THE CONSTITUTION AND THE COURTS OF THE UNITED STATES

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The Constitution: What Is It?

The American Constitution sets forth our nation's governing structure, establishing both the powers of government and the basic rights of the people. The modern world's first written constitution, it is the glue that has held the nation together through civil war; recession; depression; world war; and profound social, economic, political, racial, sectional, and cultural conflict.

When the delegates to the Constitutional Convention in Philadelphia approved the document on September 17, 1787, its provisions principally concerned structural issues—namely, the *separation of powers*, which refers to the distribution of powers among the legislative, executive, and judicial branches of the national government, and *federalism*, or the allocation of powers between the national government and the states.

Three years later, in 1791, the Constitution expanded to address individual liberty. In that year, the states ratified the first ten amendments, called the *Bill of Rights*, laying down the constitutional rights of the people. The Bill of Rights had been championed by Anti-Federalists, who feared a tyrannical central government. Under these amendments, Congress could not establish a church or deny free exercise of religion, deny the right to assemble and petition for a redress of grievances, violate free speech or free press, conduct unreasonable or warrantless searches and seizures, or punish people twice for the same offense (*double jeopardy*).

Read through the Constitution and Bill of Rights in the Appendix and ask yourself: what values were important to our Founders?

The Constitution: Whose Is It?

The Constitution begins "We the People," and these may be the three most important words in the whole document. For our Constitution incorporated the ideas of John Locke and Thomas Paine by assuming that *all people* begin with inalienable rights and that people only create governments to secure those rights and promote the common good. Thus, as Thomas Jefferson put it earlier in the Declaration of Independence, governments derive "their just Powers from the Consent of the Governed." The Constitution belongs to all of us because all of us are, through a process of moral and political imagination, consenting parties to it.

President Abraham Lincoln returned to this democratic principle in the Gettysburg Address, perhaps the greatest speech in our history, when he poetically proclaimed dedication to the idea that "government of the people, by the people, for the people, shall not perish from the earth." It was indeed the Civil War and the resulting Thirteenth, Fourteenth, and Fifteenth Amendments that ended the horrors of slavery and launched the nation on a path that ultimately saw all Americans become consenting members of its social contract.

Our government belongs to all of us, but it is the Supreme Court that is generally the final interpreter of the meaning of the Constitution. The Court must be the constant guardian of our civil rights against government abuse. Congress and the people of the states have the power to amend the Constitution on "great and extraordinary occasions," as urged by James Madison in *Federalist* No. 49.

The Constitution defined the structure and powers of the national government and, in short order, set forth a Bill of Rights for the people. Here the founders take turns signing their names.

And in fact, the people have exercised this power seventeen times since the Bill of Rights was ratified. But it is the Court that is charged with interpreting the meaning of the written document along the way. This is the power of *judicial review,* by which the courts may declare *unconstitutional* any federal or state laws and policies that violate rights, rules, or principles set forth in the Constitution.

The principle and practice of judicial review were first established in the great case of *Marbury v. Madison* (1803), where the chief justice of the United States, John Marshall, declared: "[i]t is emphatically the province and duty of the judicial department to say what the law is."

The Constitution: What Does It Mean?

In some places, the Constitution is very clear and specific, such as where it says that citizens must be thirty-five years old in order to become president. In other places, the Constitution speaks in broad, majestic generalities, such as where it says that states may not deprive persons of "equal protection of the laws" or abridge the "freedom of speech."

How exactly the Court should interpret broad constitutional terms is an issue of enduring and fascinating controversy, but the major sources of interpretation that we all must use are

- the text of the Constitution itself;
- *precedent,* or rulings from factually similar cases that illuminate the Constitution's meaning;
- the intentions of the Framers;
- the history of the nation and its institutions;
- the general structure of the constitutional design based on the division of national, state, and local powers through federalism and the separation of powers among the legislative, executive, and judicial branches at the national level;
- the spirit and values of the Constitution embodied in the Bill of Rights; and
- practical concerns and requirements.

The Constitution does not enforce itself, nor do judges go out searching for constitutional violations. If people think that their constitutional rights are being violated, they must summon up the courage to go to court and bring a case. Under the Constitution's case-or-controversy requirement, which is set out in Article III's description of the judicial branch, the Court may only take cases brought by people who have an active controversy involving an actual *injury,* that is, a violation of their legally protected rights. Our Court is not permitted to issue an *advisory opinion,* which is an opinion that states how the Court would rule on a legal matter that is not actually ripe. *Ripeness* is a doctrine requiring that a case or controversy be present—as opposed to hypothetical or potential—in order for it to be heard. One of the "passive virtues" of the Supreme Court is that it deals with specific public conflicts and controversies only when they are ripe. At the

same time, a case cannot be *moot,* or no longer fit for judicial resolution because no actual controversy exists anymore. If there is no real injury alleged in a plaintiff's complaint, or the government is not responsible for it, or there is nothing the Court can do about it anyway, the Court will say that the plaintiff lacks *standing.* If the Court believes that it does not have proper jurisdiction over an issue because the Constitution leaves the resolution of that issue entirely up to the executive or legislative branches, the Court may decline to decide the case on the merits because the case presents a *political question.*

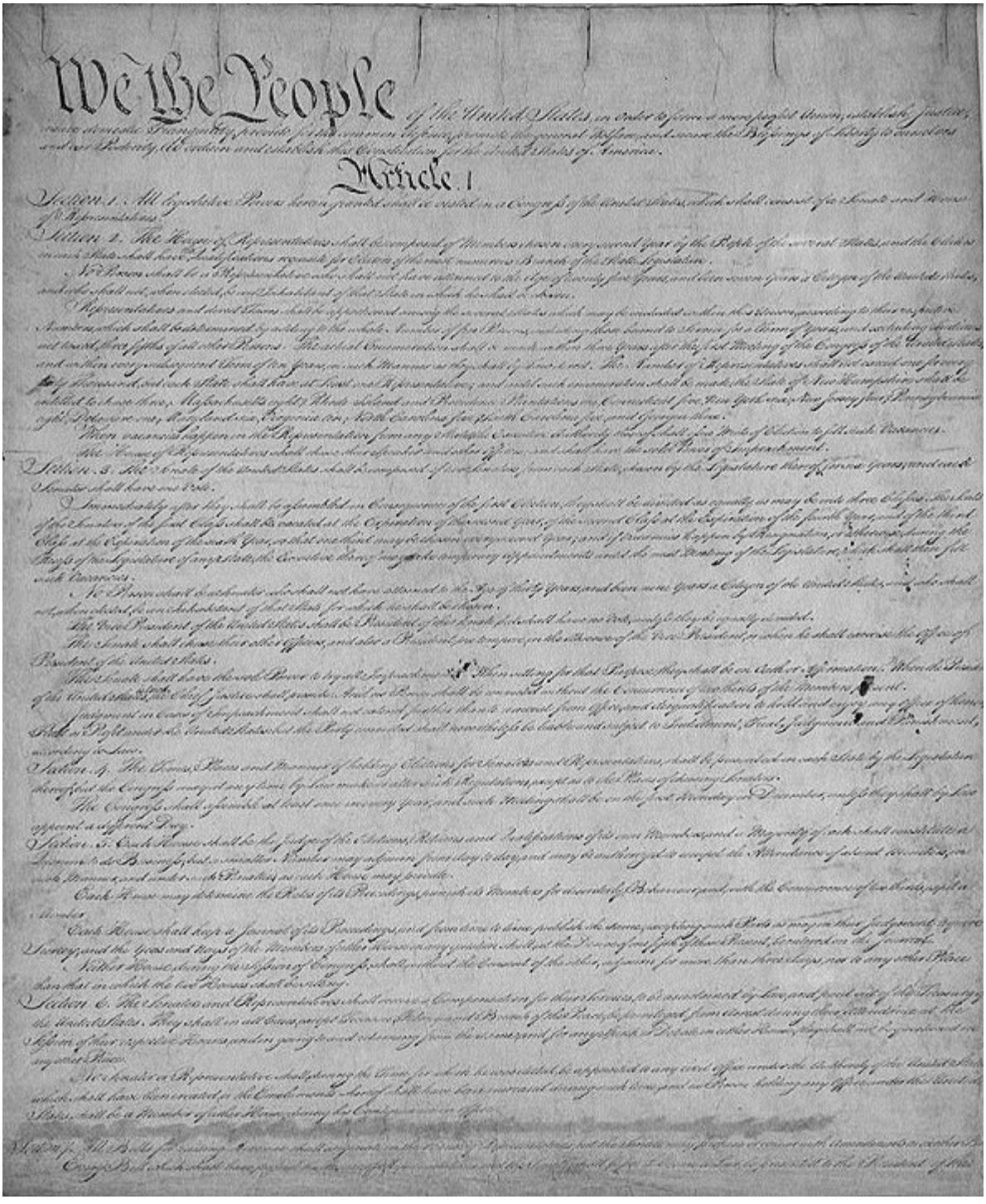
The Incorporation of the Bill of Rights

Although the provisions of the Bill of Rights originally applied only against Congress ("*Congress* shall make no law . . ."), the Supreme Court has decided that the Bill of Rights binds all of the states and localities as well. The reason for this is that, in 1868, the Fourteenth Amendment was added to the Constitution. The Fourteenth Amendment's *Due Process Clause* provides that "No state shall . . . 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." The Court has found that the "liberty" guaranteed by "due process of law" includes almost all of the specific rights granted to the people against Congress by the Bill of Rights. Thus, state governments cannot abridge the rights recognized in the Bill of Rights—such as the right to speak, or publish a newspaper, or practice religion, or be free from unreasonable searches and seizures—any more than Congress can. This assimilation of Bill of Rights protections to citizens facing state power is called "incorporation" through the Due Process Clause.

The State Action Requirement

It is important to remember that, while the Constitution does apply against both Congress and the states (and localities), it applies only to actions of *government.* Specifically, it applies to what we call a *state action*—an action undertaken by a government agency or actor, whether federal, state, or local. This is known as the state action requirement. A private entity is not ordinarily subject to constitutional restraints. (One exception is the Thirteenth Amendment's ban on slavery and involuntary servitude even where the offending actor is a private person or entity acting outside of law.)

Thus, unlike public schools, which are an arm of government, private schools are not bound directly by the Constitution. Private schools may be found to be in violation of a *statute,* or law passed by a federal or state legislature, such as



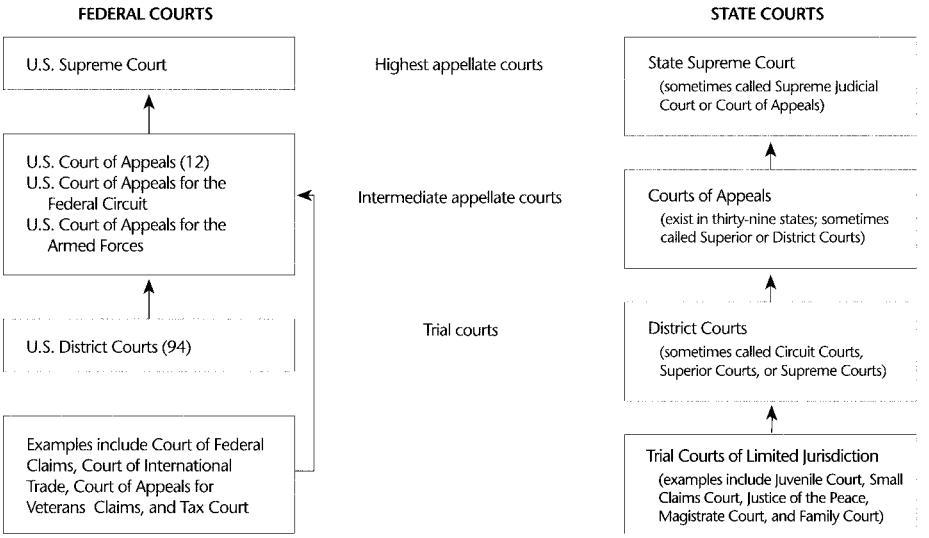
The Constitution's opening words "We the People" may be not only the largest but the most important in the whole document, infusing the meaning of the entire text.

those forbidding discrimination on the basis of race, gender, ethnicity, and disability, but private schools may not themselves be found to be in direct violation of the U.S. Constitution.

Judicial Architecture: How Our Court System Works

To understand the cases that appear in the chapters that follow, some background information will be useful, beginning with an overview of the judicial process.

There are two major branches of the judicial system in the United States: the federal courts and the state courts in each of the fifty states (as well as the equivalent in the District of Columbia and the Territories). Depicted graphically, our judiciary looks something like this:



Source: Adapted from Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice,* 2d ed. (Washington, D.C.: CQ Press, 1995), 865.

Federal courts decide issues of federal law, which means controversies relating to the United States Constitution, federal laws (or statutes) passed by Congress, and regulations issued by federal agencies. The federal system has three levels of courts. The *United States District Courts* are trial courts that make findings of fact and law in civil cases and render verdicts in federal criminal cases. The *United States Circuit Courts of Appeal* are those courts where people appeal decisions and verdicts reached in district courts. In the courts of appeals, there are no juries; judges decide all of the issues.

The U.S. Supreme Court is housed in a beautiful building across the street from the Capitol. When the Court is in session the plaza in front is filled, both before and after oral arguments, with interested parties, journalists, spectators, lawyers, and, sometimes, protesters.

The *United States Supreme Court* is the highest court of appeals. The Supreme Court is the final step in the appeals process; its decisions become the supreme law of the land on constitutional issues.

The state system also usually has three levels of courts, comprised of trial, appellate, and supreme courts. The decisions of the state supreme courts may be appealed to the United States Supreme Court if there is a federal question involved. State courts may decide issues relating to both state law and federal law. In most cases, however, the issues in question concern the former. Most crimes, such as assault, murder, rape, and burglary, are prosecuted in state court. Each state also has its own constitution that provides its citizens with additional protections beyond those afforded by the United States Constitution.

Courts hear two types of cases: criminal and civil. In a *criminal prosecution* charges are brought by a government prosecutor against a person who has allegedly violated a state or federal criminal statute. For example, if you attack your neighbor, the county or district attorney will prosecute you for violating the state's criminal code; if you are convicted, you might go to jail. *Civil suits,* in contrast, are brought by one person, company, or government entity against another for a civil wrong, property invasion, or breach of contract. For example, if you don't take care of your tree, and it falls on your neighbor's house, he can bring a negligence action against you for damages. This is called a *tort*.

Courts will hear the facts and legal claims presented by two parties. The *petitioner,* or *plaintiff,* is the party that initiates the lawsuit; the *respondent,* or *defendant,* is the party that responds to the lawsuit. (In a case that has been appealed, the appealing party is known as the *appellant* and the responding party as the *appellee.*) The courts will then either dismiss the case or grant *relief*—that is, some monetary benefit or other restitution—based on the evidence and the arguments presented. Depending on the kind of case, courts utilize different resources to reach their verdicts and make decisions. Courts analyze the Constitution and other relevant rules of law, such as a *statutory* law, which is passed by the state legislatures or Congress; an *ordinance,* which is enacted by a city, suburb, town, municipality or other local entity; or the *common law,* which is developed over time from the judgment of courts, as well as prior case precedent.

Majority and Dissenting Opinions

You will notice that most of the case excerpts in this book present both majority and dissenting opinions. A *majority opinion* will typically first summarize the *procedure* of the case, which is the path the case took to get to the Supreme Court, and then the *facts* of the case—that is, what happened that led the parties to a court battle. The procedure and facts are normally followed by the justice's analysis of the issues posed in the case. The majority opinion represents the views of a majority of justices on the nine-member Court. It is sometimes joined by a *concurring opinion,* in which one or more justices express agreement with the majority's result but demonstrate a different analysis or give the law or facts a different emphasis. A *dissenting opinion* expresses a different point of view on major or minor issues in the case and rejects the result reached by the majority of the Court.

It is important to read dissenting opinions along with majority opinions. Many decisions are decided on the slender margin of 5–4, and the simple change of one justice's mind—or the replacement of an outgoing or deceased justice with a newly appointed one—can create a new 5–4 majority in the opposite direction. Well-argued dissenting opinions are often the seeds of a later reversal. An example of a realignment of views took place between 1940 and 1943. In *Minersville School Dist. v. Gobitis* (1940) the Supreme Court upheld compulsory flag salute rituals. But a strong dissenting opinion laid the groundwork for a reversal that followed three years later in *West Virginia v. Barnette* (1943) (see Chapter 2). In the latter case, the Court overruled *Gobitis,* finding that the First Amendment does not allow public schools to force students to pledge allegiance to the flag.

Dissenting opinions register the diversity of legal and political thought in our society and remind us that the law is not a "hard science." A court is not a computer that prints out right answers once you enter all of the facts. The law

The justices of the Supreme Court. From left, Clarence Thomas, Antonin Scalia, Sandra Day O'Connor, Anthony M. Kennedy, David H. Souter, and Stephen G. Breyer; Chief Justice William H. Rehnquist; and Ruth Bader Ginsburg.

is a field of contests among competing theories, ideas, analogies, values, interpretations, and beliefs. As Justice Robert H. Jackson once famously put it, "We are not final because we are infallible, but we are infallible only because we are final."

How to Brief a Case

When law students read cases, they often take notes on them and outline them in a way that has come to be known as "briefing a case." You might find it useful to brief cases as you start your own habits of case-reading and analysis. To effectively brief a case, you must

State the procedure—Where did this case come from? A state supreme court after a state appeals court after a state district court? A federal appeals court after a federal district court? What happened in those lower courts? Who won? Who lost? The procedural history of the case is a very quick statement about the path the case has followed in the courts.

Name the parties—Who is the plaintiff? Who is the defendant?

State the facts—Write down the facts of what happened to the parties. What is the story

between them? Who did what to whom? What happened that is of legal significance, that is, what happened that is relevant to deciding the legal issues?

State the issue (or issues)—What are the legal issues that the court must decide in order to arrive at a decision?

State the holding—What does the court hold or decide? What is the "rule" that it comes up with in answer to the legal issues posed?

State the court's reasoning or rationale—Why does the court decide the way it does? What is the logic or rationale of its holding? What is its analysis?

There is no single right way to brief a case, but these basic features might be useful to you as you dip your toes in the water. If you become really interested in the process of case-briefing and outlining—and do it as part of a study group—consider renting the classic movie about students at Harvard Law School called *The Paper Chase*. It might make you determined to go to law school—or to avoid the experience at all costs!

Read On

Cushman, Clare. *The Supreme Court Justices.* Washington, D.C.: Congressional Quarterly, 1995.

Hall, Kermit. *The Oxford Companion to the Supreme Court of the United States.* New York: Oxford University Press, 1992.