (7th ed. 2020) [hereinafter BLBAS].

[†] [In the line-up images that accompany cases in these materials, the names of Justices in the majority are green; the names of Justices who dissented are in red; and the names of Justices who did not participate in the case are in grey (with their images faded out as well). The names of Justices who authored any opinion in the case are underlined. —BE]

to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause 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?

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

3d. 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?

[It is] decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state. [To] withhold [Marbury's] commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the [**2d**] inquiry; which is: If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. [The] government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behooves us then to enquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from [legal redress].

Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy? That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.

By the act concerning invalids, passed in June, 1794, the secretary at war is ordered to place on the pension list all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it to be contended that the heads of departments are not amenable to the laws of their country? [It] is not believed that any person whatever would attempt to maintain such a proposition.

It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that [act]. [T]here cannot, it is believed, be much difficulty in laying down the rule. By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.

The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president according to his own discretion. [But if Marbury] conceives that, by virtue of

his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court [whether that is so.] It is, then, the opinion of the Court [that the] refusal to deliver [Marbury's commission] is [a] violation [for] which the laws of his country afford him a remedy.

It remains to be inquired whether, **3dly**. He is entitled to the remedy for which he applies. This depends on—[whether] the officer to whom [the writ of mandamus] is to be directed [is] one to whom, on legal principles, such writ may be [directed]; [and on the power of this court].

With respect to the officer to whom it would be directed. [The] intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful, that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. [But it] is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. [Where] the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation. But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and therefore is never presumed to have forbidden[;] in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

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

Whether it can issue from this court.

The act to establish the judicial courts of the United States [i.e., the Judiciary Act of 1789] authorizes the Supreme Court “to issue writs of mandamus in cases warranted by the principles and usages of law, to any

courts appointed, or persons holding office, under the authority of the United States.”*

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

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

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

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

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

* [For comparison, here is a simplified version of the full text of § 13 of the Judiciary Act of 1789 (with the portion quoted by Marshall underlined): “And be it further enacted, That the Supreme Court shall have exclusive jurisdiction of [certain cases, such as disputes between states]; [and in certain other cases, such as disputes between a state and citizens of another state,] it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of [suits] against [ambassadors]; and original, but not exclusive jurisdiction of all suits brought by [ambassadors]. [And] the trial of issues of fact in the Supreme Court [shall] be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases specially provided for [in other provisions of the statute]; and shall have power to issue writs of prohibition to the district courts [and] writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.” —BE]

the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

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

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

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

To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate [jurisdiction]. It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction.

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

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

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

proceed is supreme, and can seldom act, they are designed to be permanent.

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

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

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

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

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

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

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

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide

that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

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

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

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

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

The judicial power of the United States is extended to all cases arising under the constitution. [See Art. III, § 2, cl. 1.] Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained.

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

There are many other parts of the constitution which serve to illustrate this subject. It is declared that “no tax or duty shall be laid on articles exported from any state.” [Art. I, § 9, cl. 5.] Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares that “no bill of attainder or ex post facto law shall be passed.” [Art. I, § 9, cl. 3.] If, however, such a bill should be passed,

and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

“No person,” says the constitution, “shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.” [Art. III, § 3, cl. 1.] Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

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

Why otherwise does it direct the judges to take an oath to support it? [See Art. VI, cl. 3.] This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

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

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank. [See Art. VI, cl. 2.] Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.

The [case] must be [dismissed].

INTRODUCTION TO INTERPRETIVE SUPREMACY

Marbury clearly claims some role for the Court in assessing the constitutionality of statutes, but what role exactly? As Feldman and Sullivan explain:

On a narrow reading of *Marbury*, judicial review is simply a byproduct of a court's duty to decide cases within its jurisdiction in accordance with law, including the Constitution. Recall Marshall's modest statement that the Constitution is 'a rule for the government of courts as well as the legislature' and thus that 'courts, as well as other departments, are bound by that instrument.' A broader reading of *Marbury*, however, regards the courts as having special competence to interpret law, including the Constitution, so that they are the ultimate, supreme interpreters of the Constitution. Recall Marshall's statement in *Marbury* that '[i]t is emphatically the province and duty of the judicial department to say what the law is,' and the fact that much of his argument aimed to establish that courts are institutionally competent to consider issues of constitutionality.*

The difference between these interpretations is important. Imagine an official who relies on their own conscientious assessment of what the Constitution requires, even though their assessment flatly contradicts the Court's past pronouncements in its opinions. On the more modest conception of judicial review (and of *Marbury*), that official has not necessarily done anything lawless or unfaithful to their constitutional oath. To be sure, if and when a challenge to the official's action comes before a court, the court will rely on *its* interpretation of the Constitution in resolving that case. And if the court then renders a binding judgment (such as an injunction) directing the official to do (or not do) something, the official would generally be obligated to comply with that bottom-line order even if they think the court was wrong to issue it.† But unless and until a court actually renders such a binding judgment against a particular defendant, the mere fact that the judiciary is "on record" as holding one view of the Constitution's demands does not give that view any special authority with respect to what anyone ought to do.

By contrast, under the more ambitious conception of judicial review—sometimes termed "interpretive supremacy" (or simply "judicial supremacy")—the Supreme Court's interpretations of the Constitution effectively settle for everyone what the Constitution *itself* demands of them, even before any court order, rendered by a court with jurisdiction over a particular case, directs an official to do or forbear from doing anything. To the extent

* FELDMAN & SULLIVAN, CONSTITUTIONAL LAW 20 (21st ed. 2022) [hereinafter FS].

† This commitment to the bindingness of court orders is sometimes called "judgment supremacy." See William Baude, *The Judgment Power*, 96 GEO. L.J. 1807 (2008). Judgment supremacy has traditionally been a point of broad consensus, but that norm may be eroding somewhat today. In April 2025, for instance, a federal district court found that the Trump Administration had shown "willful disregard" for the court's order not to remove certain noncitizens to El Salvador. And Vice President J.D. Vance has suggested that the President should disregard orders that overstep the courts' legitimate authority. See Ian Ward, *There's No Need to Guess. JD Vance Is Ready to Ignore the Courts*, Politico (Feb. 11, 2025), <https://tinyurl.com/3p48vw5m>.

that officials take their constitutional oaths seriously, therefore, they ought to comply proactively with what the Court has said the Constitution requires. And to the extent that they fail to do so, they are not just vulnerable to a lawsuit, but also open to criticism for violating their constitutional duties and undermining the rule of law—even if no court order binds them, and even if the Court’s relevant decisions actually got the Constitution’s requirements wrong.

Cooper v. Aaron (1958), in which the Court confronted Southern resistance to desegregation, is a famous illustration of the contrast between these conceptions of judicial authority. As you read *Cooper*, think about why “judgment supremacy” alone proved insufficient for the Court to vindicate its interpretation of the Constitution and how the Court responded to that predicament. Is the Court’s articulated position faithful to the *Marbury* opinion? If it is not—if the Court’s claim of authority in *Cooper* goes beyond *Marbury*—might that claim be justified nonetheless?[†]

Cooper v. Aaron

358 U.S. 1 (1958)



■ Opinion of the Court by CHIEF JUSTICE [WARREN and JUSTICES] BLACK, FRANKFURTER, DOUGLAS, BURTON, CLARK, HARLAN, BRENNAN, and WHITTAKER:^{*}

As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court’s considered interpretation of the United States Constitution. Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education*. [We] reject these contentions.

^{*} Cf. William Baude, *The Court, or the Constitution?*, in *MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER* (Heidi M. Hurd ed., 2019) (arguing that *Cooper* “relies on an egregious overreading of” *Marbury*).

[†] Cf. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

[‡] [In an unusual step, the Court issued its unanimous opinion with all nine of its members listed as authors. A separate concurrence by JUSTICE FRANKFURTER is omitted. —BE]

[After the decision in *Brown*, the Little Rock School Board promptly acknowledged its “responsibility to comply with Federal Constitutional Requirements” and began to devise a desegregation plan, which an Arkansas district court later approved and directed the School Board to implement.] While the School Board was thus going forward with its preparation for desegregating the Little Rock school system, other state authorities, in contrast, were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this Court had held violated the Fourteenth Amendment. First came [an] amendment to the State Constitution [proclaiming opposition to] “the Un-constitutional desegregation decisions [of] the United States Supreme Court[.]” [Then, when nine Black students were poised to attend Central High School for the first time,] the Governor of Arkansas [dispatched] units of the Arkansas National Guard to the Central High School grounds and placed the school “off limits” to colored students. [As the School Board explained]: “The effect of that action of the Governor was to harden the core of opposition to the Plan and cause many persons who theretofore had reluctantly accepted the Plan to believe there was some power in the State of Arkansas which, when exerted, could nullify the Federal law and permit disobedience of the decree of [the district court], and from that date hostility to the Plan was increased and criticism of the officials of the School District has become more bitter and unrestrained.”

[After the district court enjoined the Governor from obstructing the integration plan, the Arkansas Guard withdrew, but an unruly crowd gathered at the school and made it unsafe for the “Little Rock Nine” to attend.] [T]he President of the United States dispatched federal troops to Central High School and admission of the Negro students to the school was thereby effected. [In February of that school year, however,] the School Board [filed] a petition in the District Court seeking a postponement of their program for desegregation. Their position in essence was that because of extreme public hostility, which they stated had been engendered largely by the official attitudes and actions of the Governor and the Legislature, the maintenance of a sound educational program at Central High School, with the Negro students in attendance, would be impossible.

After a hearing the District Court granted the relief requested by the Board. Among other things the court found that the past year at Central High School had been attended by conditions of “chaos, bedlam and turmoil”; that there were “repeated incidents of more or less serious violence directed against the Negro students and their property”; [that] a “serious financial burden” had been cast on the School District; that the education of the students had suffered “and under existing conditions will continue to suffer”; that the Board would continue to need “military assistance or its equivalent”; [and] that the situation was “intolerable.”

[In now] affirming the judgment of the Court of Appeals which reversed the District Court we have accepted without reservation the position of the

School Board [that] they displayed entire good faith [in] dealing with the unfortunate and distressing sequence of events which has been outlined. [But] regardless of the Board's good faith, the actions of the other state agencies responsible for those conditions compel us to reject the Board's legal position. [The] constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. [The] constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation.

What has been said, in the light of the facts developed, is enough to dispose of the case. However, we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.

Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison* that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶ 3, "to support this Constitution." [No] state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.

[The] decision in *Brown* was unanimously reached by this Court only after the case had been briefed and twice argued and the issues had been given the most serious consideration. Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us.

MODERN CHALLENGES TO INTERPRETIVE SUPREMACY

1. Private Enforcement

Cooper illustrates how state officials can sap the Court's constitutional decisions of practical effect by enlisting the public at large in a campaign of resistance. The Texas Heartbeat Act of 2021, widely known as "S.B. 8," represents a more recent variation on this strategy. In short, Texas gave private individuals a right to sue anyone who performed an abortion (after the sixth week of pregnancy) for \$10,000 in damages. Under the governing Supreme Court precedents at the time, including *Roe v. Wade* (1973), prohibiting abortion so early in pregnancy was clearly unconstitutional. But because the law gave a right of action to the public at large, abortion providers could not protect themselves by suing the potential enforcers in advance and seeking a court order enjoining them from enforcing the law. Although providers could still raise their patients' constitutional rights as *defenses* in an enforcement action if they were sued, providing abortions without an advance assurance that the provider would not be held liable was widely seen as an untenable risk—especially because many anticipated that the Court's abortion precedents could well be overruled (as they in fact were) within the four-year statute of limitations for S.B. 8 claims. The main abortion providers in Texas thus announced that they would cease performing abortions that would expose them to liability under S.B. 8.

Abortion providers tried to solve this predicament by seeking an injunction against the Texas state court officials who would ordinarily docket S.B. 8 lawsuits, but, in **Whole Woman's Health v. Jackson**, 142 S. Ct. 522 (2021), a majority of the Court rejected that creative legal theory.* Chief Justice Roberts wrote a dissent, joined by Justices Breyer, Sotomayor, and Kagan, that invoked *Marbury* and clearly alluded to *Cooper*:

The clear purpose and actual effect of S.B. 8 has been to nullify this Court's rulings. It is, however, a basic principle that the Constitution is the "fundamental and paramount law of the nation," and "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). [The] nature of the federal right infringed does not matter; it is the role of the Supreme Court in our constitutional system that is at stake.

Justice Sotomayor also dissented, joined by Justices Breyer and Kagan, and expressly invoked *Cooper*: "In its finest moments, this Court has ensured

* The Court did hold that the providers could sue certain medical-licensing officials whom the Court understood to play an indirect enforcement role under the law. But the Texas Supreme Court then clarified that the Justices had misinterpreted the statute in this regard—and a state supreme court, not the U.S. Supreme Court, is the final authority on the interpretation of state law. In any case, an injunction that bound only these licensing officials—not the myriad potential private plaintiffs—might not have done the providers much good.

that constitutional rights ‘can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes whether attempted ingeniously or ingeniously.’ Today’s fractured Court evinces no such courage.”

The architect of S.B. 8 was Jonathan Mitchell, a former law professor and Texas Solicitor General. The idea for the law came from a law-review article that Mitchell had written critiquing what he termed the “writ-of-erasure fallacy”—the idea that the courts have the power to literally erase or “strike down” unconstitutional statutes, rather than simply treating them as invalid for purposes of resolving a particular case.* In briefs defending the law, Mitchell advanced the same idea as part of a forthright attack on interpretive supremacy:

[The] judiciary may enforce its interpretations of the Constitution only when deciding “cases” or “controversies” between litigants; it is powerless to impose its will apart from resolving “cases” or “controversies” under Article III. [This limitation] gives the political branches tools by which they can counteract judicial pronouncements that they regard as lawless or inconsistent with the Constitution. The political branches can *never* disregard or undermine a judgment that the judiciary enters in a case or controversy between parties; even President Lincoln acknowledged that Dred Scott must be returned to his master despite his vehement disagreement with *Dred Scott v. Sandford*, 60 U.S. 393 (1856). At the same time, Lincoln rejected the notion that *Dred Scott* could establish “a rule of political action for the people and all the departments of the government,” and insisted that the political branches could adopt and enforce differing interpretations of the Constitution in the performance of their constitutional duties.

Because the judicial power is limited to resolving “cases” and “controversies,” Congress and the states may enact legislation that departs from the federal judiciary’s preferred interpretations of the Constitution and limits the judiciary’s opportunities to pronounce that legislation unconstitutional. [And] that is what Texas has done in enacting Senate Bill 8. By prohibiting state officials from enforcing the statute, and by authorizing the citizenry to enforce the law through private civil-enforcement actions, Texas has boxed out the judiciary from entertaining pre-enforcement challenges.

[The] claim[] that [Texas’s] maneuver threatens constitutional supremacy [is] nonsense. The Supreme Court’s *interpretations* of the Constitution are not the Constitution itself—they are, after all, called *opinions*. The federal and state political branches have every prerogative to adopt interpretations of the Constitution that differ

* See Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018).

from the Supreme Court's, and they have every prerogative to enact laws that deprive the judiciary of opportunities to consider pre-enforcement challenges to their statutes.*

2. Executive Noncompliance

Mitchell's invocation of the Article III "case or controversy" requirement highlights a closely related point about interpretive supremacy that extends far beyond the context of "pre-enforcement review." As Mitchell observed, the Supreme Court has held that there is only a genuine "case" or "controversy," in the sense relevant to Article III, if the plaintiff has "standing"—meaning, roughly, that the plaintiff is personally affected by the allegedly unlawful conduct of the defendant.[†] Sometimes there will be *no* plaintiff with standing to challenge some government action, and any purchase of the Court's constitutional interpretations in those areas thus depends on voluntary compliance by the Executive Branch.

One well-known example of this phenomenon, as Mitchell noted, is Lincoln's response to *Dred Scott*. The Supreme Court's holding in that case—that a Black person could not be a citizen of the United States for constitutional purposes—doomed Scott's lawsuit against his putative owner. But while Lincoln acknowledged the bindingness of the Court's judgment in that case, he did not take himself to be bound by the constitutional interpretation underlying it. So, for example, he directed the State Department to grant U.S. passports to Black applicants—which meant treating them as citizens even though the Supreme Court had said that they were not. Since nobody is directly harmed by the grant of a passport to somebody else, it is hard to see how that policy could ever have been enjoined by a federal court.

Similar situations still arise from time to time—especially in connection with grants of government benefits, which third parties rarely have standing to challenge. In **King v. Burwell**, 576 U.S. 473 (2015), for instance, a handful of plaintiffs claimed that the Obama administration had been misinterpreting the Affordable Care Act (ACA) to authorize tax credits for millions of people—including the plaintiffs—who were actually ineligible for that benefit. These particular plaintiffs had standing to challenge the government's action because, without the tax credits, they would have qualified for an "unaffordability exemption" under the ACA; the unwanted "benefit" thus had the indirect effect of subjecting them to a penalty for failing to buy health insurance. But even if the Court agreed with the plaintiffs that they (and millions of other people) were being awarded the tax credits unlawfully, could the Executive Branch have just continued to grant those benefits to the millions of people who were glad to have them? Consider this op-ed by William Baude, published shortly before the Court's decision:

* Reply Brief In Support Of Intervenors' Emergency Motion To Stay Preliminary Injunction Pending Appeal, *United States v. Texas* (5th Cir. No. 21-50949).

[†] The details of standing doctrine are usually covered in a Federal Courts class; only the general idea is important here.

While the [Obama] administration may well prevail, it has expressed remarkable pessimism about its options if it does lose. The secretary of health and human services [has said]: “We know of no administrative actions that could, and therefore we have no plans that would, undo the massive damage to our health care system that would be caused by an adverse decision.”

But luckily the Constitution supplies a contingency plan, even if the administration doesn’t know it yet: If the administration loses in *King*, it can announce that it is complying with the Supreme Court’s judgment—but only with respect to the four plaintiffs who brought the suit.

This announcement would not defy a Supreme Court order, since the court has the formal power to order a remedy only for the four people actually before it. The administration would simply be refusing to extend the Supreme Court’s reasoning to the millions of people who, like the plaintiffs, may be eligible for tax credits but, unlike the plaintiffs, did not sue.

To be sure, the government almost always agrees to extend Supreme Court decisions to all similarly situated people. In most cases, it would be pointless to try to limit a decision to the parties to the lawsuit. Each new person who was denied the benefit of the ruling could bring his own lawsuit, and the courts would simply rule the same way. Trying to limit the decision to the parties to the suit would just delay the inevitable.

But the *King* litigation is different, because [most] people who receive tax credits will never sue to challenge them. [The] administration is therefore free to follow its own honest judgment about what the law requires.

This idea may seem radical, but it has a strong legal pedigree. Judicial authority, or jurisdiction, is case-specific and person-specific. That is true even of the Supreme Court, which the Constitution gives “judicial power” to decide “cases” and “controversies.” It is reaffirmed by *Marbury v. Madison* (1803), which affirmed the power of judicial review by relying on the Supreme Court’s duty to decide “particular cases.”

President Obama could also take a page from President Lincoln[, who] said that Supreme Court opinions [were] “entitled to very high respect and consideration in all parallel cases” but were ultimately limited to “the parties to a suit as to the object of that suit.” If the Obama administration thinks the stakes are high enough, it can take the same path.

[The] real obstacle to this contingency plan is not legal, but political. Invoking this constitutional prerogative forces the president to spend substantial political capital, and it is easier to shift the blame. That may be a broader pattern in modern politics. For instance, the administration has called on Congress to reduce unjust sentences even though the president could simply commute them on his own constitutional authority [using the pardon power in Article II, § 2, cl. 1].

But we should not let the president avoid responsibility by abdicating his powers. If the administration believes that a Supreme Court loss would be egregious and disastrous, it ought to consider taking the political heat to limit it.*

Ultimately, the Court ruled against the plaintiffs in *King*, so President Obama never squarely confronted the question of whether to acquiesce to an adverse interpretation of the law. What do you think Obama should have done if the case had gone against him? Suppose Obama took Baude's advice and continued to grant the tax benefits to everyone but the handful of *King* plaintiffs. Could one condemn S.B. 8 as an "evasive scheme" without condemning that refusal to follow the Court's interpretive pronouncements as well?

3. Legislative Override of Implementing Rules

In theory, the Court's claim to "interpretive supremacy" can also be challenged by Congress itself.† Consider **Dickerson v. United States**, 530 U.S. 428 (2000), where Chief Justice Rehnquist wrote for the Court:

In *Miranda v. Arizona* (1966), we held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence. [These warnings include that a suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him."] In the wake of that decision, Congress enacted 18 U.S.C. § 3501, which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress.

[The] law in this area is clear. [Congress] retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.

* William Baude, *Could Obama Bypass the Supreme Court?*, N.Y. TIMES (Mar. 17, 2015).

† We will consider a special form of this situation—where Congress relies on its express power to "enforce" the Fourteenth and Fifteenth Amendments—at the end of the semester.

But Congress may not legislatively supersede our decisions interpreting and applying the Constitution. [The] *Miranda* Court announced a constitutional rule[.] [After all,] *Miranda* and [its] companion cases applied the rule to proceedings in state courts—[even though] our ‘authority [over state courts] is limited to enforcing the commands of the United States Constitution.’ [In] fact, the majority opinion is replete with statements indicating that the majority thought it was announcing a constitutional rule. [Because *Miranda* announced a constitutional rule,] Congress may not supersede [it] legislatively.

At first blush, this seems quite straightforward: if *Marbury* is clear about anything, it is that the Court will not treat as valid a statute that transgresses the limits that (according to the Court) are imposed by the Constitution. In fact, though, the case is more complicated than that, thanks to the distinctive character of the Court’s decision in *Miranda*. As many critics of that decision have pointed out, it is not really plausible that a failure to advise *any* suspect of *any* of the rights mentioned in the standard-issue warnings *necessarily* makes a confession involuntary, such that admitting it into evidence would always violate the Fifth Amendment privilege against compelled self-incrimination. To take the simplest counterexample, even an unwarned suspect might well know of his rights already; in that case, the lack of a warning would hardly establish that the confession was involuntary. So, insofar as *Miranda* made *warnings* (rather than *actual voluntariness*) the touchstone of admissibility, it is probably best understood as having adopted an “implementing rule”: a rule of law that does not purport to track or specify the contours of the underlying constitutional requirement, but rather seeks to *implement* that requirement in an appropriate way—taking account of workability, the relative costs of false positives and false negatives, and the like. Here, for instance, one might think that, in the real world, a prophylactic, concededly overbroad rule excluding *all* unwarned confessions will better accomplish the exclusion of *involuntary* confessions than would a rule excluding only confessions that can be proved, based on a case-specific inquiry, to have been involuntary.*

This understanding of *Miranda* undergirds Justice Scalia’s argument, in dissent, that Congress should be free to supersede the Court’s chosen rule with a different (and less defendant-friendly) one:

Marbury v. Madison held that an Act of Congress will not be enforced by the courts if what it prescribes violates the Constitution

* On the idea of an “implementing rule” in the context of *Miranda* and beyond, see RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001). See generally Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 123–28 (2004) (drawing a related distinction between “constitutional operative propositions” and “constitutional decision rules”); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 813–15 (2022) (arguing that the Court has no authority to adopt decision rules of the sort seemingly represented by *Miranda*).

of the United States. [One] will search today's opinion in vain, however, for a statement (surely simple enough to make) that what 18 U.S.C. § 3501 prescribes—the use at trial of a voluntary confession, even when a *Miranda* warning [was not] given—violates the Constitution. [In fact, such a statement] would be absurd, inasmuch as § 3501 excludes from trial precisely what the Constitution excludes from trial, viz., compelled confessions. [And] so, to justify today's [result], the Court must adopt a significant *new*, if not entirely comprehensible, principle of constitutional law. As the Court chooses to describe that principle, statutes of Congress can be disregarded, not only when what they prescribe violates the Constitution, but when what they prescribe contradicts a decision of this Court that “announced a constitutional rule.” [The] only thing that can possibly mean in the context of this case is that this Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful “prophylactic” restrictions upon Congress and the States. [By] disregarding congressional action that concededly does not violate the Constitution, the Court flagrantly offends fundamental principles of separation of powers, and arrogates to itself prerogatives reserved to the representatives of the people. [What] today's decision will stand for, whether the Justices can bring themselves to say it or not, is the power of the Supreme Court to write a prophylactic, extraconstitutional Constitution, binding on Congress and the States.

Isn't Justice Scalia right that *Dickerson* goes far beyond *Marbury* in its conception of the Supreme Court's authority to “say what the law is”? Might it even go beyond *Cooper*?

B. What Is Constitutional Law? (30 PAGES)

INTRODUCTION TO CONSTITUTIONAL THEORY

Nearly all of this course will be devoted to substantive controversies *within* constitutional law. We'll encounter broader questions about what constitutional law is, and about whether or how it attains legitimacy, by seeing it in practice. Still, it will help to have in the background an initial sense of some of those broader questions and some of the available answers. This section should give you that initial sense and equip you with some distinctions that will prove valuable in thinking about what we are doing when we are arguing about constitutional law. But you shouldn't expect to have firm views or even necessarily a clear sense of the theoretical alternatives yet. (You might find it valuable to revisit this section at the end of the semester, so that you can measure these theories against the practice as you've seen it unfold.)

Law in the Supreme Court: Jurisprudential Foundations

Richard H. Fallon, Jr.*

This chapter explores the nature and foundations of law in reasonably contestable cases in the Supreme Court. Where do the legal norms that apply to the Court come from, and how do they acquire their legitimate authority? These questions apply fully as much to the Constitution as to second-order norms of constitutional interpretation.

In addressing this topic, I begin with—but only in order to debunk—a picture of law and legitimacy in the Supreme Court that many people find intuitively compelling. According to this model, the Constitution was lawfully adopted and, having been lawfully adopted, applies in the ways in which the Framers understood or expected it to apply, unless and until the American people lawfully amend it. (The amendment process laid out in Article V normally requires votes by two-thirds majorities in both houses of Congress and ratification by three-fourths of the states. Due to the extreme difficulty of this process—under which just thirteen states, potentially constituting less than 5 percent of the population, could block an amendment—formal amendment has rarely occurred.) Today, no major scholar may endorse the model of the Constitution as the Framers’ lawful and therefore binding commands in all of the particulars in which I shall present it. Nevertheless, decades of experience with students leave me convinced that this way of thinking exerts a continuing grip on many minds.

Views that identify legitimate constitutional authority with the dictates of those who wrote and lawfully ratified the Constitution reflect a number of misunderstandings, some hidden in unarticulated premises. But we can start by noticing the shakiness of the intuitive model’s historical assumptions. On that front, it is doubtful that the Constitution actually was adopted lawfully under the law as it stood in 1787 and 1788. The Articles of Confederation that previously linked the states permitted changes in their terms only by the unanimous agreement of the states, voting in Congress. In seeking approval of the Constitution drafted by the Constitutional Convention, the Convention’s delegates ignored this stricture. They vested responsibility for approving or disapproving their handiwork directly in the people of the thirteen states, voting in state ratifying conventions, and provided in Article VII that the new Constitution would take effect if as few as nine states approved. The Constitutional Convention’s decision to seek ratification by conventions, rather than by state legislatures, posed especially deep difficulties under prior law. Each of the states had its own structure of government, functioning under a state constitution, and many of the state constitutions contemplated that the states could be bound only by the votes of their legislatures. In bypassing the state legislatures and seeking approval

* RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT*, ch. 4 (2018).

from delegates to conventions, the process of the Constitution's ratification arguably violated the law of many if not most states.

It is also very arguable that the Thirteenth and Fourteenth Amendments were not lawfully ratified under the standards for constitutional amendment that Article V sets out. Ratification of the Thirteenth Amendment, which abolished slavery, depended on the approval of a number of Southern legislatures then subject to military Reconstruction. Whether those legislatures could consent to a constitutional amendment on behalf of their states seems questionable. However one judges that issue, ratification of the Fourteenth Amendment, which includes the Equal Protection Clause, occurred only as a result of manifest coercion. After ten Southern states had rejected the Fourteenth Amendment, Congress insisted that they must ratify it as a condition of regaining their representation in Congress. Given the compulsion, some argue that the Fourteenth Amendment's "ratification" failed to meet constitutional standards.

In discussing the lawfulness of the Constitution's ratification, I have inserted the words "arguable" and "arguably" at several points. Constitutional scholars have made clever cases supporting the lawfulness of both the Constitution's ratification and the processes that produced the Thirteenth and Fourteenth Amendments. For present purposes, however, we have no need to dig deeper into legal technicalities involving the remote past. Even without doing so, we can recognize that the difficulty with predicating the Constitution's current authority on its lawful ratification hundreds of years ago is not just historical but also both practical and conceptual. Merely contemplating that the entire Constitution might be adjudged invalid based on the terms of the Articles of Confederation or state law in the eighteenth century, or that the current validity of the Thirteenth and Fourteenth Amendments depends on the outcome of debates about events during Reconstruction, should bring out the crucial point: nothing of practical, legal consequence hinges on the historical arguments.

The ultimate measure of legality in our legal system—as in any other—inheres in currently accepted standards for identifying past events as possessing legal authority. In 1787 and 1788, it was questionable whether the prescribed process for ratifying the Constitution was legally legitimate. In the minds of some, the doubtful legality bore on whether the draft Constitution, if adopted, could succeed in establishing a legally and sociologically legitimate government. Significantly, however, the answer to those questions did not come through decisions by the Supreme Court or any other tribunal. It came from widespread public acceptance of the new Constitution as legally valid by the American people and their chosen political officials. Correspondingly, what ultimately matters today—legally as well as practically—is that nearly everyone continues to accept the Constitution, including the Thirteenth and Fourteenth Amendments, as valid, binding law.

A thought experiment will further illustrate the point that the foundations of constitutional legality inhere in current practices of accepting past actions and decisions as legally authoritative. Imagine that another revolution, analogous to the one that began in 1776, were to occur in the United States. The Constitution would lose its status as law if enough people ceased to accept it as a legitimate authority, just as the British Parliament and King ceased to be legitimate legal authorities for the colonies when the colonists threw off their rule, whether legally or illegally. This result would occur even if we assume that the current Constitution was validly ratified under preexisting law. The validity of the Constitution's ratification under preexisting law is neither a necessary nor a sufficient condition for its legal authority today or in the future. Sociological legitimacy with relevant constituencies—a concept defined [earlier in the book]—ultimately plays the determinative role.

As is generally true with sociological legitimacy, the Constitution did not enjoy unanimous acceptance in 1788. Nor does it possess legitimacy in the Weberian sense—meaning a belief that it ought to be obeyed—in everyone's eyes today. To point only to the most urgent ground for resistance in 1788, a Constitution that contemplated the race-based bondage of some (nearly 20 percent of the population, according to the 1790 census) could not plausibly have enjoyed unanimous acceptance. Nevertheless, when enough people embraced the Constitution as the operative framework of government, there was no need for further questioning whether its ratification satisfied prior law. Its sociological legitimacy gave it legal legitimacy, at least in a minimal sense.

This blunt statement about the relation of the Constitution's legal legitimacy to its sociological legitimacy deliberately skirts many complexities. In particular, in asserting that the Constitution enjoys legal legitimacy because it is "accepted," I mean to elide, for now, the questions (to which I shall return) of exactly what needs to be accepted and by whom for the Constitution to enjoy its lawful status. In his jurisprudential classic *The Concept of Law*, H. L. A. Hart suggested that for a legal system to exist, government officials must embrace shared legal norms—such as those embodied in the Constitution—as providing reasons for action and grounds for criticism and self-criticism. "The ordinary citizen," he wrote, "manifests his acceptance largely by acquiescence."

Once the Constitution is accepted as legally valid, an additional basis for assessing claims of legal validity and legitimacy obviously exists. The legal legitimacy of governmental actions will typically depend on their conformity with constitutional norms. As is illustrated by the Constitution itself, however, not all legally valid authority needs to be or even could be derived from more ultimate, purely legal norms. If embrace and acceptance confer legal validity on the Constitution, they might also confer legal validity on norms that supplement, or qualify, or even partially displace the written

Constitution. For example, we can imagine that the Thirteenth and Fourteenth Amendments would be legally valid, due to the fundamental and presently unshakable status of their acceptance, even if they were not otherwise validly enacted within the terms of Article V. In other words, both public officials and overwhelming majorities of the public might agree that the fundamental law of the United States consists of the original written Constitution, of all amendments subsequently enacted pursuant to Article V, and of the Thirteenth and Fourteenth Amendments, regardless of whether their enactments satisfied Article V.

It may seem unsettling to trace the foundations of our constitutional order to nothing more solid than a vague, potentially amorphous, and irreducibly contingent phenomenon of sociological acceptance. But if it is unsettling to recognize that legal validity and legitimacy can depend on sociological legitimacy, so recognizing can also provide inspiration. It highlights the role and responsibility of each successive generation, including our own, in maintaining and possibly reshaping the constitutional order. Our acceptance may be active or sheeplike, but we cannot plead that the Framers rule us tyrannically from the grave. Even if we think that we as individuals have no choice as a practical matter but to go on with the Constitution that the Framers left us, we should direct our complaints, if we have them, more at contemporary Americans who uphold the constitutional order than at those who established it.

A Practice-Based Theory of Law

By insisting that the foundations of our constitutional order lie in sociological phenomena of acceptance, I endorse the basic tenets of a practice-based theory of law in the sense of “practice” in which philosophers sometimes use that term. So employed, it refers to activities that are constituted by the convergent or overlapping understandings, expectations, and intentions of multiple participants. Chess is a practice in this sense, as is baseball. So are promising, speaking English, and joke telling.

Philosophers often say that practices have a necessary connection with, or are constituted by, rules. The rules of chess constitute the game of chess. The rules of baseball give a point to the hitting and throwing of balls that would otherwise be unintelligible. Sometimes, as with chess and baseball, the constitutive rules of practices are clearly set out in propositional form. In other practices, the pertinent “rules” are rules only in the sense made famous by the philosopher Ludwig Wittgenstein: the term marks the existence of a shared and often tacit understanding among some relevant group concerning how to “go on” in ways that will be acknowledged by other members of the group as appropriate or correct. What makes a remark a joke—or not a joke? Within a community, there is likely to be substantial convergence in judgment, and if I am asked to tell a joke, then I follow the rules of joke telling insofar as I conduct myself in accordance with shared if tacit norms that count as “rules” in the relevant sense. In doing so, I must hold myself open to the possibility that I have failed to conform to the standards that I set out

to satisfy: maybe my intended joke failed utterly, reflecting a lack of true understanding of the practice in which I meant to engage.

American constitutional law is a practice in this sense, constituted by the shared understandings, expectations, and intentions of those who accept the constitutional order and participate in constitutional argument and adjudicative practices. It is crucial to recognize, moreover, that the relevant understandings and expectations go far beyond knowledge of the linguistic meanings of the Constitution's words and the history of its drafting and ratification. To take a relatively simple example—which I shall actually oversimplify in order to avoid becoming hopelessly bogged down—let us imagine that someone asks me whether a state law that forbids flag burning or nude dancing is constitutionally valid. Although the Constitution written in 1787 and formally amended since then undoubtedly furnishes a touchstone, I cannot reliably appraise the challenged law's legal status and effects without also knowing a good deal about widely shared rules, practices, precedents, and assumptions that bear on proper constitutional interpretation in the present day. Among the relevant assumptions and precedents would be these:*

Although the First Amendment says that “Congress shall make no law . . . abridging the freedom of speech,” the Supreme Court has held, and nearly everyone accepts, that the Due Process Clause of the Fourteenth Amendment, which was ratified in 1868, “incorporates” the First Amendment (along with most other provisions of the Bill of Rights) and thus makes it applicable against states. As a result, state laws are subject to scrutiny under the First Amendment, even though the First Amendment does not say so. If someone else were to object that the Fourteenth Amendment is not a valid part of the Constitution because its purported ratification was coerced, I need to know that virtually no one will take this argument seriously. Almost everybody will think that history has settled the matter. It also matters that nearly everyone, centrally including the Supreme Court, now understands that the First Amendment guarantee of freedom of speech extends to some forms of “expressive conduct,” not just to pure speech; that the Court has rendered specific rulings that flag burning is a form of expression the prohibition of which triggers the most demanding form of judicial scrutiny but that a prohibition against nude dancing can be justified pursuant to less exacting standards; and that nearly everyone accepts, as the Supreme Court insists, that rulings by the Justices bind lower courts. It might also be relevant, however—as nearly all informed participants in constitutional practice would agree—that the Justices were narrowly divided in their decisions about the protected or unprotected status of flag burning and nude dancing and that the Court itself could imaginably reconsider its rulings in a future case. As I said previously, moreover, these recitations barely scratch the surface. Nearly all lawyers and judges have attended law schools in

* [Don't worry about the substantive details of the next paragraph, since we aren't covering the First Amendment. Just treat it as an illustration of the broader point. —BE]

which a central aspect of the educational mission involves “distinguishing cases” and other techniques of legal reasoning.

The significance of these points about the nature and elements of American legal practice runs deep. Insofar as constitutional adjudication is a practice, situated in the broader practice of American law, the most fundamental governing rules—including those supplying the ultimate criteria for determining what the Constitution means or requires—are necessarily rooted in social facts involving the behaviors, expectations, and attitudes of participants in those practices. The intentions of past generations, and even the purportedly plain meaning of the constitutional text, matter only insofar as currently prevailing norms make them relevant. Think again of the First Amendment, which today binds both the states and the president, even though it “plainly” begins with the words “Congress shall make no law.”

Moreover, if the foundations of our constitutional order lie in acceptance, acceptance is not limited to the written Constitution. It could not be. We also need shared assumptions about the nature of proper legal interpretation. The Constitution does not, and could not, contain adequately determinate rules for the process of constitutional interpretation. Even if the Constitution attempted to provide such rules, as it mostly does not, questions could always arise about how those rules should be interpreted. Rules for the interpretation of constitutional rules might then seem necessary, but they could not be sufficient: a naïvely puzzled or a skeptical person could always ask what rules of interpretation to use in interpreting the interpretive rules. At some point, we would need to end the regress through reliance on shared understandings that are more tacit and foundational. At the limit, shared understandings of this kind may ground our capacities to communicate through language in the first place. Insofar as they exist, such understandings are necessarily external to the Constitution and to formal rules of legal interpretation.

In the most widely embraced practice theory of law, Professor Hart referred to the criteria that officials and especially judges apply in identifying what the law is and means—including, for example, many of those that I invoked earlier in discussing the constitutionality of state prohibitions against flag burning and nude dancing—as “rules of recognition” that he suggested could be traced to a master “rule of recognition.” His basic idea involved the convergence of judicial and other officials in recognizing what is law and what is not and what the law requires.

Although accepting the basic Hartian idea that the foundations of law lie in acceptance, we should elaborate on (and perhaps partially qualify) the Hartian picture in several ways. First, we should recognize—as Hart himself came to do—that the concept of a “rule,” as it functions in the technical idea of a rule of recognition, can easily prove more misleading than illuminating. We would do better to speak of practices of recognition. As Hart himself later made explicit, he did not mean to imply that judges and legal officials who practiced or applied rules of recognition could necessarily state the

rule or rules to which they conformed or that they would necessarily agree with each other's attempts at articulation. Rather, in the formulation of a source that Hart cited approvingly, "the test of whether a man's actions are the application of a rule is . . . whether it makes sense to distinguish between a right and a wrong way of doing things in connection with what he does."

Second, in describing American constitutional law as a practice that is constituted by the shared assumptions and understandings of those who participate in it, we should recognize that American constitutional law is a relatively fluid and open practice and that, in particular, it opens at a number of points into the domains of moral, political, and prudential judgment. Practices can be more or less open or closed. In relatively closed practices, such as chess or baseball, the constitutive rules can be stated more or less exhaustively, they are more or less fixed, and they are highly determinate. In open practices, by contrast, it will be less possible, even in principle, to furnish a comprehensive list of the pertinent rules or standards, which may evolve over time. And if decision making within a relatively open practice invites the exercise of moral or political judgment, then issues arising within the practice will, to that extent, understandably occasion ideologically related controversy.

Any descriptively plausible account of American constitutional practice must acknowledge its partial openness to or reliance on moral and political criteria of sound decision making. No other credible way exists to account for the extent of ideologically based division between judicial liberals and conservatives that our practice exhibits—for example, about whether the Constitution includes or should be interpreted to include abortion rights, or about whether Congress can validly require people who do not want health insurance to buy it anyway. In some cases, knowing how to "go on" within the practice may include knowing how and when to incorporate moral and political judgment into otherwise indeterminate processes of constitutional analysis—even though we have to expect that the resulting conclusions will prove controversial. If so, it is possible for the Justices of the Supreme Court to share practices of recognition or criteria of legal validity, and for them further to agree that they must make practical judgments in resolving otherwise disputable cases, without agreeing on the outcomes of such cases.

[Third], although the Supreme Court's most fundamental interpretive standards and practices tend to be relatively fixed, interpretive norms, understandings, and expectations can shift over time. As becomes obvious every time a vacancy on the Supreme Court emerges, presidents and senators have their own rough-and-ready standards for determining what the Constitution means or requires, and they routinely seek—through their nominations and confirmation votes—to alter the Court's practices and standards, at least at the margins. As history demonstrates, shifts in the balance of power on the Court can have profound effects in unsettling and then sometimes resettling norms of interpretive practice. Transformation has happened before. It could happen again. This is a phenomenon that any

practice-based theory of law, and in particular of constitutional law in the Supreme Court, must explain, rather than deny. The consequences can be huge.

[An] error into which we might fall is that of thinking that where agreement among the Justices ends, the law—as defined in practice-based terms rooted in acceptance—necessarily runs out. This need not be so. As I emphasized previously, the Justices can share standards that call for the exercise of moral or practical judgment in some cases yet disagree about what good judgment requires. In addition, we should not discount the possibility of simpler forms of error in correctly identifying and applying substantive and interpretive rules. To put the same point only slightly differently, only the truly fundamental or ground-level rules, standards, or practices of recognition depend for their validity on the sheer sociological fact of their acceptance. Disagreement about less fundamental matters may sometimes result from legal mistakes, including by the Justices.

Think of *Plessy v. Ferguson*, the notorious 1896 case in which the Supreme Court held by eight to one that state-mandated segregation in public transportation (and, by implication, in public education) did not offend the Equal Protection Clause. At the time, it appears that nearly everyone regarded the case as an easy one, rightly decided by the Justices. The sole dissenting Justice, John Marshall Harlan, stood as an outlier at the time of the case's decision. Today, nearly everyone thinks that Harlan was right and that the opposing consensus was wrong, based on rules of recognition that applied to the case even at the time of its decision. As psychologists recurrently demonstrate, a variety of cognitive biases, often reinforced by socially entrenched expectations, can lead to demonstrable mistakes in reasoning, including in legal analysis. Today, nearly everyone can see the fallacies of the *Plessy* majority's credulous denial that "the enforced separation of the two races stamps the colored race with a badge of inferiority," followed immediately by its explanation that "if this be so, it is . . . solely because the colored race chooses to put that construction upon it." As Charles Black memorably wrote, at this point in the Court's opinion, "the curves of callousness and stupidity intersect at their respective maxima." Put less memorably, the Justices' rationale for decision was utterly indefensible.

The realization that the Justices can err in the application of legal norms binding on them may give us a quasi-paradoxical picture of the rules, standards, or practices of recognition that apply in the Supreme Court. But the picture is only quasi-paradoxical, not entirely so. From a purely sociological point of view, there is no escape from the dependence of all claims of legal validity and legitimacy on sociologically dominant understandings and expectations. For many purposes, the correct answer to the question whether statutes requiring racial segregation were legally valid in the United States in the immediate aftermath of *Plessy v. Ferguson* would be yes. But when we adopt a legal perspective or point of view, the deepest assumption of our constitutional arguments, embraced by all who argue in good faith about

what the Constitution means or requires, is that a majority or even all of the Justices can make mistakes both about how best to formulate the norms of our constitutional order and about how those norms apply to particular cases.

[If] we accept that legal standards apply in the Supreme Court, and that the Justices have meaningful disagreements when they differ about what the Constitution requires—that it is not just a matter of their making up the rules for themselves as they go along—then it becomes our challenge to identify some of the most pertinent, practice-based rules or standards of recognition.*

1. In this excerpt, Fallon offers a general account of what constitutional law is: an argumentative practice that is governed by certain “rules” deriving their authority from the sociological fact of shared acceptance. The excerpt does not include a developed account of what those particular rules—analagous to the rules of chess or joke-telling—actually are. But one way to think about this course as a whole (and, indeed, of law school as a whole) is as a process of developing your own sense of these rules by observing and participating in the practice in action.

2. How much agreement about the rules has to exist in order for Fallon’s picture of constitutional law to make sense? It’s one thing if Justices sometimes accuse each other of doing constitutional law *wrong* (as we’ll see that they often do). Arguably, such accusations only support Fallon’s picture; they presume that there is a shared practice at issue and that it has standards of correctness. But what if some Justices (or citizens) come to believe that what others are doing is not actually constitutional law at all, but something else entirely—such as the bare imposition of political preferences? Can our constitutional system work if the participants don’t understand themselves to be playing the same game?

3. If the ground rules of the system draw their authority from some form of “social” acceptance, what does “social” mean? Who counts (and who counts more or less) for that purpose?

4. Thinking of constitutional law as a social practice highlights the distinction between what the practice *is* and what it *would be best* for it to be. Just like games or languages might be improved if they had different rules, the same might be true of constitutional law. As you encounter different constitutional theories, try to keep these two questions separate: Is this a convincing account of the practice that exists? And if not, is this an appealing vision for reforming the practice?

5. As you read the next excerpt, ask yourself those two questions about originalism—one of the most influential contemporary theories of constitutional law—in particular.

* [Fallon’s effort to meet this challenge is omitted. —BE]

We Are All Originalists Now

Lawrence B. Solum*

Debates about originalism are often full of sound and fury. Originalists rail against judicial activism. Living constitutionalists claim that originalism is nothing more than a political ideology that wraps itself in a constitutional flag. Originalists claim that respect for popular sovereignty requires contemporary courts to defer to the opinions of the framers. Living constitutionalists retort that the founding generation knew nothing of contemporary circumstances like the global Internet or the modern administrative state. Originalists argue that living constitutionalism is a thin disguise for Supreme Court decisions that are based on naked politics. Living constitutionalists argue that constitutional adjudication inevitably involves value choices and that apolitical judging is a myth. And so it goes.

If we are going to make progress in the debates about originalism, we need to transcend political rhetoric and eschew straw-man arguments. [S]o let us begin with the question, What is the content of originalism as a constitutional theory? It turns out that there is no good answer to that question that also has the virtue of being short. The word *originalism* means different things to different people. What we call *originalism* has evolved over time into a family of related theories. But [w]e can start with four core ideas that define one version of what is sometimes called the “*new originalism*.”

First, at its core, originalism claims that the meaning of each provision of the Constitution becomes *fixed* when that provision is framed and ratified. But we need to be careful about the nature of that claim. When originalists claim that the meaning of the Constitution is fixed, their claim is about meaning in the linguistic sense. For example, the phrase *domestic violence* was used in the Constitution of 1789. Today, that phrase means violence within a family or spousal abuse, but that usage was unknown in 1789. At that time, domestic violence meant something like violence within the boundaries of a state, including riots and insurrections. Originalists claim that we should interpret the Constitution on the basis of the meanings that the words and phrases had back then: the fixed meaning of the Constitution cannot be altered by accidental changes in linguistic practice. Thomas Cooley, as famously quoted by Justice George Sutherland, put it this way: “The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.”

The second idea that forms part of the core of contemporary originalism is that sound interpretation of the Constitution requires the recovery of its *original public meaning*. Although the first generation of originalists focused on the original intentions of the framers, contemporary originalists

* Lawrence B. Solum, *We Are All Originalists Now*, in CONSTITUTIONAL ORIGINALISM: A DEBATE (Solum & Bennett eds., 2011).

believe that the original meaning of the Constitution is the meaning that the words and phrases had (or would have had) to ordinary members of the public. So when we read the Constitution of 1789, our question should be, How would an ordinary American citizen fluent in English as spoken in the late eighteenth century have understood the words and phrases that make up its clauses? To the extent that grammar and syntax are relevant, we should consult evidence of linguistic practice during that era. Our concern is not directly with the mental states of the framers. Rather, our quest is for the linguistic meaning that the words and phrases of the text had for the public (including farmers, seamstresses, shopkeepers, and even lawyers) in the 1780s.

A third notion at the core of contemporary originalism is the claim the original public meaning has the *force of law*. Originalists believe that courts and officials are bound by the text of the Constitution. To be more precise: the linguistic meaning of the text (as fixed at the time each provision was framed and ratified) is the supreme law of the land. This claim may strike some readers as obvious, but some opponents of originalism do not agree. Originalists reject the claim that the text of the Constitution is just a starting point for judges who are free to depart from the letter of the Constitution so long as they have good reasons. They reject the idea that the text of the Constitution of 1789 and its amendments is a mere symbol of the aspirations of the American people. To put things more directly, originalists believe that the text (and therefore the meaning of the text) should have binding or constraining force.

There is a fourth idea that many contemporary originalists embrace but that is more controversial than the three ideas we have just discussed. Many originalists believe that it is important to distinguish between two distinct aspects of constitutional practice: *constitutional interpretation* and *constitutional construction*. The distinction between interpretation and construction is an old one made in many areas of the law. The basic idea is that there are two different steps in the process of understanding and applying a legal text. The first is interpretation. When we *interpret* a legal text, we look for its linguistic meaning. The second step is *construction*. When we *construe* a constitutional provision, we determine the legal effect of the text: in other words, *construction* enables officials to apply the text. Such application can occur in a variety of different contexts. When an appellate court engages in constitutional construction, it may fashion doctrines or rules of constitutional law. But construction can also occur when Congress or the president acts in ways that require implementation of the Constitution.

Many contemporary originalists believe that constitutional interpretation (the determination of original public meaning) must be supplemented by constitutional construction because our Constitution contains provisions that are abstract and vague. The original linguistic meaning of the phrase *legislative power* in Article I does not provide us with bright-line rules, but courts may need such rules to decide particular cases. Many

originalists believe that the original meanings yielded by constitutional interpretation should constrain the doctrines produced by constitutional construction.

[I]n sum, our first look at originalism yields four basic ideas:

The fixation thesis: The linguistic meaning of the constitutional text was fixed at the time each provision was framed and ratified.

The public meaning thesis: Constitutional meaning is fixed by the understandings of the words and phrases and the grammar and syntax that characterized the linguistic practices of the public and not by the intentions of the framers.

The textual constraint thesis: The original meaning of the text of the Constitution has legal force: the text is law and not a mere symbol.

The interpretation-construction distinction: Constitutional practice includes two distinct activities: (1) constitutional interpretation, which discerns the linguistic meaning of the text, and (2) constitutional construction, which determines the legal effect of the text.

[W]hy might we think the text of the Constitution is legally binding? One reason is obvious: What other point could there be to having a written constitution that declares itself the “supreme law of the land”? The supremacy clause states:

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, anything in the Constitution or laws of any State to the contrary notwithstanding.

By its reference to “this Constitution” the supremacy clause refers unequivocally to the text of the Constitution of 1789. By stating that “this Constitution” “shall be the supreme law of the land” and limiting the authority of statutes to those that are made “in pursuance thereof,” the clause places the Constitution at the top of the hierarchy of legal authority. Of course, this is all familiar to everyone who has had high school civics. The Constitution is the top dog of American legal texts.

But the fact that the Constitution says it is the supreme law of the land is not decisive, because a text cannot make itself legally binding simply by saying so. The role of the Constitution as fundamental law depends on the practices of legal officials and ordinary citizens. It might be argued that something other than the Constitution is at the top of the hierarchy, and in particular, that it is the decisions of the Supreme Court (and not the Constitution) that are (in legal practice as recognized by officials and citizens) the true “supreme law of the land.” It might even be argued that the Supreme Court has the power to amend the Constitution by judicial fiat.

[D]oes our current legal practice recognize a general power of the Supreme Court to amend the constitution by judicial construction? A full and complete answer to that question would involve detailed consideration of the whole constitutional history of the United States. But some facts are telling. The Supreme Court has never claimed the authority to render decisions that are inconsistent with the constitutional text. The Court does go beyond the text in various ways. It constructs constitutional doctrines that provide specificity where the text is abstract: think of the “clear and present danger” test that implements the freedom of speech. The Court articulates principles that elaborate the structure of the Constitution when individual provisions interact: think of the separation-of-powers doctrine that constructs a relationship among the judicial power, legislative power, and executive power conferred by the first three articles of the Constitution. But implementation and supplementation are not the same as alteration and amendment.

Would a Supreme Court opinion that purported to overrule or amend a provision of the Constitution be legally valid? Originalists believe that the answer is no. If living constitutionalists believe that the Supreme Court does have this power, they surely owe us an explanation for that belief. What is the evidence for the legal validity of amendment by judicial fiat? Why is that power legitimate? And why has the Supreme Court failed to claim this power explicitly?

[O]ne of the great weaknesses of the old originalism is the implausibility of the claim that original meaning provides a uniquely correct answer for every constitutional question. The claim seemed plausible to old originalists because they were focused on the idea that original meaning was in the heads of the founders, but once we focus on the original *public* meaning, things begin to look quite different. It is true that some provisions of the Constitution have a determinate original meaning, providing us with bright lines and sharp distinctions. The president must be thirty-five years of age. Each state gets two senators. We have a president but no prime minister. Congress has a constitutional obligation to establish a Supreme Court. But many of the most important provisions of the Constitution are general, abstract, and vague: think of phrases like *legislative power*, *due process*, *freedom of speech*, and *privileges or immunities*.

The new originalism recognizes what we might call *the fact of constitutional underdeterminacy*: many of the most important questions of constitutional law are underdetermined by the linguistic meaning of the constitutional text. The original meaning of many of the general, abstract, and vague provisions of the Constitution underdetermines the outcome of a wide range of constitutional controversies. An outcome is underdetermined if the meaning is inconsistent with some outcomes but would be consistent with two or more resolutions of the case. That is, new originalists reject the radical claim that the meaning of the Constitution is indeterminate (provides no constraint), but they do not embrace the implausible

claim that the original meaning provides a fully determinate answer to every constitutional question.

Originalism is a theory of constitutional interpretation. Originalists are united by their beliefs about the meaning of the Constitution. But once we move from interpretation to construction, different originalists will have different views. Nonetheless, most or almost all of them will agree that the practice of constitutional construction should be constrained by the results of constitutional interpretation. In other words, they agree on the contours of the construction zone—the space of constitutional issues where legal doctrine is underdetermined by the original meaning.

The question upon which originalists may disagree is, What are the proper methods of constitutional construction inside the construction zone? Some originalists have suggested that courts should defer to elected officials when those officials act within the zone of constitutional under-determinacy. Others have suggested that constitutional construction must preserve the legitimacy of the Constitution by construing vague provisions so as to preserve the basic justice of the constitutional scheme. And yet other originalists have suggested that methods of constitutional construction should preserve the rule of law; in a common-law system this means that construction should be constrained by precedent and by custom (widely shared and deeply held social norms) when precedent is unavailable. Finally, some originalists believe that something like original purposes or original principles should guide constitutional construction.

Originalism insists that constitutional construction should be constrained by the original meaning of the Constitution. Beyond that, the topic of constitutional construction raises questions for which originalism does not provide the answers. The original meaning of the Constitution goes only as far as linguistic meaning will take it.

[T]he core of the case for original-public-meaning originalism is based on a two-step argument. The first step is the claim that the linguistic meaning of the constitutional text is the conventional semantic meaning of the words and phrases as combined by the rules of syntax and grammar found in linguistic practice at the time each provision of the constitution was framed and ratified. This step of the argument conjoins the fixation thesis and the public meaning thesis. The second step of the argument is the claim that the linguistic meaning of the Constitution is legally binding in the sense that it constrains legal practice outside very exceptional circumstances. This step of the argument expresses the textual constraint thesis. The two-step argument is sufficient to give anyone who takes up the internal point of view toward American law good reason to affirm originalism.

Originalist theorists also believe that there are good reasons to affirm originalism from an external point of view and that there are good and sufficient reasons for maintaining our current practices. [O]riginalists have offered two fundamental arguments for originalism from the external point

of view. The first focuses on the fundamental value of the rule of law. It argues that originalism is superior to a variation on our current constitutional practice that explicitly endorses the power of the Supreme Court to offer amending constructions of the Constitution. It argues that such an amending power is inconsistent with the values of predictability, certainty, and stability that the rule of law serves. This rule-of-law argument also claims that an amending power is likely to foster the politicization of constitutional law and that politicization would further undermine the rule of law.

The second argument for originalism from the external point of view draws on democratic theory and the idea of popular sovereignty. The fundamental premise of this argument is that the constraining force of original meaning is a prerequisite for a constitutional order that enables “We the People” to lay down constitutional rules that will bind our agents—officials in the legislative, executive, and judicial branches. If the people’s agents have the power to amend the people’s instructions, then the agents (and not the people) are the true sovereigns.

1. Consider the four propositions that, according to Solum, comprise originalism (p. I-33, *supra*). Do all, some, or none of them strike you as plausible?

2. Where, according to Solum, is the line between interpretation and construction? As you read Supreme Court cases that apply particular constitutional provisions, see whether you can distinguish segments of analysis that Solum would characterize as “interpretation” from segments that he would characterize as “construction,” and whether you find the distinction illuminating.

3. Solum refers in passing to an “old originalism” that held that “original meaning was in the heads of the founders”—whereas the “new originalism” (of which Solum is a leading proponent) holds that the relevant original meaning is “the original *public* meaning,” as determined by contemporaneous rules of semantics, syntax, and grammar (p. I-34, *supra*). What are the costs and benefits of this shift? If originalist inquiry is limited to the public meaning of relevant words and phrases—such as “cruel and unusual punishments,” “equal protection of the laws,” and “commerce among the several states”—how much guidance will that inquiry provide in contested cases?

4. How is the original public meaning of a word related to the prevailing understandings at the time about whether particular things did or did not fall within its scope? For example, consider the following argument:

- The linguistic meaning of “cruel” in the late 18th century was “unjustly harsh.”
- On the best view of justice, the death penalty is, in fact, unjustly harsh, at least as a punishment for non-homicide crimes.

- Therefore, sentencing a non-homicide offender to death is “cruel” within the meaning of the Eighth Amendment—even though such sentences were commonplace at the time of the amendment’s adoption, and even though practically nobody thought that the amendment cast any doubt on them.

Is this a respectable originalist argument? Should it be?

5. As noted above, originalism could be advanced as an account of how U.S. constitutional law actually works, or as an account of how constitutional law ought to work, or both. As we proceed, ask yourself to what extent our constitutional system adheres to originalism and to what extent it ought to do so.

Does the Constitution Mean What It Says?

David A. Strauss*

If we read the text of the Constitution in a straightforward way, American constitutional law contradicts the text of the Constitution more often than one might think. Adhering to the text would require us to relinquish many of the most important and well-established principles of constitutional law. Here are some examples of the anomalies—outcomes that are inconsistent with established principles of constitutional law—that following the text of the Constitution would produce:

- Both the President and the federal courts could abridge the freedom of speech and prohibit the free exercise of religion, because the First Amendment, by its terms, applies only to “Congress.”
- [For the same reason,] a state could have an established church.
- The requirement that “searches” not be “unreasonable” would not apply to the interception of many electronic communications.
- States could disenfranchise, for example, poor people or gay people, because the Equal Protection Clause of the Fourteenth Amendment does not protect the right to vote.
- States could discriminate against racial minorities, or any other group, in providing, for example, schools, parks, or transportation, because the Equal Protection Clause, by its terms, refers only to “protection.”
- The federal government would be free to engage in discrimination on the basis of race or sex, because the Equal Protection Clause applies only to the states.

* David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015).

- The federal government, under a standard application of the principle of *expressio unius*,* could not enact criminal laws, except in certain narrow areas.
- The Bill of Rights would not apply, in whole or with the current exceptions, to the states.

[S]ome of these examples are well known, like the principle [that] the law developed under the Equal Protection Clause applies to the federal government. Other instances in which we have departed from the text of the Constitution are obvious but more or less systematically ignored, like the fact that the First Amendment begins with “Congress.” Others require more explanation[.] But the important point is that these examples cannot be dismissed as curiosities that don’t really have much to do with the nature of American constitutional law. They involve important and well-established principles of constitutional law that are inconsistent with the text. They are anomalies not in the sense that they are odd excrescences but in the sense that they call into question our familiar way of thinking about the relationship between the text of the Constitution and constitutional law.

That familiar way of thinking, I believe, goes something like this: Constitutional law is derived from the text of the Constitution. Sometimes the text is clear; if so, it controls. But many provisions are not clear. They must be “interpreted” according to relatively familiar, if sometimes controversial, principles. Always, though, constitutional law begins with the text and proceeds from there.

That familiar view misdescribes American constitutional law. Clear text does not always govern, as the anomalies show; there are times when established principles are simply inconsistent with the text. Beyond that, constitutional “interpretation” usually has little to do, in practice, with the words of the text. There are times when the text is decisive, and it is never acceptable to announce that you are ignoring the text. But routinely the text, although not flatly inconsistent with the outcome of a case, has very little to do with the way the case is argued or decided. In most litigated cases, constitutional law resembles the common law much more closely than it resembles a text-based system.

So there is a puzzle: How can we make sense of a system that treats the text in this way? If the familiar understanding—start with the text, and proceed from there—is incorrect, just what role does the text play, and how can that role be harmonized with the other sources of constitutional law?

* [This is short for “*expressio unius est exclusio alterius*,” an interpretive principle holding that when a document expressly mentions one thing, it thereby impliedly excludes others that are relevantly alike. Here, Strauss is suggesting that because Congress is expressly empowered to enact criminal laws in certain spheres (e.g., “To define and punish Piracies and Felonies committed on the high Seas,” Art. I, §8), the natural reading of the text would be that Congress is not empowered to create other crimes. —BE]

The answer, I think, is that provisions of the text of the Constitution are, to a first approximation, treated in more or less the same way as precedents in a common law system. The effect of constitutional provisions is not fixed at their adoption—or, for that matter, at any other time. Instead, like precedents, provisions are expanded, limited, qualified, reconceived, relegated to the background, or all-but-ignored, depending on what comes afterward—on subsequent decisions and on judgments about the direction in which the law should develop.

As a result, a provision of the Constitution will be most important when there are not a lot of subsequent precedents “interpreting” it. Once a large body of precedent-based law has developed, the text will recede from view. Like a venerated old case, a textual provision might be invoked for rhetorical effect and maybe even for more than that—in the way that, for example, *Marbury v. Madison* might be invoked when a court is considering the constitutionality of an act of Congress. But just as the reasoning and precise holding of *Marbury* do not determine the scope of judicial review today, so the text of the Constitution often does not determine the shape of constitutional law today—as the anomalies dramatically show. It is true that the Supreme Court would never “overrule” a provision of the text, in the way it might overrule a precedent. But the anomalies—instances in which the text has been effectively overridden by later developments—suggest that there is less to this difference than meets the eye.

These claims will have to be qualified in some important ways. But I believe the idea that provisions of the Constitution function roughly in the same way as precedents in a common law system is a better description of U.S. constitutional law than the familiar view that constitutional law is a matter of “following” or “interpreting” those provisions. And because the common law is a well-established approach to the law that has plausible (at least) justifications, understanding constitutional law as an evolutionary, common law system avoids the notorious problem of explaining why constitutional provisions adopted decades or centuries ago should continue to bind us today.

[T]he anomalies suggest that constitutional law is a more complicated enterprise than might first appear. The idea that we are interpreting the text of the Constitution in some straightforward way is problematic even apart from the anomalies. Too many principles, as I said, seem to have their source in precedent, with only a loose connection to the text. One might have thought that the text at least controls when it is clear. The anomalies suggest otherwise. Alternatively one might, of course, contend that in these cases, the text is not clear; it is vague or ambiguous, so the principles that have developed are at least not inconsistent with the text. But that just makes the point. Our understanding of the provisions of the text cannot be separated from the common law-like elements of constitutional law. The principles that have evolved over time, and are attributable to precedent and policy, are so deeply a part of constitutional law that we unreflectively

think of the text as saying things that actually were established by the precedents, not by the text. What's more, there is some reason to think that constitutional law is not exceptional in this respect. In other areas as well, we have to harmonize precedent-based, common law-like developments with a supposedly authoritative text.* How can we make sense of this process?

My proposal, tentative of course, is that the legal systems within which we operate today should be seen as an effort to accommodate three institutional interests—what I'll call the interests in sovereignty, adaptation, and settlement. Different aspects of the legal system develop ways of balancing these interests, and the ways in which they do so evolve over time.

[The] idea of an accommodation among these interests does two things. It provides a justification for the system that we have, and it gives actors in that system a sense of how to proceed. The underlying notion is that a legal system exists because there is agreement on certain norms. Exactly who are the parties to the agreement, and what counts as agreement—those are very difficult things to specify. But norms, agreed upon in some sense, define what counts as an acceptable legal argument, and they provide a basis for making a judgment about when an argument is correct. Something like this has to be true if law is capable of being learned and practiced.

Within the boundaries set by those norms, there is room for good faith differences in judgment about what the law is. And, because the norms are ultimately based on agreement, they can change over time. My suggestion is that in making arguments within the existing boundaries, or in attempting to shift the boundaries, the three interests I mentioned are ultimately what we should take into account. That is how the notion of an accommodation among those interests can provide some guidance. They are also interests that any reasonable person should accept as interests that a legal system should try to promote. That is why they can serve as a justification. To be a little more concrete, if conforming to the text of even an old and nearly unamendable Constitution is a good way to accommodate, say, the interest in settlement, then we have a reason that we can give to people for conforming to the text. We do not have to rely on the kind of vague and arguably sectarian notions (like claims about an intergenerational community of Americans) that are sometimes offered as a basis for adhering to the text. And, by the same token, if we cannot justify adherence to the text by reference to those interests, then we should—in fact, we do—depart from it.

[Sovereignty] refers to the interest in having some institution that can intervene and change things. Today we naturally associate that capacity with the legislature and with the process for amending the Constitution.

* [Strauss is referring here to various federal statutes, including the Administrative Procedure Act and the Sherman Antitrust Act, that have given rise to extensive judge-made rules through a common-law-like process. —BE]

There is an interest in having sovereignty vested somewhere for both practical and, we would say today, democratic reasons. The practical reason is that new problems can arise and we should have a way to address them quickly and comprehensively. The democratic reason is that if large numbers of people believe that something should be done, they should, as a general matter, have their way. In fact, a sovereign without some kind of democratic pedigree would be unacceptable in societies like ours today. One can imagine a legal system that does not have an entity that is sovereign in any simple sense—a system governed entirely by custom, for example. But the modern legal systems with which we are usually concerned do have some institution or combination of institutions that serve this interest.

The interest in adaptation is obvious. Whatever the initial state of a legal system, there will have to be a mechanism to adjust to changes in the world—either in circumstances or in people's assessments of whether the laws adequately deal with those circumstances. In principle a single entity could serve both the interest in sovereignty and the interest in adaptation, intervening on a larger or smaller scale depending on what was needed. In practice, though, there will often be a natural division of labor, roughly corresponding to the respective roles of a legislature on the one hand and courts and executive agencies on the other. Some institutions are more suited to intermittent but far-reaching interventions; others are better for gradual adjustments. Over time, it seems fair to say, the central role in making adaptations has shifted from courts using a common law-like approach to regulatory agencies (which often also use such an approach).

The interest in settlement is based on the familiar idea that sometimes it is more important that matters be resolved than that they be resolved correctly. While the interest in adaptation is naturally served by an evolutionary process, of which the common law is an example, the interest in settlement is served by various norms that favor leaving existing arrangements intact if they seem satisfactory, even if they are not optimal, especially if unsettling those arrangements could be costly. [T]he text of the Constitution also serves the settlement function; that seems to be the best explanation for why we adhere to the text to the extent we do. And while the common law-like character of much of constitutional law can be seen as a means of adaptation, it is also a means of settlement. It is tempting, and to some degree correct, to justify common law practices on broadly Burkean grounds that appeal to the accumulated, trial-and-error wisdom of past generations. But that seems an implausibly grandiose explanation of why courts generally follow precedent in ordinary cases. It is hard to say that the wisdom of the ages lies behind a year-old rule about, say, what constitutes an unreasonable search. But following precedent in those everyday contexts does serve the interest in leaving imperfect rules settled when the costs of unsettlement would be greater.

[Evolutionary] processes are important in our constitutional system, but it remains true that the text settles many vitally important questions.

One common example is the age of the President; the President must be thirty-five years old. There is no serious dispute about that, and that provision is not treated as the source of a body of evolving precedent. The text simply settles that question.

But there are much more important examples of how the text performs a settlement function, and no account of U.S. constitutional law can ignore them. For example, the text determines when the President must leave office and what to do if the President is disabled. These are questions that could easily become controversial—highly controversial, in fact—in circumstances that are not too hard to imagine. So it is very important to settle questions like these. Evolving understandings might provide enough settlement, but those understandings will probably be less secure than a settlement that is explicitly stated in the text and is generally accepted.

While uncertainty about issues like presidential succession could create enormous problems, it is less important that those issues be settled in an optimal way. Knowing when, for sure, the presidential transition will take place is more important than having a presidential term of ideal length, whatever that might be. The text is especially well suited to performing the settlement function in these circumstances. The text can state a rule clearly; evolutionary norms are less able to do that. The rule stated in the text will probably be harder to change, but since the important thing is settlement, not optimality, that is an advantage.

This feature of the text—its ability to settle matters that should be settled—has more general effects. In particular, it explains the taboo against explicitly ignoring the text. If it were sometimes acceptable explicitly to ignore the text, then it might be more difficult to rely on the text to settle issues like the date on which the President leaves office. The anomalies suggest that this taboo is, to some extent, illusory. But, on the other hand, the anomalies mostly go unnoticed, and that is a way of preserving the settlement function of the text.

This is probably the best way to understand why it is unthinkable that the “one person, one vote” rule* would be applied to the Senate. The provision specifying that each state has two Senators is entirely clear. Uncertainty about the composition of the Senate could be very troubling, because, among other things, it might raise questions about whether certain laws had been validly enacted.

Of course no one would say that the composition of the Senate is an unimportant issue as long as it is settled one way or another. For that reason, [i]t is not unthinkable that we could see a common law-like evolution in which the Senate’s power were diminished, in the same way that the power

* [As we will see later in the course, the Supreme Court has held that states must draw legislative districts—for both their state legislatures and their seats in the U.S. House of Representatives—so that each district has roughly equal population. This is often called the “one person, one vote” rule. See, e.g., *Reynolds v. Sims* (1964) [*infra*, p. V-202]. —BE]

of presidential electors has been diminished—and, arguably, in the same way that the power of state governments has been diminished. But that is the form in which the principle of “one person, one vote” would assert itself against the Senate, if it were ever to do so: the text would remain formally intact, so that the ability of the text to settle issues would not be impaired too badly.

[Constitutional] law has its share of complexity and mystery, but in the end it is law—subject to being manipulated and abused, of course, as all law is, but also capable of being applied in good faith. It is easier to apply it in good faith, though, if we have a sense of what it involves. And the presence of the great document can mislead us.

It hardly needs to be said that the Constitution—the document, that is—has played a critical role in American history. The risk, though, is that we will ask it to do too much, and in that way obscure the true nature—the true genius, in fact—of our constitutional system. We do not simply read commands from the text. We do not simply implement decisions made when provisions were adopted. We have learned a lot over the years, and much of what we have learned is, necessarily, not directly stated in the text. All of that is part of constitutional law—in many ways the most important part.

Everyone, really, knows those things. The risk is that our rhetoric about the Constitution sometimes says otherwise, and that rhetoric might lead us astray—both in our understanding of the system and in the specific decisions we make. In the end, the Constitution requires not following the dictates of the document but working out, over time, a complex balance among institutional interests. That is how we do constitutional law, and that may be how we do law in general.

1. Strauss’s “common law” account of U.S. constitutional law is clearly non-originalist. As we proceed, ask yourself whether his account or Solum’s better describes constitutional law as you see it in practice.

2. What is the relationship between Strauss’s account of common-law constitutional development and Fallon’s broader picture of constitutional law as a social practice? Could Strauss’s argument be taken as a description of the rules of our practice? Or as an account of how the rules change?

3. Strauss argues that the system he describes reflects an accommodation between three competing values, which he labels “sovereignty,” “adaptation,” and “settlement.” As we proceed, ask yourself whether and how the constitutional decisions we read implicitly or explicitly appeal to these values, either in justifying particular results or in justifying methods of decision-making.

4. At the end of the previous excerpt, Solum sketches two arguments for originalism: one that focuses on the risks of instability and politicization if

the Court is empowered “to offer amending constructions of the Constitution”; and a second that is based on “the idea of popular sovereignty” (p. I-36, *supra*). Is Strauss’s vision of constitutional law vulnerable to criticism on either or both of these grounds?

5. The next and final two excerpts are from Supreme Court cases in which some of the Justices debated their preferred methods of constitutional interpretation. Don’t worry about the particulars of the substantive doctrine on either issue (the Eighth Amendment and the Establishment Clause), neither of which we are studying in depth in this class. Focus instead on the methodological debate: What should the Court draw on when it interprets and applies a constitutional provision, and what role should original meaning play in particular?

Roper v. Simmons

543 U.S. 551 (2005)



[In *Stanford v. Kentucky* (1989), the Supreme Court held that the Eighth Amendment’s bar on “cruel and unusual punishments” does not categorically prohibit capital punishment for juvenile offenders. In this case, the Court reconsidered the question and decided, by a vote of 5–4, that the Eighth Amendment *does* categorically prohibit capital punishment for juvenile offenders.]

■ JUSTICE KENNEDY delivered the opinion of the Court.

The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” [T]he prohibition against “cruel and unusual punishments,” like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be cruel and unusual. [Applying that standard, the majority concluded that the juvenile death penalty is unconstitutional.]

■ JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring.

Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. See *Stanford v. Kentucky* (1989) (describing the common law at the time of the Amendment's adoption). The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment. In the best tradition of the common law, the pace of that evolution is a matter for continuing debate; but that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text. If great lawyers of his day—Alexander Hamilton, for example—were sitting with us today, I would expect them to join Justice Kennedy's opinion for the Court. In all events, I do so without hesitation.

■ JUSTICE O'CONNOR, dissenting.

It is by now beyond serious dispute that the Eighth Amendment's prohibition of "cruel and unusual punishments" is not a static command. Its mandate would be little more than a dead letter today if it barred only those sanctions—like the execution of children under the age of seven—that civilized society had already repudiated in 1791. Rather, because "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." In discerning those standards, we look to "objective factors to the maximum possible extent." Laws enacted by the Nation's legislatures provide the "clearest and most reliable objective evidence of contemporary values." And data reflecting the actions of sentencing juries, where available, can also afford "a significant and reliable objective index" of societal mores.

Although objective evidence of this nature is entitled to great weight, it does not end our inquiry. Rather, as the Court today reaffirms, "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." "[P]roportionality—at least as regards capital punishment—not only requires an inquiry into contemporary standards as expressed by legislators and jurors, but also involves the notion that the magnitude of the punishment imposed must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant's blameworthiness." We therefore have a "constitutional obligation" to judge for ourselves whether the death penalty is excessive punishment for a particular offense or class of offenders. [Justice O'Connor goes on to explain why, applying this framework, she disagrees with the majority's holding.]

■ JUSTICE SCALIA, with whom THE CHIEF JUSTICE [REHNQUIST] and JUSTICE THOMAS join, dissenting.

In urging approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people's representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this, since "[t]he judiciary ... ha[s] neither FORCE nor WILL but merely judgment." The Federalist No. 78. But Hamilton had in mind a traditional judiciary, "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." Bound down, indeed. What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed*. The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to "the evolving standards of decency" of our national society. It then finds, on the flimsiest of grounds, that a national consensus which could not be perceived in our people's laws barely 15 years ago now solidly exists. Worse still, the Court says in so many words that what our people's laws say about the issue does not, in the last analysis, matter: "[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.

[O]f course, the real force driving today's decision is not the actions of four state legislatures [which changed their laws since the Court last considered this issue in *Stanford*], but the Court's "own judgment" that murderers younger than 18 can never be as morally culpable as older counterparts. The Court claims that this usurpation of the role of moral arbiter is simply a "retur[n] to the rul[e] established in decisions predating *Stanford*." That supposed rule—which is reflected solely in dicta and never once in a *holding* that purports to supplant the consensus of the American people with the Justices' views—was repudiated in *Stanford* for the very good reason that it has no foundation in law or logic. If the Eighth Amendment set forth an ordinary rule of law, it would indeed be the role of this Court to say what the law is. But the Court having pronounced that the Eighth Amendment is an ever-changing reflection of "the evolving standards of decency" of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people. On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation? [T]he reason for insistence on legislative primacy is obvious and

fundamental: “[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.”

[J]ustice O’Connor asserts that the Eighth Amendment has a “special character,” in that it “draws its meaning directly from the maturing values of civilized society.” Nothing in the text reflects such a distinctive character—and we have certainly applied the “maturing values” rationale to give brave new meaning to other provisions of the Constitution, such as the Due Process Clause and the Equal Protection Clause. See, e.g., *Lawrence v. Texas* (2003) ([striking down Texas sodomy law]); *Planned Parenthood of Southeastern Pa. v. Casey* (1992) ([striking down some state restrictions on abortion]). [Justice Scalia dissented in both of those cases.]

In a system based upon constitutional and statutory text democratically adopted, the concept of “law” ordinarily signifies that particular words have a fixed meaning. Such law does not change[.] The Court has purported to make of the Eighth Amendment, however, a mirror of the passing and changing sentiment of American society regarding penology.

Van Orden v. Perry

545 U.S. 677 (2005)

McCreary County, Kentucky v. ACLU

545 U.S. 844 (2005)

[These two cases, decided together, concerned the constitutionality of Ten Commandments displays on state property. One central issue in the cases was whether the Establishment Clause merely prohibits the government from favoring particular monotheistic sects over others—in which case the Ten Commandments displays might be upheld on the ground that they represent a symbol shared by all major monotheistic religions—or whether the Establishment Clause instead prohibits the government from endorsing religion itself over other worldviews, in which case the monuments might be struck down. Justice Stevens argued for the more demanding view of the Establishment Clause, and Justice Scalia argued for the more permissive one. Ultimately, for reasons not relevant here, a majority voted to uphold one of the monuments but not the other.]

■ JUSTICE STEVENS.

[The defenders of the monuments] rel[y] heavily on the fact that our Republic was founded, and has been governed since its nascence, by leaders who spoke then (and speak still) in plainly religious rhetoric. [But] reliance on early religious statements and proclamations made by the Founders is [p]roblematic because those views were not espoused at the Constitutional Convention in 1787 nor enshrined in the Constitution's text. Thus, the

presentation of these religious statements as a unified historical narrative is bound to paint a misleading picture. [Justice Stevens describes various historical evidence reflecting some Founders' disapproval of official endorsements or celebrations of religion, including President Thomas Jefferson's refusal to issue Thanksgiving proclamations (as President George Washington had done) because of Establishment Clause concerns.] As the widely divergent views espoused by the leaders of our founding era plainly reveal, the historical record [i]s too indeterminate to serve as an interpretive North Star.

It is our duty, therefore, to interpret the First Amendment's command that "Congress shall make no law respecting an establishment of religion" not by merely asking what those words meant to observers at the time of the founding, but instead by deriving from the Clause's text and history the broad principles that remain valid today. As we have said in the context of statutory interpretation, legislation "often [goes] beyond the principal evil [at which the statute was aimed] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." In similar fashion, we have construed the Equal Protection Clause of the Fourteenth Amendment to prohibit segregated schools, see *Brown v. Board of Education* (1955), even though those who drafted that Amendment evidently thought that separate was not unequal. [A]nd we have construed "evolving standards of decency" to make impermissible practices that were not considered "cruel and unusual" at the founding. See *Roper v. Simmons* (2005) (Stevens, J., concurring).

To reason from the broad principles contained in the Constitution does not, as Justice Scalia suggests, require us to abandon our heritage in favor of unprincipled expressions of personal preference. The task of applying the broad principles that the Framers wrote into the text of the First Amendment is, in any event, no more a matter of personal preference than is one's selection between two (or more) sides in a heated historical debate. We serve our constitutional mandate by expounding the meaning of constitutional provisions with one eye toward our Nation's history and the other fixed on its democratic aspirations. See *McCulloch v. Maryland* (1819) [*infra*, p. II-5] ("[W]e must never forget, that it is a constitution we are expounding" that is intended to "endure for ages to come, and, consequently, to be adapted to the various crises of human affairs"). Constitutions, after all, "are not ephemeral enactments, designed to meet passing occasions. [I]n the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be[.]"

The principle that guides my analysis is neutrality. The basis for that principle is firmly rooted in our Nation's history and our Constitution's text. I recognize that the requirement that government must remain neutral between religion and irreligion would have seemed foreign to some of the Framers[.] Fortunately, we are not bound by the Framers' expectations—we are bound by the legal principles they enshrined in our Constitution. [The]

vision that States should not discriminate between Christian sects[—which defenders of the monuments accept as well-founded—]has as its foundation the principle that government must remain neutral between valid systems of belief. As religious pluralism has expanded, so has our acceptance of what constitutes valid belief systems.

■ JUSTICE SCALIA.

[Recounting of numerous invocations of religion by early Congresses and Presidents omitted. —BE]

With all of this reality (and much more) staring it in the face, how can the Court *possibly* assert that the “First Amendment mandates governmental neutrality between . . . religion and nonreligion,” and that “[m]anifesting a purpose to favor adherence to religion generally” is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society’s constant understanding of those words. Surely not even the current sense of our society, recently reflected in an Act of Congress [c]riticizing a Court of Appeals opinion that had held “under God” in the Pledge of Allegiance unconstitutional. Nothing stands behind the Court’s assertion that governmental affirmation of the society’s belief in God is unconstitutional except the Court’s own say-so[.]

Justice Stevens’ writing is largely devoted to an attack upon a straw man. “[R]eliance on early religious proclamations and statements made by the Founders is . . . problematic,” he says, “because those views were not espoused at the Constitutional Convention in 1787 nor enshrined in the Constitution’s text.” But I have not relied upon (as he [does]) mere “proclamations and statements” of the Founders. I have relied primarily upon official acts and official proclamations of the United States or of the component branches of its Government, including the First Congress’s beginning of the tradition of legislative prayer to God, its appointment of congressional chaplains, its legislative proposal of a Thanksgiving Proclamation, and its reenactment of the Northwest Territory Ordinance; our first President’s issuance of a Thanksgiving Proclamation; and invocation of God at the opening of sessions of the Supreme Court.

It is no answer for Justice Stevens to say that the understanding that these official and quasi-official actions reflect was not “enshrined in the Constitution’s text.” The Establishment Clause, upon which Justice Stevens would rely, *was* enshrined in the Constitution’s text, and these official actions *show what it meant*. There were doubtless some who thought it should have a broader meaning, but those views were plainly rejected. Justice Stevens says that reliance on these actions is “bound to paint a misleading picture,” but it is hard to see why. What is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?

Justice Stevens argues that original meaning should not be the touchstone anyway, but that we should rather “expoun[d] the meaning of constitutional provisions with one eye toward our Nation’s history and the

other fixed on its democratic aspirations.” This is not the place to debate the merits of the “living Constitution[.]” Even assuming, however, that the meaning of the Constitution ought to change according to “democratic aspirations,” why are those aspirations to be found in Justices’ notions of what the Establishment Clause ought to mean, rather than in the democratically adopted dispositions of our current society?