

THE U.S. CONSTITUTION

An Introduction to the U.S. Constitution

1. The Living Constitution
2. Understanding the U.S. Supreme Court

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ACCORDING TO James Madison, “The happy Union of these States is a wonder; their Constitution a miracle; their example the hope of Liberty throughout the world. Woe to the ambition that would meditate the destruction of either.” In a very real sense, the U.S. Constitution is a marvel. It was crafted in an environment of political uncertainty, and its success was by no means certain. Not only has it survived, but also it has demonstrated its strength, weathering challenges and change that its authors scarcely could have foreseen. Even after two and a quarter centuries, the document remains the foundation for the structure of American government; it is the world’s oldest written constitution.¹ This is especially impressive, given that most constitutions hardly endure for a generation. Since the Constitution was ratified in 1789, national constitutions around the world have lasted an average of only seventeen years.²

In what follows, we provide a brief introduction to the U.S. Constitution—in particular, the circumstances under which it was written, the basic principles underlying it, and some controversies surrounding it. This material may not be new to you, but it is especially important to review, since these concerns frequently frame and inform how the Supreme Court interprets the Constitution.

THE ROAD TO THE U.S. CONSTITUTION

While the fledgling United States was fighting for its independence from England, it was being run (and the war conducted) by the Continental Congress. Although this body had no formal authority, it met in session from 1774 through the end of the war in 1781, establishing itself as a *de facto* government. But it may have

¹Technically, the small microstate of San Marino, located completely within the nation of Italy, has the oldest constitution, but it is not a single document. It consists of a series of books that date to 1600.

²Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009).

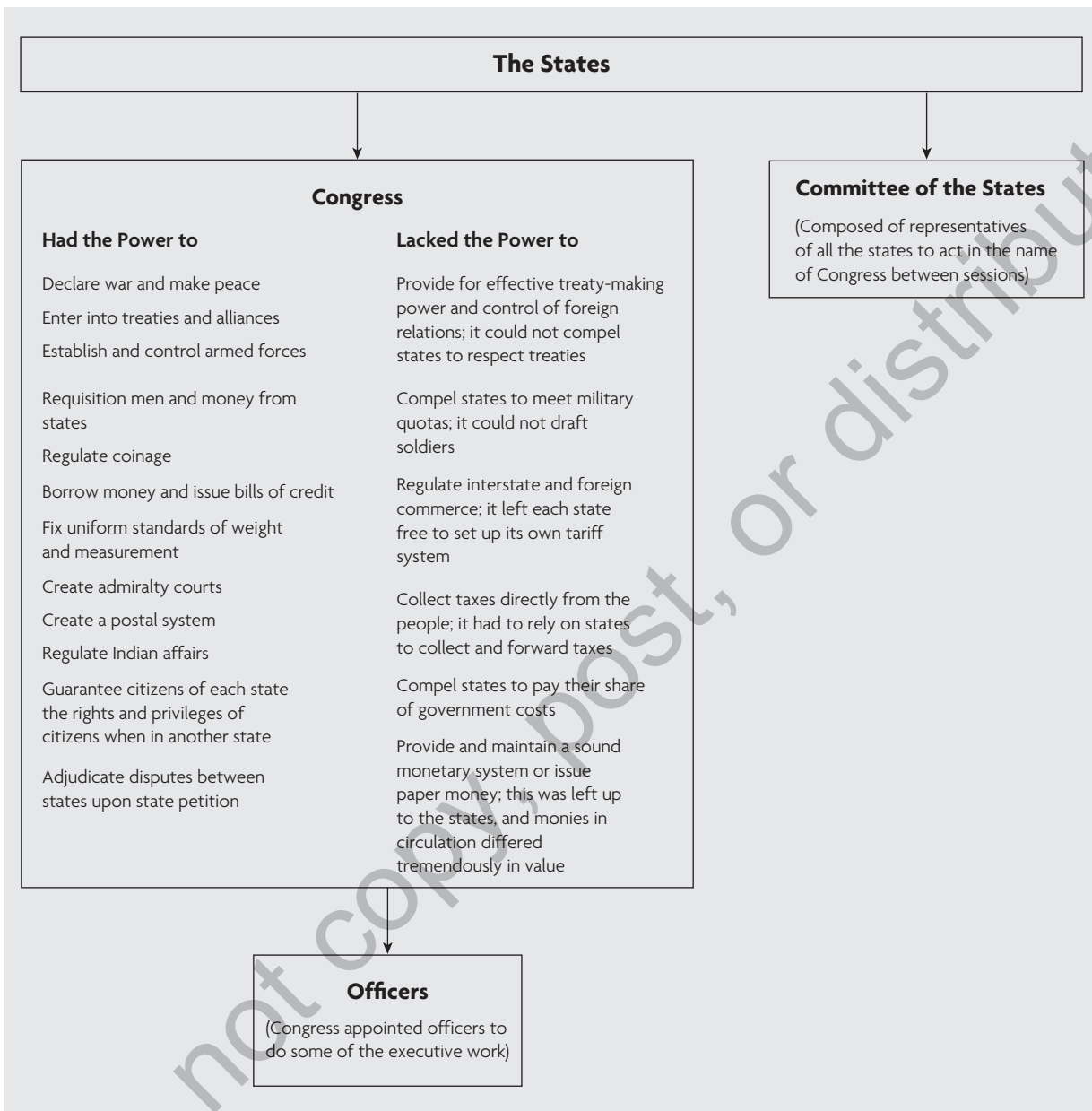
been something more than that: About a year into the Revolutionary War, the Continental Congress took steps toward nationhood. On July 2, 1776, it passed a resolution declaring the “United Colonies free and independent states.” Two days later, on July 4, it formalized this proclamation in the Declaration of Independence, in which the nation’s founders used the term *United States of America* for the first time.³ But even before the adoption of the Declaration of Independence, the Continental Congress had selected a group of delegates to make recommendations for the formation of a national government. Composed of representatives of each of the thirteen colonies, this committee labored for several months to produce a proposal for a national charter, the Articles of Confederation.⁴ Congress passed the proposal and submitted it to the states for ratification in November 1777. Ratification was achieved in March 1781, when Maryland—a two-year holdout—gave its approval.

The Articles of Confederation, however, had little effect on the way the government operated; instead, the articles more or less institutionalized practices that had developed under the Continental Congress (1774–1781). Rather than provide for a compact between the people and the government, the 1781 charter institutionalized “a league of friendship” among the states, an agreement that rested on strong notions of state sovereignty. Having just fought successfully for independence from what they perceived as “repeated injuries and usurpations” by a distant, overbearing government, they were naturally wary of concentrating power. This is not to suggest that the charter failed to provide for a central government. As is apparent in Figure I-1, which depicts the structure and powers of government under the Articles of Confederation, the articles created a national governing apparatus, however simple and weak. The plan created a one-house legislature, with members appointed as the state legislatures directed, but with no formal federal

³The text of the Declaration of Independence is available at http://avalon.law.yale.edu/18th_century/declare.asp.

⁴The full text of the Articles of Confederation is available at http://avalon.law.yale.edu/18th_century/artconf.asp.

Figure I-1 The Structure and Powers of Government under the Articles of Confederation



Source: Adapted from Steffen W. Schmidt, Mark C. Shelley II, and Barbara A. Bardes, *American Government and Politics Today*, 14th ed. (Boston: Wadsworth, 2008), 42.

executive or judiciary. And although the legislature had some power, most notably in foreign affairs, it derived its authority from the states that had created it and not from the people.

The condition of the United States under the Articles of Confederation was less than satisfactory. Analysts have pointed out several weaknesses of the articles, including the following:

- Because it allowed Congress only to requisition funds and not to tax, the federal government was virtually broke. From 1781 to 1783 the national legislature requested \$10 million from the states and received only \$1.5 million. Given the foreign debts the United States had accumulated during the Revolution, this problem was particularly troublesome.
- Because Congress lacked any concrete way to regulate foreign commerce, treaties between the United States and other countries were of limited value. Some European nations (for example, England and Spain) took advantage by imposing restrictions on trade that made it difficult for America to export goods.
- Because the government lacked coercive power over the states, cooperation among them quickly dissipated. The states engaged in trading practices that hurt one another economically. In short, they acted more like thirteen separate countries than a union or even a confederation.
- Because the exercise of most national authority required the approval of nine states and because the passage of amendments required unanimity, the articles stymied Congress. Indeed, given the divisions among the states at the time, the approval of nine states for any action of substance was rare, and the required unanimity for amendment was never obtained.

Nevertheless, the government accomplished some notable objectives during the years the Articles of Confederation were in effect. Most critical among these, it brought the Revolutionary War to a successful end and paved the way for the 1783 Treaty of Paris, which helped make the United States a presence on the international scene. The charter served another important purpose: it prevented the states from going their separate ways until a better system could be put into place.

In the mid-1780s, as the articles' shortcomings were becoming more and more apparent, several dissidents, including James Madison of Virginia and Alexander Hamilton of New York, held a series of meetings to arouse interest in revising the system of government. At a session in Annapolis in September 1786, they urged the states to send delegations to another meeting scheduled for the following May in Philadelphia. Their plea could not have come at a more opportune time. Just the month before, a former Revolutionary War captain, Daniel Shays, had led disgruntled farmers in an armed rebellion in Massachusetts. They were protesting the poor state of the economy, particularly as it affected farmers.

Shays' Rebellion was suppressed by state forces, but it was seen as yet another sign that the Articles of Confederation needed amending. In February 1787 Congress issued a call for a convention to reevaluate the current national system. It was clear, however, that Congress did not want to scrap the articles; in fact, it stated that the delegates were to meet "for the sole and express purpose of revising the Articles of Confederation."

Despite these words, the convention's fifty-five delegates quickly realized that they would be doing more than "revising" the articles: they would be framing a new charter. We can attribute this change in purpose, at least in part, to the Virginia delegation. When the Virginians arrived in Philadelphia on May 14, the day the convention was supposed to start, only they and the Pennsylvania delegation were there. Although lacking a quorum, the Virginia contingent used the eleven days that elapsed before the rest of the delegates arrived to craft a series of proposals that called for a wholly new government structure composed of a strong three-branch national government empowered to lead the nation.

Known as the Virginia Plan, these proposals were formally introduced to all the delegates on May 29, just four days after the convention began. And although it was the target of a counterproposal submitted by the New Jersey delegation, the Virginia Plan set the tone for the convention. It served as the basis for many of the ensuing debates and, as we shall see, for the Constitution itself (see *Table I-1*). With the delegates now drafting an entirely new charter, they had to consider both the structure of the national government and its relationship to the states. Since the framers reflected competing political ideologies and represented diverse interests from across the states, one might well wonder how they were able to reach consensus—and do so in just four months.

A plausible explanation is that the Constitutional Convention was an assembly of very able men, the

Table I.1 The Virginia Plan, the New Jersey Plan, and the Constitution

Item	Virginia Plan	New Jersey Plan	Constitution
Legislature	Two houses	One house	Two houses
Legislative representation	Both houses based on population	Equal for each state	One house based on population; one house with two votes from each state
Legislative power	Veto authority over state legislation	Authority to levy taxes and regulate commerce	Authority to levy taxes and regulate commerce; authority to compel state compliance with national policies
Executive	Single; elected by legislature for a single term	Plural; removable by majority of state legislatures	Single; chosen by Electoral College; removable by national legislature
Courts	National judiciary elected by legislature	No provision	Supreme Court appointed by executive, confirmed by Senate

generation's leading lights of statecraft. According to historian Melvin I. Urofsky, "Few gatherings in the history of this or any other country could boast such a concentration of talent." And, "despite [the framers'] average age of forty-two [they] had extensive experience in government and were fully conversant with political theories of the Enlightenment."⁵ That certainly would have been apparent to observers at the time; Thomas Jefferson, who was serving as ambassador to France during the convention, observed that it was "an assembly of demigods." Indeed, they were an impressive group. Thirty-three had served in the Revolutionary War, forty-two had attended the Continental Congress, and two had signed the Declaration of Independence. Two would go on to serve as U.S. presidents, sixteen as governors, and two as chief justices of the United States.

Nevertheless, some commentators take issue with this rosy portrait of the framers. Because they were a relatively homogeneous lot—white men, well-educated, and affluent—skeptics suggest that the document the framers produced was biased in various ways. This point of view was expressed by historian Charles Beard in *An Economic Interpretation of the Constitution of the United States*, which depicts the framers as self-serving. Beard says the Constitution was an "economic document" devised to protect the "property interests" of those who wrote it. Various scholars have refuted this view, and

Beard's work, in particular, has been largely negated by other studies.⁶ Still, *by today's standards*, it is impossible to deny that the original Constitution discriminated on the basis of race and sex or that the framers wrote it in a way that benefited their class. As Justice Thurgood Marshall once observed, the Constitution was "defective from the start"; despite its first words, "We the People," it excluded "the majority of American citizens" because it left out Blacks and women. He further alleged that the framers "could not have imagined, nor would they have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendant of an African slave."⁷ Over time, of course, Americans have revised the Constitution to make it substantially more egalitarian.

This is not to suggest that controversies surrounding the Constitution no longer exist. To the contrary, charges abound that the document has retained an elitist or otherwise biased flavor. Some argue that the amending process is too cumbersome, that it is too slanted toward

⁶See, for example, Robert E. Brown's *Charles Beard and the Constitution* (Princeton, NJ: Princeton University Press, 1956). Brown concludes, "[W]e would be doing a grave injustice to the political sagacity of the Founding Fathers if we assumed that property or personal gain was their only motive" (198).

⁷Quoted in *Washington Post*, May 7, 1987. See also Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution," *Harvard Law Review* 101 (1987): 1–5.

the will of the majority. Others point to the Supreme Court as the culprit, asserting that its interpretation of the document—particularly at certain points in history—has reinforced the framers’ biases.

Throughout this volume, you will have many opportunities to evaluate these claims. They will be especially evident in cases involving economic liberties—those that ask the Court, in some sense, to adjudicate claims between the privileged and the underdogs in society. For now, let us consider some of the basic features of that controversial document—the U.S. Constitution.

UNDERLYING PRINCIPLES OF THE CONSTITUTION

Table I.1 sets forth the basic proposals considered at the convention and how they got translated into the Constitution. What it does not show are the fundamental principles underlying, but not necessarily explicit in, the Constitution. Three are particularly important: the separation of powers, with checks and balances to govern relations among the branches of national government; federalism, which governs relations between the states and the national government; and the principle of individual rights and liberties, which governs relations between the government and the people.

Separation of Powers with Checks and Balances

One of the fundamental weaknesses of the Articles of Confederation was their failure to establish a strong and authoritative federal government. The articles created a national legislature, but that body had few powers, and those it did have were kept in check by the states. The new U.S. Constitution overcame this deficiency by creating a national government invested with a host of explicit powers and significant authority independent of the states. Despite their desire to invigorate national power, though, the framers were also aware that power could be abused, especially when it was concentrated. One guard against such abuse was to diffuse authority, to divide and disperse it rather than allow it to be centralized. By creating a national government with three branches—the legislature, the executive, and the judiciary—and providing each with its own set of responsibilities, the members of the convention sought to limit the possibility of arbitrary and oppressive policy making.

The framers did not consider the separation of powers sufficient protection, however. As depicted in Figure I-2, they allowed each branch to impose limits on the primary functions of the others through the use of checking powers. Before Congress could enact legislation, it would need the support of the president. The president could not make treaties without supervision from the Senate. If the president, as commander in chief, had designs on entering into foreign conflicts, the Congress retained the power to declare war as well as the fiscal authority to refuse to pay for the executive’s ambitions. The Supreme Court may have been empowered to interpret federal law, but the president and Senate together limit the Court when selecting its members. In addition to these checking powers, the framers included a number of institutional balances: they made each element of the national government responsible to a different constituency and had them all selected on different timetables. This made it unlikely that the national government could be overwhelmed by the prevailing passions of the day.

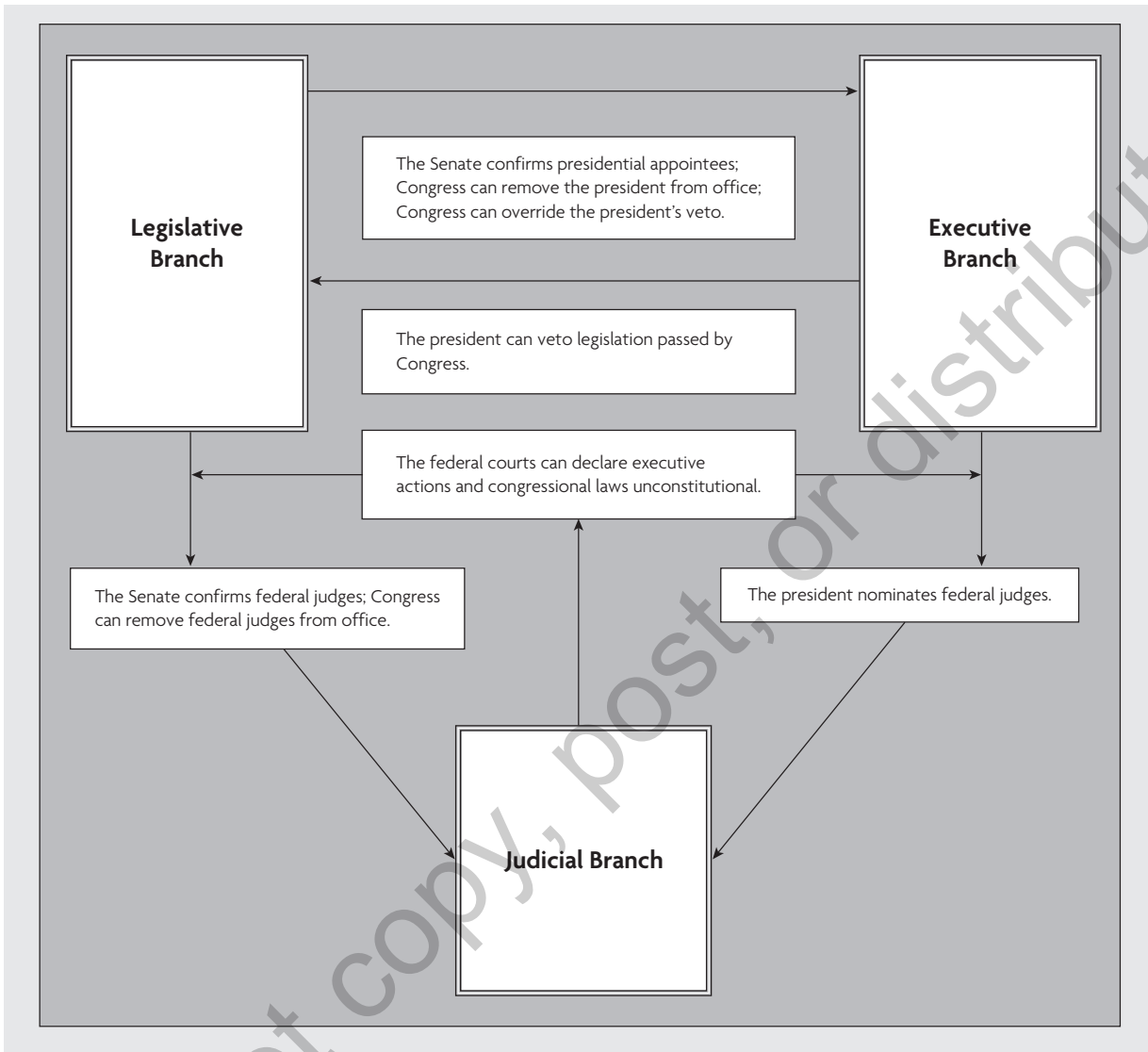
These various institutional designs underscored the framers’ pessimism about human nature. They were realists; as Madison observed, in steering the ship of government, “[e]lightened statesmen will not always be at the helm.” The solution was to craft a government that incorporated their distrust. “Ambition must be made to counteract ambition.”

Federalism

Another flaw in the Articles of Confederation was how the document envisioned the relationship between the national government and the states. As already noted, the Congress under the articles was not just weak—it was more or less an apparatus controlled by the states. Remember that, only a few years earlier, most Americans thought of themselves as residents of British colonies—the Connecticut Colony, the Delaware Colony, the Colony of Virginia, and so on. Now they were independent states, and their citizens did not necessarily have a “national” consciousness. The Articles of Confederation reflected that view; the states were the center of political life.

Some of the delegates at the convention—most notably, Alexander Hamilton—greatly preferred national power over state authority and proposed to place there as much control as possible. Under the articles, states had often pursued their own particular interests, attempting to raise revenue by charging tariffs on goods passing across their borders. These “rival, conflicting, and angry

Figure I-2 The Separation of Powers/Checks and Balances System: Some Examples



regulations,” as Madison called them, hindered national economic growth. Other delegates, by contrast, were quite worried about ceding any power to a new national government. After all, the states were sovereign entities. Skeptical of national authority, they believed that a republican government worked best on a localized level, where policy makers were more likely to be attuned to the needs and desires of those whom they represented. Fortunately, the framers were familiar with the political

philosophies of Enlightenment thinkers, and one of the most prominent was Montesquieu. This French lawyer had written an influential book on democratic theory, *The Spirit of the Laws*, and it contained a number of ideas that appealed to the framers. Most notably, he proposed what he called a “confederate republic,” a government that was composed of *both* a national government limited by the separation of powers and smaller individual governments. By his logic, the national government

would provide strength and protect the nation in foreign affairs and the smaller, local governments could better reflect the interests of the people in crafting domestic policy. Although the delegates modified the specifics of Montesquieu's plan, they adopted its broad principles. Thus, federalism became a key element of the framers' design, one that was meant to appeal to both sides of the debate over national versus state power.

Under this framework, the states agreed to relinquish only some of their sovereignty. The national government would be one of limited authority, restricted to exercising only those powers that were enumerated in the Constitution. Although the Constitution and the laws written by Congress were to be "the supreme law of the land," the states retained all of the remaining power.

This strategy both enlarged and limited the power of the national government, but the Constitution still left unanswered many questions about federal-state relations. For example, would the national government be empowered to exercise other, non-explicit powers in order to carry out its explicit obligations? What would happen if Congress, in exercising one of its explicit powers, regulated something that might have been reserved to the states? Could states judge for themselves the meaning of national law? As you will see, the Supreme Court has played a prominent role in defining the boundaries of federal and state power by answering these questions. In so doing, it has helped shape the contours of American federalism.

Individual Rights and Liberties

The Constitutional Convention was called in response to conditions resulting from the ineffectiveness of government under the Articles of Confederation. For that reason, most of the efforts in Philadelphia were focused on the creation of a new governmental structure, with careful attention given to the powers the national government could wield and appropriate limitations to be placed on those powers. The document that emerged from the convention reflected that emphasis.

The prominence of issues of governmental powers and structure, however, did not mean that the framers had forgotten the purposes of the Revolution. The war for independence had ended only a few years before the convention met. The values of individual liberty and freedom, over which the war was fought, were still fresh in the framers' minds. There is no doubt that safeguarding those rights remained a high priority. In fact, records of the debates indicate that some of the delegates offered

specific guarantees of individual rights. George Mason, Charles Pinckney, and Edmund Randolph, for example, all proposed to enumerate rights in the Constitution, but their efforts could muster no support.⁸ Mason, the author of the Virginia Declaration of Rights, refused to sign the Constitution because it failed to include explicit limits on the powers of the national government.

It is therefore a puzzle to many that the Constitution drafted in Philadelphia had only scant references to individual rights and liberties. Other than prohibiting government from passing *ex post facto* laws or bills of attainder—that is, laws that punish retroactively or legislative declarations that convict and punish—the framers included no explicit limitations. How could such a fundamental governing document produced by those who had led the nation to its independence fail to include a systematic statement of basic freedoms?

One explanation is that the central concern of the convention was increasing, not decreasing, the authority of the national government. In light of the failures of the Articles of Confederation, creating a government that had ample power to stabilize the economy and stimulate growth was the highest priority. There was no immediate civil liberties crisis; oppressive English rule had been overthrown. Moreover, the states all had their own bills of rights that protected individual liberties.

Another reason, according to some of the framers, was that the Constitution itself served to limit the power of the national government. Hamilton and Madison, for instance, pointed out that the national government was one of limited powers, granted by the states. By enumerating power—by explicitly stating what Congress *may* do—the Constitution, in fact, protected rights—by implicitly stating what Congress *may not* do. Not only that, Madison believed that abuses of individual rights were much more likely to take place at the state level, where local populations were more homogenous and thus more likely to be intolerant of political minorities. If national power was to be feared, he was optimistic that the checks and limitations the framers imposed would be sufficient to block abuses of personal liberty.

In addition, there was a more practical problem facing the delegates. By the time the convention had resolved matters of governmental structure and power, the delegates understandably were exhausted. Leaving

⁸This information comes from Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution*, 2nd ed. (St. Paul, MN: Thomson/West, 2005), 316–317. This book reprints verbatim debates over the Constitution and Bill of Rights.

behind their personal businesses and occupations, they had spent May through September confined together in a hot and humid room, engaged in intense debates and negotiations. The prospect of spending additional time attempting to resolve questions of what liberties should be included in a bill of rights and how those rights should be stated was not an attractive one. Yet the question of a bill of rights would not go away. Once the states set about debating ratification of the proposed Constitution, one of the primary complaints was that it lacked a bill of rights. Many argued that despite the various restraints on governmental power placed in the document, the new government would have the potential to become a very powerful institution, and one that would be quite capable of depriving the people of their

freedoms. This argument was particularly persuasive, and consequently ratification was placed in jeopardy. In response, supporters of the Constitution began to suggest a compromise: if the Constitution was ratified, one of the new government's first orders of business would be the drafting of a bill of rights to be added to the Constitution. That compromise took the form of the first ten amendments to the Constitution—the Bill of Rights. Since the ratification of the Bill of Rights, on December 15, 1791, those basic principles of the Constitution—separation of powers, federalism, and individual liberties and rights—have remained the defining features of American government. How the Constitution has been able to sustain those principles over time is a topic we consider in chapter 1.

THE LIVING CONSTITUTION

HOW HAS the Constitution of the United States endured as the oldest constitution on the earth? How has it survived the stresses of massive social, political, and economic upheaval? Constitutions are more likely to endure when they are flexible—that is, when “they provide reasonable mechanisms by which to amend and interpret the text to adjust to changing conditions.”¹ Thus, part of the explanation for the long-lasting success of the American Constitution is that its meaning can be changed, either by constitutional amendment or by its interpretation by the members of the U.S. Supreme Court. It is, in a sense, a living constitution.

When such changes occur, they should reflect a genuine transformation of fundamental values in society, not simply the regular movement of preferences that result from shifting political winds. One of the most revered figures in American legal history is Justice Joseph Story, whose *Commentaries on the Constitution of the United States* remains an indispensable analysis of the development of American law. Story spoke to precisely this issue—the need to balance stability and change—when he wrote:

It is obvious that no human government can ever be perfect; and that it is impossible to foresee, or guard against all the exigencies which may, in different ages require different adaptations and modifications of powers to suit the various necessities of the people. A government, forever changing and changeable, is, indeed, in a state bordering upon anarchy and confusion. A government,

¹Tom Ginsburg, Zachary Elkins, and James Melton, “The Lifespan of Written Constitutions” (UC Berkeley: Berkeley Program in Law and Economics, 2007, retrieved from <https://escholarship.org/uc/item/6jw9d0mf>), 51.

which, in its own organization, provides no means of change, but assumes to be fixed and unalterable, must, after a while become wholly unsuited to the circumstances of the nation; and it will either degenerate into a despotism, or by the pressure of its inequalities bring on a revolution.²

As Story recognized, a Constitution too easily adjusted promotes chaos, and one that frustrates adaptation is too rigid. To that end, the framers required constitutional amendments to have overwhelming majority support across the nation. Likewise, by providing for life tenure for the members of the Supreme Court, they ensured that constitutional interpretation would not be in chronic flux, something that might well happen if the justices were subject to being replaced every few years.

In the following sections, we trace both means of effecting constitutional change. We examine how, through the amendment process and the Court’s interpretation of the law, the Constitution has maintained its vitality over time.

THE AMENDMENT PROCESS

The framers were quite pleased with their handiwork; when the convention concluded, they “adjourned to City Tavern, dined together and took cordial leave of each other.”³ After the long, hot summer in Philadelphia, most of the delegates left for home, confident that the

²Joseph Story, *Commentaries on the Constitution of the United States*, 2nd ed. (Boston: Little, Brown, 1851), Book III, 564.

³1787, compiled by historians of the Independence National Historical Park (New York: Exeter Books, 1987), 191.

Table 1.1 The Ratification of the Constitution

State	Date of Action	Decision Margin
Delaware	December 7, 1787	Ratified, 30–0
Pennsylvania	December 12, 1787	Ratified, 46–23
New Jersey	December 18, 1787	Ratified, 38–0
Georgia	December 31, 1787	Ratified, 26–0
Connecticut	January 8, 1788	Ratified, 128–40
Massachusetts	February 6, 1788	Ratified with amendments, 187–168
Maryland	April 26, 1788	Ratified, 63–11
South Carolina	May 23, 1788	Ratified with amendments, 149–73
New Hampshire	June 21, 1788	Ratified with amendments, 57–47
Virginia	June 25, 1788	Ratified with amendments, 89–79
New York	July 26, 1788	Ratified with amendments, 30–27
North Carolina	August 2, 1788	Rejected, 184–84
	November 21, 1789	Ratified with amendments, 194–77
Rhode Island	May 29, 1790	Ratified with amendments, 34–32

Sources: Ratifying documents in the Avalon Project at Yale Law School (<http://www.yale.edu/lawweb/avalon/constpap.htm>); Ralph Mitchell, *CQ's Guide to the U.S. Constitution*, 2nd ed. (Washington, DC: Congressional Quarterly, 1994), 28–30.

new document would receive speedy passage by the states. At first, it appeared as if their optimism was justified. As Table 1.1 depicts, before the year was out, four states had ratified the Constitution—three by unanimous votes. But after January 1788, the pace began to slow. By this time, a movement opposed to ratification was growing and marshaling arguments to deter delegates at state ratifying conventions. What these opponents, the Anti-Federalists, feared most was the Constitution's new balance of power. They believed that strong state governments provided the best defense against a disproportionate concentration of power in the national government. The Constitution, they believed, tipped the scales too far in favor of federal authority.

These fears were countered by the Federalists, who supported ratification. Although their arguments and writings took many forms, among the most important was a series of eighty-five articles published in New York newspapers under the pen name “Publius.” Written by John Jay, James Madison, and Alexander

Hamilton, *The Federalist Papers* continue to provide insight into the objectives and intent of the founders.⁴ Debates between the Federalists and their opponents often were highly philosophical in tone, with emphasis on the appropriate roles and powers of national institutions. In the states, however, ratification drives were full of the stuff of ordinary politics—deal making. Massachusetts provides a case in point. After three weeks of debate among the delegates, Federalist leaders there realized that they would never achieve victory without the support of Governor John Hancock. They went to his house and proposed that he endorse ratification on the condition that a series of amendments be tacked on for consideration by Congress. The governor agreed, but in return he wanted to become president of the United States if Virginia failed to ratify or if George Washington refused to serve. Or he would accept the

⁴*The Federalist Papers* are available at <http://thomas.loc.gov/home/histdox/fedpapers.html>.

vice presidency. With the deal cut, Hancock went to the state convention to propose the compromise—the ratification of the Constitution with amendments. The delegates agreed, making Massachusetts the sixth state to ratify.⁵

This compromise, the call for a bill of rights, caught on, and the Federalists used it wherever close votes were likely. As it turned out, they needed to do so quite often. As Table 1.1 indicates, of the nine states ratifying after January 1788, seven recommended that the new Congress consider amendments. Indeed, New York and Virginia probably would not have agreed to the Constitution without such an addition; Virginia actually called for a second constitutional convention for that purpose. Other states began devising their own wish lists—enumerations of specific rights they wanted put into the document.

Whatever their specific motives might have been, most were in general agreement with Thomas Jefferson, who in a letter to James Madison noted that, while “I like much the general idea of framing a government which should go on of itself peaceably,” he remained uneasy because of the absence of explicit limits on the power of the national government. He argued that “a bill of rights is what the people are entitled to against every government on earth, general and particular, and what no just government should refuse, or rest on inference.” What Jefferson’s observation suggests is that many thought well of the new system of government but were troubled by the lack of a declaration of rights. Remember that at the time Americans clearly understood the concepts of *fundamental* and *inalienable* rights. They shared the views expressed by the English philosopher John Locke, who believed that government did not grant rights; instead, there were natural rights, those that inherently belonged to individuals and that no government could deny. Even England, the country they fought against to gain their freedom, had such guarantees. The Magna Carta of 1215 and the Bill of Rights of 1689 gave Britons the right to a jury trial, to protection against cruel and unusual punishment, and so forth. Moreover, after the Revolution, virtually every state constitution included a philosophical statement about the relationship between citizens and their government or a listing of fifteen to twenty inalienable rights, such as religious freedom and electoral independence. Small wonder that the call for such a statement or enumeration of rights in the federal Constitution became a battle cry.

⁵J. T. Keenan, *The Constitution of the United States: An Unfolding Story*, 2nd ed. (Chicago: Dorsey Press, 1988).

The reality of the political environment caused many Federalists to change their views on including a bill of rights. They realized that if they did not accede to state demands, either the Constitution would not be ratified or a new convention would be necessary. Because neither alternative was particularly attractive, they agreed to amend the Constitution as soon as the new government came into power.

In May 1789, one month after the start of the new Congress, Madison announced to the House of Representatives that he would draft a bill of rights and submit it within the coming month. As it turned out, the task proved a bit more difficult than he had anticipated; the state conventions had submitted nearly two hundred amendments, some of which would have decreased significantly the power of the national government. After sifting through these lists, Madison at first thought it might be best to incorporate the amendments into the Constitution’s text, but he soon changed his mind. Instead, he presented the House with the following statement, echoing the views expressed in the Declaration of Independence: “That there be prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from, the people.”⁶

The legislators rejected this proposal, preferring a listing of rights to a philosophical statement. Madison returned to his task, eventually fashioning a list of seventeen amendments. When he took it back to the House, however, the list was greeted with suspicion and opposition. Some members of Congress, even those who had argued for a bill of rights, now did not want to be bothered with the proposals, insisting that they had more important business to settle. One suggested that other nations would not see the United States “as a serious trading partner as long as it was still tinkering with its constitution instead of organizing its government.”⁷ Finally, in July 1789, after Madison had prodded and even begged, the House considered his proposals. A special committee scrutinized them and reported a few days later, and the House adopted, with some modification, Madison’s seventeen amendments. The Senate approved some and rejected others, so that by the time the Bill of Rights was submitted to the states on October 2, 1789,

⁶The full text of Madison’s statement is available in Neil H. Cogan, *Contexts of the Constitution: A Documentary Collection on Principles of American Constitutional Law* (New York: Foundation Press, 1999), 813–815.

⁷Farber and Sherry, *A History of the American Constitution*, 330.

only twelve remained.⁸ The states ended up ratifying ten of the twelve.⁹

Despite the somewhat disorderly process, the Bill of Rights became part of the U.S. Constitution when Virginia ratified it on December 15, 1791. So, very early in the history of the republic, Americans demonstrated a capacity for amending their fundamental charter. Rather than rejecting and replacing the document, they signaled their belief that the Constitution was an effective instrument for self-government. Once written, it was not beyond the reach of alteration; it could be transformed to embrace the shared values of those who sought to change it.

The actual mechanics of adding the Bill of Rights illustrated how the framers expected constitutional change to take place. They wanted to create a government that would have some permanence; they wanted a system that would resist easy alteration. At the same time, they recognized the need for flexibility; they were well aware that one of the major limitations of the Articles of Confederation was its amending process, which required the unanimous approval of all thirteen states. The Philadelphia convention imagined an amending procedure that would be “bendable but not trendable, tough but not insurmountable, responsive to genuine waves of popular desire, yet impervious to self-serving campaigns of factional groups.”¹⁰

The specific mechanism they established in Article V was a two-stage process (see *Table 1.2*). Proposing a constitutional amendment is the first step. This may be done either by a two-thirds vote of both houses of Congress or by two-thirds of the states petitioning for a constitutional convention. To date, all proposed constitutional amendments have been the products of congressional action. A second constitutional convention

has never been called.¹¹ The second step is ratification. Here, too, the framers allowed two options. Proposed amendments may be ratified by three-fourths of the state legislatures or by three-fourths of special state-ratifying conventions. Only the Twenty-first Amendment, which repealed Prohibition, was ratified by state conventions. The others were all ratified by the required number of state legislatures.

Responding to various political pressures, members of Congress have since proposed all manner of amendments—more than 11,000, in fact—but only thirty-three have been sent to the states for ratification. Among the six that did not receive the approval of enough states were the child labor amendment (proposed in 1924), which would have placed restraints on “the labor of persons under 18 years of age,” and the equal rights amendment (ERA; proposed in 1972), which stated, “Equality of rights under law shall not be denied or abridged by the United States or any State on account of sex.” Suggestions for new constitutional amendments, not surprisingly, continue to be advanced.

Unlike the Congress, the president and the Supreme Court are not participants in the process, but they can certainly have an influence. Presidents often instigate and support proposals for constitutional amendments. Indeed, from George Washington to Joe Biden, virtually every chief executive has wanted some alteration to the Constitution. In other instances, presidential politics have led to amendments. Prior to the presidential election of 1804, members of the Electoral College cast two votes, and the first- and second-place finishers became president and vice president, respectively. In 1796, that process resulted in John Adams, the candidate of the Federalist Party, being chosen as president and his opposition, and the Democratic-Republican’s Thomas Jefferson, being selected as his vice president. Four years later, that same procedure resulted in a tie that was broken by the House of Representatives in favor of Thomas Jefferson—after thirty-five votes. The Twelfth Amendment sought to avoid these complications by requiring electors to

⁸Among those rejected was the one Madison prized above all others: that the states would have to abide by many of the enumerated guarantees.

⁹The amendments that did not receive approval were the original Articles I and II. Article I dealt with the number of representatives in relation to state population. Article II prohibited changes in congressional salary from taking effect until after an election. Why the states originally refused to pass these amendments is something of a mystery, because few records of state ratification proceedings exist. Interestingly, the second proposal was ratified in 1992, more than two hundred years after it was first proposed, and it became the Twenty-seventh Amendment to the U.S. Constitution.

¹⁰Keenan, *The Constitution of the United States*, 41.

¹¹This is not to say that attempts to call a constitutional convention have never been made. Perhaps the most widely reported was Senator Everett Dirksen’s effort to get the states to request a national convention for the purpose of overturning *Reynolds v. Sims*, the Supreme Court’s 1964 reapportionment decision. He failed, by one state, to do so. A later attempt by the states to initiate constitutional change was a proposed amendment to require a balanced federal budget. This effort stalled with just two additional states required to call a convention.

Table 1.2 Methods of Amending the Constitution

Proposed By	Ratified By	Used For
Two-thirds vote in both houses of Congress	State legislatures in three-fourths of the states	Twenty-six amendments
Two-thirds vote in both houses of Congress	Ratifying conventions in three-fourths of the states	Twenty-first Amendment
Constitutional convention (called at the request of two-thirds of the states)	State legislatures in three-fourths of the states	Never used
Constitutional convention (called at the request of two-thirds of the states)	Ratifying conventions in three-fourths of the states	Never used

cast one vote for president and one for vice president. Similarly, after Franklin D. Roosevelt was elected to an unprecedented fourth term in 1944—and died shortly after his last inauguration—Congress introduced what became the Twenty-second Amendment, limiting presidential tenure to two terms.

For its part, the Supreme Court has played a role as an instigator of constitutional amendments. The Court’s interpretation of laws enacted by Congress can be easily overcome by the passage of new legislation, but that is not the case when the justices interpret the meaning of the Constitution. Short of the justices changing their minds—or their replacement with new justices of a different mindset—the only way to overturn the Court’s interpretation of the Constitution is by amending the Constitution itself. Occasionally, the Court’s constitutional decisions have been sufficiently out of step with public preferences that they have resulted in amendments that overturned those decisions (*see* Table 1.3). Some of these amendments—prohibiting federal law suits against states by citizens of another state or guaranteeing the right to vote to eighteen-year-olds, for example—were aimed specifically at overturning a decision of the justices. Others, like the Civil War amendments, were not

designed uniquely to reverse the Court but achieved that result, nonetheless.

Given the unpopularity of a number of the modern Court’s rulings, there are continued campaigns within the halls of Congress to overturn some of the justices’ more controversial policies. Congress has considered a number of proposed amendments, all of which target decisions of the Court: a human life amendment that would make abortion illegal (in response to *Roe v. Wade*, 1973), a school prayer amendment that would allow students in public schools to engage in prayer (in response to *Engel v. Vitale*, 1962, and *School District of Abington Township v. Schempp*, 1963), a flag desecration amendment that would prohibit mutilation of the American flag (in response to *Texas v. Johnson*, 1989), a term limits amendment (to overturn the Supreme Court’s ruling in *U.S. Term Limits v. Thornton*, 1995), and a campaign finance amendment to limit the role of corporate money in elections (in response to *Citizens United v. FEC*, 2010).¹²

CONSTITUTIONAL CHANGE AND THE SUPREME COURT

Quite apart from amending the nation’s fundamental law, the meaning of the Constitution can also be changed through interpretation by the justices. As Chief Justice John Marshall famously noted, “It is emphatically the province and duty of the judicial department to say what the law is.” When the justices issue decisions about the meaning of the Constitution, that is precisely what they are doing. Thus, when those decisions change, so, too, does the Constitution.

Part of what makes the Court’s changing interpretations possible is the general language in which much of the Constitution is written. In a sense, the document contains more principles and structures than it does rules and procedures. One indicator of its lack of specificity is its length. The United States has one of the world’s shorter constitutions, less than 8,000 words. The constitutions of Australia, Canada, and Ireland are twice as long. Germany has a constitution that is four times the length of its U.S. counterpart, and Mexico’s is seven times longer. Even a casual inspection of the U.S. Constitution reveals that it contains provisions that can

¹²Boldface type indicates that the opinions in the case can be found in the online archive at <https://edge.sagepub.com/conlaw>. For a complete list of cases in the archive, see the Online Case Archive List (Appendix 4) at the end of this volume.

Table 1.3 Six Amendments That Overturned Supreme Court Decisions

Amendment	Date Ratified	Supreme Court Decision Overturned
Eleventh	February 7, 1795	<i>Chisholm v. Georgia</i> (1793). In its first major decision, the Court authorized citizens of one state to sue another state in the Supreme Court. The decision angered advocates of states' rights.
Thirteenth	December 6, 1865	<i>Scott v. Sandford</i> (1857). The Court ruled slaves are property with which Congress may not interfere, and that neither slaves nor their descendants are citizens under the Constitution. Ratified in the wake of the Civil War, the Thirteenth and Fourteenth Amendments rectified the Court's decision.
Fourteenth	July 9, 1868	<i>Scott v. Sandford</i> (1857).
Sixteenth	February 3, 1913	<i>Pollock v. Farmers' Loan & Trust Co.</i> (1895). The Court declared the federal income tax unconstitutional, occasioning the adoption of the Sixteenth Amendment eighteen years later.
Nineteenth	August 18, 1920	<i>Minor v. Happersett</i> (1875). The Court held that, because the right to vote was not among the "privileges or immunities" of U.S. citizenship protected against state infringement by the Fourteenth Amendment, states could limit the right to vote to men. The continued efforts of the women's suffrage movement eventually led to the passage of the Nineteenth Amendment.
Twenty-sixth	July 1, 1971	<i>Oregon v. Mitchell</i> (1970). The Court ruled that Congress has the power to lower the voting age to eighteen only for federal, not state and local, elections. At a period when eighteen-year-olds were drafted to serve in the Vietnam War, Congress quickly responded to <i>Mitchell</i> , proposing the Twenty-sixth Amendment in March 1971.

Source: Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments*, 6th ed. (Thousand Oaks, CA: CQ Press, 2015), Tables 1.1 and 7.1.

be reasonably understood in multiple ways. True, some language—such as the requirement that the president be thirty-five years old or the provision that senators serve six-year terms—is not open to widely varying interpretations, but the meaning of other elements is not as obvious; phrases such as “necessary and proper,” “due process law,” “cruel and unusual punishments,” “establishment of religion,” and “unreasonable searches and seizures” are quite open-ended. Because there are not straightforward answers to questions about how to apply such words to specific cases, their meaning, as understood by the justices, has changed over time.

Consider, for example, the Supreme Court's interpretation of the commerce clause. The inability of the national government to regulate interstate commerce was a deficiency of the Articles of Confederation, and thus the framers invested Congress with the “Power . . . To regulate Commerce . . . among the several States.”

What qualifies as “interstate commerce”? Early in the twentieth century, the Supreme Court made a distinction between the production and manufacturing of a good and its subsequent sale and distribution. The latter was “interstate commerce” and subject to congressional regulation, but the former was not. Given that interpretation, the justices ruled that Congress could not use its commerce power to limit manufacturing monopolies, such as the sugar industry.¹³ Neither would the justices permit Congress to use the commerce clause to set minimum wages and maximum working hours for the coal industry.¹⁴ Manufacturing and labor were not a part of interstate commerce and thus subject only to state regulation. Later, however, the Court reconsidered this approach. It brought to bear a new interpretation

¹³*United States v. E.C. Knight* (1895).

¹⁴*Carter v. Carter Coal Co.* (1936).

Table 1.4 Cases Incorporating Provisions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment

Constitutional Provision	Case	Year
First Amendment		
Freedom of speech and press	<i>Gitlow v. New York</i>	1925
Freedom of assembly	<i>De Jonge v. Oregon</i>	1937
Freedom of petition	<i>Hague v. CIO</i>	1939
Free exercise of religion	<i>Cantwell v. Connecticut</i>	1940
Establishment of religion	<i>Everson v. Board of Education</i>	1947
Second Amendment		
Right to bear arms	<i>McDonald v. Chicago</i>	2010
Fourth Amendment		
Unreasonable search and seizure	<i>Wolf v. Colorado</i>	1949
Exclusionary rule	<i>Mapp v. Ohio</i>	1961
Fifth Amendment		
Payment of compensation for the taking of private property	<i>Chicago, Burlington & Quincy Railroad v. Chicago</i>	1897
Self-incrimination	<i>Malloy v. Hogan</i>	1964
Double jeopardy	<i>Benton v. Maryland</i>	1969
When jeopardy attaches	<i>Crist v. Bretz</i>	1978
Sixth Amendment		
Public trial	<i>In re Oliver</i>	1948
Due notice	<i>Cole v. Arkansas</i>	1948
Right to counsel (felonies)	<i>Gideon v. Wainwright</i>	1963
Confrontation and cross-examination of adverse witnesses	<i>Pointer v. Texas</i>	1965
Speedy trial	<i>Klopfer v. North Carolina</i>	1967
Compulsory process to obtain witnesses	<i>Washington v. Texas</i>	1967
Jury trial	<i>Duncan v. Louisiana</i>	1968
Right to counsel (misdemeanor when jail is possible)	<i>Argersinger v. Hamlin</i>	1972
Eighth Amendment		
Cruel and unusual punishment	<i>Louisiana ex rel. Francis v. Resweber</i>	1947
Ninth Amendment		
Privacy ^a	<i>Griswold v. Connecticut</i>	1965

Note: Provisions the Court has not incorporated: Third Amendment right against quartering soldiers, Fifth Amendment right to a grand jury hearing, Seventh Amendment right to a jury trial in civil cases, and Eighth Amendment right against excessive bail and fines.

^aThe word *privacy* does not appear in the Ninth Amendment (nor anywhere in the text of the Constitution). In *Griswold* several members of the Court viewed the Ninth Amendment as guaranteeing (and incorporating) that right.

of interstate commerce, one that was sufficiently broad to permit Congress to regulate not only activities it had previously forbidden—such as labor activity—but also actions far removed from commercial activity, such as the growth of wheat that never leaves a farm.¹⁵ Under this subsequent approach, whatever had a substantial relationship to interstate commerce was subject to regulation by Congress.

What changed? Not the text of the Constitution; it was instead how the members of the Court interpreted its words. By moving from an interpretation that limited congressional power to an alternative interpretation that took a more expansive view, the Supreme Court effectively altered the meaning of the Constitution.

More recently, the Court has brought about another revision of its understanding of the commerce clause, this time by reconsidering whether state and local governments must adhere to federal labor law. In 1976, the justices ruled that, while national wage and hours standards could be applied to private employers, Congress could not force its choices about labor policy on the states; the Tenth Amendment, which expressly reserves to the states the powers not delegated to national government, does not permit Congress to impair the policy making of states.¹⁶ Less than ten years later, however, the justices reversed course, holding that the states were not impaired by having to abide by federal wage regulations.¹⁷ In that short span of time, no amendments were made to the Constitution; the justices altered their interpretation of it.

Perhaps the most significant constitutional change to be forged by judicial interpretation is the application of the Bill of Rights to the states. As we have noted, the Bill of Rights was designed to serve as a limitation on the power of the national government. The passage of the Fourteenth Amendment in 1868, however, introduced new provisions to the Constitution, including a stipulation that “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law.”

To some—most notably, Justice John Marshall Harlan I—this language meant that states would have to adhere to the Bill of Rights, just like the national government; if the due process clause protected “liberty” from infringement by the states, then that “liberty” should certainly include the basic protections already in the Constitution.

Initially, Justice Harlan’s argument for binding the states to the Bill of Rights found little support among his brethren; when those arguments came before the Court, the justices rejected them. They ruled, for instance, that the due process clause did not include the First Amendment’s guarantee of freedom of assembly.¹⁸ Nor did it include the Fifth Amendment’s right to indictment by a grand jury.¹⁹ The Court emphasized that the states were free to recognize those freedoms they deemed important and to develop their own guarantees against state violations of those rights.

By the early twentieth century, however, Harlan’s view gained momentum among the justices, and the Court gradually reversed course. Through a doctrine called selective incorporation, the justices applied, one by one, virtually all of the provisions of the Bill of Rights to the states; when they concluded that a specific protection in one of the amendments was so fundamental that it was “implicit in the concept of ordered liberty,” the states would be bound by its commands, no less than the national government (*see Table 1.4*). The result has been a considerable alteration in the nature of national-state relations and an expansion of the constitutional protection of liberties. Redrawing the scope of liberties protected by the Constitution has been a consequence of doctrinal shifts on the Supreme Court.

The ability of the Court to change doctrine in this fashion, combined with the possibility of formal amendments, ensure that the Constitution has the flexibility necessary to be adaptable from one generation to the next. The framers constructed a resilient framework for government, and its capacity for promoting both continuity and change is a key explanation for its longevity.

¹⁵*National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) and *Wickard v. Filburn* (1942), respectively.

¹⁶*National League of Cities v. Usery* (1976).

¹⁷*Garcia v. San Antonio Metropolitan Transit Authority* (1985).

¹⁸*United States v. Cruikshank* (1876).

¹⁹*Hurtado v. California* (1884).

ANNOTATED READINGS

In the text and footnotes, we mention many interesting studies on the Supreme Court. Our goal in each chapter's "Annotated Readings" section is to highlight a few books for the interested reader.

Analyses of the framing of the Constitution include Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Routledge, 2017); Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* (New York: Oxford University Press, 2016); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origin of the Constitution* (Lawrence: University Press of Kansas, 1987); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1997); David Brian Robertson, *The Original Compromise: What the Constitution's Framers Were Really Thinking* (New York: Oxford University Press, 2013);

and John R. Vile, *The Writing and Ratification of the U.S. Constitution: Practical Virtue in Action* (Lanham, MD: Rowman & Littlefield, 2012).

Books on the creation and ratification of the Bill of Rights include Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press, 1998); Neil Cogan, ed., *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* (New York: Oxford University Press, 1997); Richard Labunski, *James Madison and the Struggle for the Bill of Rights* (New York: Oxford University Press, 2006); Leonard W. Levy, *Origins of the Bill of Rights* (New Haven, CT: Yale University Press, 1999); Gerard Magliocca, *The Heart of the Constitution: How the Bill of Rights Became the Bill of Rights* (New York: Oxford University Press, 2018); and Robert Allen Rutland, *The Birth of the Bill of Rights, 1776–1791* (Boston: Northeastern University Press, 1997).

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