ESSENTIALS OF THE AMERICAN CONSTITUTION

The Supreme Court and the Fundamental Law

CHARLES H. SHELDON

Essentials of the American Constitution

Essentials of Political Science

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Essentials of the AMERICAN CONSTITUTION

The Supreme Court and the Fundamental Law

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Westview PRESS

A Member of the Perseus Books Group

Essentials of Political Science

Published in 2002 in the United States of America by Westview Press, 5500 Central Avenue, Boulder, Colorado 80301-2877, and in the United Kingdom by Westview Press, 12 Hid's Copse Road, Cumnor Hill, Oxford OX2 9JJ

Find us on the World Wide Web at www.westviewpress.com

Library of Congress Cataloging-in-Publication Data
Sheldon, Charles H., 1929–2000
The essentials of the constitution : the Supreme Court and the fundamental law / Charles H. Sheldon as edited by Stephen L. Wasby.
p. cm. (Essentials of political science)
Includes bibliographical references and index.
ISBN 0-8133-6854-5 (cloth); 0-8133-6855-3 (paper)
1. Constitutional law—United States. 2. Separation of powers—United States. 3. Judicial review—United States. 4. United States. Supreme Court. I. Wasby, Stephen L., 1937–. II. Title. III. Series.

KF4550 .S53 2001
342.73'02—dc21

2001017952

The paper used in this publication meets the requirements of the American National Standard for Permanence of Paper for Printed Library Materials Z39.48-1984.

10 9 8 7 6 5 4 3 2 1

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Author's Preface*

After teaching the course Introduction to the American Constitution for over twenty-five years, I have found that the popular approaches political scientists take in teaching this course are inadequate, if not incomplete. First, the historical-political approach explains constitutional cases and doctrine in terms of the politics surrounding the court and the American political system. The tendency is to fragment constitutional evolution into jump-starts, such as the Federalist-Jeffersonian struggle (**Marbury**), slavery and civil war (**Dred Scott**), or economic revolution (**Lochner** and **West Coast Hotel**). Students tend to come away from such courses as they would from an English literature course based on a text of short stories: interesting, but how does it all fit together?

Another common approach is to borrow the law school case method and attempt to understand constitutional doctrine by teaching students how to "think like a lawyer" focusing on precedent. Certainly this method works for many, but again, it is a piecemeal approach. Students learn about the First Amendment free speech doctrines or the development of the commerce clause, but rarely do they pull all the doctrines together and say, "Here is the American Constitution."

Recently, texts have appeared that focus on the sources of interpretation available to the Supreme Court justices. Opin-

*This Preface has been constructed from the author's own words, taken from a letter to his editor at Westview Press, Leo A.W. Wiegman, with only minor changes in wording.

ions are analyzed in terms of the intent of the framers (originalist or intentionalist) or within the wording of the document (contextualist) and the like. From this perspective, constitutional doctrine is not as important as how the justices justified that doctrine. Students thus learn about the reasoning of the justices but little about the fundamentals of the Constitution.

Of course, there are many variations of these approaches, serving different purposes, but to my knowledge, no serious text has successfully integrated constitutional principles into a comprehensible whole. This book is an attempt to do that. It has been tested over the years in the classroom, in many undergraduate classes. With this introduction to constitutional principles, students should be prepared to analyze in detail constitutional cases and doctrine in more advanced courses on constitutional law.

The book describes five fundamental "constitutional components": the compact, separation of powers, federalism, representation, and the Bill of Rights. Each component is understood in terms of a location along a dynamic continuum that has been defined and extended by the Supreme Court over the years. After variations of each component are explained, they are integrated with other components. The important concept that the reader is to take away is that these fundamental components of the basic law work together in resolving constitutional issues. One component reinforces, explains, or extends another to bring about the decision. Herein lies the value of this particular approach, which works well within the vocabulary of any observer of the Constitution. Students should be able to see how the American Constitution is complete, with its fundamental principles working together.

Charles Sheldon
Pullman, Washington

Editor's Preface

The Constitution, as Professor Sheldon writes, is both instrument and symbol. As instrument, it empowers the branches of government while also constraining them. As symbol, invoked for and against many policy proposals, it seems bigger than life and certainly more than a piece of parchment, and as such it helps serve to bring us together as one nation.

The Constitution is also both simple and complex. Some of its provisions are simple, clear, and specific, while others are ambiguous and open-ended. Even when a constitutional provision seems at first reading to be clear, such clarity may be deceptive. For example, Justice Hugo Black, who always carried a copy of the Constitution in his pocket, regularly expounded that the First Amendment's language, "Congress shall make no law abridging" freedom of speech and press, meant just that: "No law abridging means no law abridging!" Yet, indicating that many others understood that apparent clarity quite differently, that position has never commanded a majority of the Supreme Court.

The Constitution is complex because the individual pieces of the document may each appear simple while concealing complexity, and, put together, they make for a complex whole, a result of the brilliance of the Founders and the compromises necessary to achieve its ratification. In addition, long-standing practice by Congress and the president and the Supreme Court's rulings have also become embedded in "the living Constitution." Such rulings often elaborate on existing

provisions, but at other times they add what was not in the text but was at best assumed or inferred. The best example, of course, is judicial review—the power of the courts to declare acts of the legislative and executive branches unconstitutional—which Chief Justice John Marshall declared in **Marbury v. Madison,** on which Professor Sheldon draws.

Judicial rulings are not the only matter making the task of understanding the Constitution less easy. Although the U.S. Constitution has been amended far less frequently than most state constitutions, which are often replaced and then amended further, its amendments may resolve some matters but often add new layers requiring interpretation—for example, whether, because of the Fourteenth Amendment, the various provisions of the Bill of Rights apply to and limit the states.

Help in understanding the Constitution's complexity is often necessary, particularly when two centuries of (judicial) exegesis and explication are added to the document. No one should feel embarrassed in seeking such help, whether to begin to penetrate the words of the document or to benefit from the perspective brought by someone well-versed in the Constitution.

Professor Charles Sheldon was well-versed in the Constitution. For many years, he assisted students in discovering its meanings. He was someone who could engage other serious scholars in the intricacies of debate over the Constitution's provisions and could also reach out to those approaching the study of the Constitution for the first time to aid them in decoding its mysteries.

* * *

I consider myself fortunate to have been Professor Sheldon's colleague and good friend. I first met Chuck Sheldon when he returned to graduate school at the University of Oregon

after several years of teaching. Our paths crossed regularly, even after he made good on the wishes of many of us who sought the solace of the Oregon Coast by moving to Pullman ("still six hours' drive to the coast," I kept saying). Several times I had the great pleasure of joining him to perform our own "tag-team" performances for his classes. Our last visit was in Pullman shortly before Chuck died, when, after a group in Coeur d'Alene had honored his career, I sought, and received, from him and his wife, Pat, who was always part of his research missions, counsel about how to go about writing judicial biography.

What you read in the pages of this book is what he wrote: This manuscript is his voice speaking to his students and those who come after them about what he thought important concerning the Constitution and how it might be interpreted. Although I knew that Chuck was working on this book, I did not see the manuscript before his death. I am glad to have had a small part in preparing it for publication. All of us wanted Chuck's voice to be preserved, to provide the opportunity for his considerable wisdom to be heard. But the part I have played has been small, because Chuck wrote very well—clearly, concisely, and far more simply than I. I may disagree with a few of his interpretations, but he has conveyed very well what he wanted you, the reader, to know, and that has been kept intact. I have straightened out a sentence or two, moved a paragraph here and there, and added a few lines about a few more cases—but that is all. What you see is almost entirely what Chuck Sheldon wrote. And, I think, you will better understand the world of constitutional law for having read it.

Stephen L. Wasby
Albany, New York, October 2000

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1

Introduction

In his attempt to find reality and establish purpose, man seeks a sense of harmony, a sense which accords meaning and limits to existence. Pursuit of the harmonious, conscious or not, is pervasive, dominating serious human concerns. . . . Man orders his existence according to harmony discovered, the absence of total symmetry propelling him forward in quest of that not yet found. Within himself, man seeks stasis; in his art, proportion; in his science, equilibrium; in his mathematics, elegance; in his thought, symmetry; in his politics, balance.

* * *

He who finds balance seeks to preserve it; those who discover imbalance strive to transform the present condition.

—P. N. Goldstene, 1977[1]

The human dynamic underlying the evolution of the U.S. Constitution is simply enough stated—the political struggle for balance.

The Constitution Defined

Edward S. Corwin, the dean of constitutional scholars, has viewed the American fundamental law as representing a bal-

ance between the Constitution as an *instrument* and the Constitution as a *symbol.* As instrument of governance, the Constitution defines governmental structures, designates who will carry on the public's business, endows these officials with specific powers, and sets broadly defined collective goals. As symbol, the Constitution takes on an aura of sanctity and is thereby clothed in authority and legitimacy. Such an aura compels public observance and private respect. Ideally, there is little need to sanction public officials and for them to suffer critical attention from those outside government. According to Corwin:

> The constitutional instrument exists to energize and canalize public power, [and] it is the function of the constitutional symbol to protect and tranquilize private interest or advantage against public power, which is envisaged as inherently suspect, however necessary it may be.[2]

The Constitution as instrument sets goals and provides the wherewithal to achieve those goals, however broadly defined. Thus, the Constitution looks to the future. "Things need to be done," and humans are able to "shape things and events" through the instrument. From this perspective, the Constitution is "an instrument of popular power—sovereignty . . . for the achievement of progress."[3] The fundamental law, then, entails a conditional grant of power. If we were to look for indications of the Constitution as instrument, we would be wise to turn to the Preamble:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, ensure 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.

The pursuit of these high-sounding goals requires the assignment of specific responsibilities such as those found in Article 1, section 8, which begins, "The Congress shall have Power" or Article 2, section 2: "The President shall be Commander in Chief" or Article 3, section 1: "The judicial Power of the United States, shall be vested in one supreme Court."

The grant of instrumental power is never made without conditions. Specific limits are placed on provisions of the instrument to guard against abuses, reflecting the inherent distrust of power endemic to the American culture. For example, the First Amendment dictates that "Congress shall make no law" and the Fourteenth Amendment states that "[n]o state shall."

Of course more is involved than merely stating the limits of power. Provisions of the instrument of power are narrowly delineated and are dispersed throughout the Constitution. This provides a means of achieving internal harmony or balance whereby power checks power. For example, Article 2, section 2, reads in part: The president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators . . . concur," and it further declares that the "President shall be Commander in Chief of the Army." However, the commander is checked by what is given to him or her to command. Article 1, section 8, declares that Congress shall have power "[t]o raise and support Armies."

Intentionally, only those powers assigned could be exercised by any particular branch. Because of the Constitution's function as symbol, only occasionally is it necessary for those directly responsible for the instruments of power consciously to check themselves. Nonetheless, the Constitution in most respects provides an ideal and stable standard to which real governmental conduct can be compared.

As symbol, the Constitution is endowed with a fundamental character analogous to a constitutional "Ten Command-

ments." Consequently, it is viewed as worthy of obedience and provides a decidedly moralistic but usually effective check on the instrument of power. Those responsible for carrying out the public's business are constrained from exceeding their power. They feel compelled to observe the limits placed on what power their positions permit because of the basic or fundamental character attributed to the Constitution.

The Constitution is fundamental as a result of one symbolic and one actual incident. First, those responsible for endowing the Constitution with authority are those who ultimately are sovereign—namely, the people. Second, the Constitution's legitimacy is accomplished by requiring an extraordinary and burdensome process to give it effect. The process must be more arduous than what is involved in ordinary legislation. Both fundamental endowments are articulated by Chief Justice John Marshall in **Marbury v. Madison*** (1803), where he said that the writing and ratifying of the Constitution were accomplished after "a very great exertion" and "the principles . . . so established are deemed fundamental" and "the authority from which they proceed is supreme."[4]

The authority is announced in the Preamble to the Constitution, which begins with "We the people" and ends with "do ordain and establish this Constitution for the United States of America." That authority is further confirmed in Article 5 of the Constitution. In order to amend the basic law, which is akin to the original task of drafting and approving the document, a formidable gauntlet must be overcome.

> 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

*Citations to the Supreme Court cases mentioned in this book may be found in the Case Index, starting on page 183.

> 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.

To accomplish the sanctity necessary to gain trust and to compel obedience, the Constitution as symbol looks to the past. Concepts which had "long antedated the rise of science," and had resulted from the struggle to bring some dignity, "security and significance" to the human existence are said to be embodied in provisions of the Constitution. Because these concepts are universal aspirations based on a higher or natural law, they create objects worthy of obedience, limiting what those in power are rightfully able to do. For example, the symbolic nature of the Bill of Rights is evident as it does not *grant* rights but rather *guarantees* already existing rights. The Ninth Amendment exemplifies the symbolic significance of the Constitution: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Constitution as instrument permits government to work toward the lofty goals enumerated in the Preamble. It is government in action, but within limits. The Constitution as symbol attaches fundamental and "higher law" significance to the organic law, assuring its worth and providing checks on the mundane day-to-day enactments and actions of public officials.[5]

The U.S. Constitution is written to make the details of the Constitution as instrument available to delineate governmental powers and to proclaim the principles of the Constitution as symbol. Again, the words of Chief Justice John Marshall recorded in **Marbury v. Madison** are instructive:

> The powers of the legislature are defined and limited; and that these limits may not be mistaken, or not forgotten, the constitution is written. To what purpose are powers limited, and

> what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"[6]

Should restraints fail or necessary power be unexercised over an extended period of time, an imbalance is experienced and constitutional harmony is lost. The grants of power must not overwhelm the limits, for, given the nature of humans, the power will certainly be used for selfish and destructive ends. However, the limits must not be so narrow as to prevent the government from achieving the goals that necessitated the Constitution in the first place. The harmony between symbol and instrument is evident when government is acting within written confines, with authority and toward common goals.

The Necessity of a Constitution

Why are constitutions necessary? The necessity follows from certain assumptions about human nature accepted by eighteenth-century political thinkers and by the delegates to the Philadelphia Convention in 1787. By nature, humans possess both reason and passion. When possessed of power, humans have a tendency to revert to passions and abuse that power. The American radicals of the middle and late 1700s had a "paranoiac mistrust of power." As Gordon Wood puts it, "Every accumulation of political power, however tiny and piecemeal, was seen as frighteningly tyrannical, viewed as some sinister plot to upset the delicately maintained relationships of power and esteem."[7]

On the other hand, humans have, under certain conditions, the ability to exercise reason and to override their passions. The Constitution is designed to check the appetite for power among officials and to create the conditions for reason to prevail. Of course, not just any design will accomplish the goal.

The Constitution as a Machine

Eighteenth-century conceptions of political science entailed seeking to apply the laws of Newtonian physics to the concerns of humans. Consequently, the science of constitution-making required that the results should resemble an internally consistent, well-oiled, and functioning machine. The Founders believed that "the actions and affairs of men are subject to as regular and uniform laws, as other events [and that] the laws of Mechanics apply in Politics as well as in Philosophy."[8] Thus, a naturally balanced system was the goal sought by those who wrote the document over 200 years ago. The Constitution was envisaged as a mechanism in which each part contributed to the successful functioning of the whole. A breakdown within the system, or a change in the power or function of one part or structure, would change that of another and require an adjustment to regain a delicate balance or harmony needed for a smoothly working constitutional machine. However, not all would agree on the diagnosis or cure for a malfunction of the constitutional machine, leading to politics that are aimed at transforming or preserving the fundamental law or its applications.

Components of the Constitutional Mechanism

The components of the Constitution as an instrument through which the needs of unity, justice, tranquillity, defense, welfare, and liberty are to be met are *separation of powers* and *federalism*. Both institutional arrangements involve the exercise of power to achieve specific ends. The components of the Constitution as symbol, those that provide constitutional sanctity and authority, are the *compact* and the *Bill of Rights*. The component of *representation* bridges the instrument and the symbol aspects of the U.S. Constitution.

Within each of the components are built-in redundancies. For example, in federalism both state and national governments are responsible for governmental action. The Tenth Amendment recognizes the division of powers among the governmental units in these words: "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." When power remains balanced as delineated in the Tenth Amendment, this constitutional component functions as the Founders hoped. However, the history of the politics of American federalism reflects an unremitting and unresolved struggle for power between the national government and states—or among the several states.

The separation of powers mechanism disperses governmental responsibilities among the three branches of government. As with federalism, competition for power among the three branches is inherent in political life as occupants of all three branches attempt to secure (if not aggrandize) their role in American government. The separation of powers is clearly a basic feature of the American constitutional structure, although one cannot point to its exact location in the document. By dividing the governing responsibilities among the branches as accomplished in Articles 1, 2, and 3 of the Constitution, recognition is given to the principle. Each Article designates the function of its respective branch: "All legislative Powers herein granted shall be vested in a Congress"; "The executive Power shall be vested in a President"; and "The judicial Power of the United States shall be vested in one supreme Court." The politics of separation of powers involves the struggle for influence among the president, Congress, and the courts. The same drama is played out within each state in the union.

Once the constitutional charter survives the burdensome process of drafting and ratification in order to confirm the consent of those to be governed by its provisions (and who

possess ultimate sovereignty), it takes on the character of legal authority and moral legitimacy. The idea that the Constitution is a solemn, hard-fought-out, and long-lived compact among the people and between them and their government assures that the provisions of the charter supersede ordinary statutory law. What the Constitution dictates is more important than what the legislature enacts. However, sovereign power remains elsewhere. Under some extreme circumstances, the support of the people directly or through the states could theoretically be withheld and all power would revert back to them. However, in practical terms, the Civil War settled for supremacy of federal law, and the amending process (Article 5) allows for a process of renegotiation of the compact, averting the extreme circumstances that would cause power to revert to the people. The political problem of the compact concerns who wrote and signed on to the fundamental law: Was it the people or the states that concluded the compact? The issue of where sovereignty resides is fundamental, of course. Also, what exactly was created by the compact? Was it an agreement between the people and government, or was it an agreement to bring people into a social union?

The Bill of Rights, a fundamental part of the Constitution because it was adopted almost simultaneously with ratification and resulted from demands during that process, defines those areas of political, economic, and social existence that are beyond the concern of government. The First Amendment's order that "Congress shall make no law" and the Fourteenth Amendment's provision that no state shall "deprive any person of life, liberty, or property, without due process" have come to mean federal and state governments alike are restricted in what laws they can enact and what they may do regarding personal rights. The politics surrounding provisions of the Bill of Rights focus on what freedoms are to be retained by the individual and what demands society can

make on individual freedoms. Some rights are procedural in nature, requiring government to follow defined procedures before it can impose its will on individuals. Other rights are substantive rights, not to be infringed on by government.

Should access to public office be restricted and representation narrowed, the scope of the Bill of Rights might be reduced and the power of Congress or the president might be enhanced. If the restraint exercised by public officials is perceived as inadequate, voters could impose restrictions and changes through representation. Representation bridges the Constitution as instrument and the Constitution as symbol. Problems of representation center on who is to be represented, who the representative is, and how that representative is to be chosen.

It is these five basic components of the Constitution—compact, separation of powers, federalism, Bill of Rights, and representation—that interact, providing a substantial political dynamism as they give rise to tensions and conflicts that occasion a constant search for some sort of balance or equilibrium in constitutional practice and jurisprudence.

The Holistic Concept of the Constitution

The constitutional components, each serving a different set of purposes, nonetheless constitute an integrated whole. The components coexist in a symbiotic relationship with each other. Each constitutional component contributes to the working of the entire mechanism, and ideally a state of equilibrium exists among the five basic integral parts.

The Supreme Court, as the authoritative interpreter of both the instrumental and symbolic provisions of the Constitution, must confront a number of fundamental questions in any given session of the Court. Of course, those questions vary substantially in difficulty. While some involve only some minor jurisdictional issue, a number of cases decided on their merits deal with some aspect of at least one of the five fun-

damental constitutional elements. These cases we regard as primary constitutional cases; they are important in defining the nature of one or another of the key components of the Constitution. Complex constitutional cases involve the interaction between and among two or more of the components.

For example, the nature of the compact that makes the Constitution fundamental could influence the balance between Congress and the courts in the separation of powers (**Marbury v. Madison,** 1803); or the question of the relations between the states and the federal government could define the form of the compact (**McCulloch v. Maryland,** 1819); or the compact could define the limits on governmental action listed in the Bill of Rights so as to shape the balance between state and nation in federalism (**Barron v. Baltimore,** 1833, and **Gitlow v. New York,** 1925); or to form a more perfect union under the compact, the various powers assigned to states could threaten individual rights (**Jacobson v. Massachusetts,** 1905); or the president's prerogatives could overreach the limits of the Bill of Rights (**U.S. v. Nixon,** 1974); or the powers of Congress could be usurped by the Court in order to meet the demands of representation (**Powell v. MacCormack,** 1969).

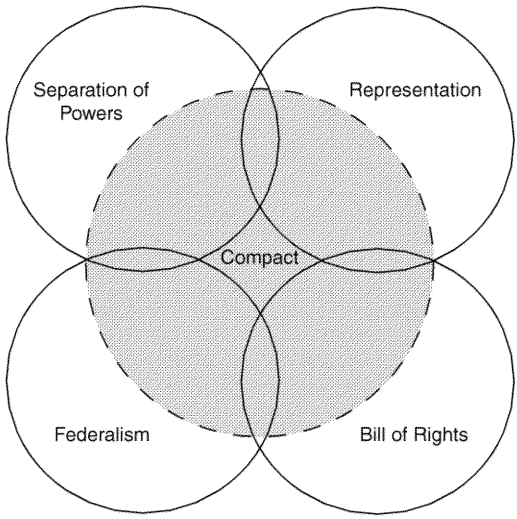
Figure 1.1 portrays the interaction or overlap between and among the five constitutional components:

It is the complex cases found in areas of the figure—where two or more of the components overlap—with which we are primarily concerned in this book. Through these cases, a better understanding of the whole or *holistic* Constitution can be achieved. But why must we concentrate on Supreme Court cases? Are not Congress, the president, and the states involved in explaining the Constitution?

Judicial Review and the Constitution as Symbol

As Corwin recognized, the power of judicial review has both "conserved the Constitutional Symbol" and benefited there-

FIGURE 1.1 The Holistic Constitution



from.[9] When the Supreme Court attaches certain meanings to the organic law, the American people generally accept those meanings. Something that comes from the Constitution is special, and those who have had the responsibility for interpreting the organic law normally require our reverence. The Supreme Court, as the keeper of the symbolic Constitution, limits the other public officials who are responsible for the constitutional instrument. But why couldn't Congress perform this needed guardianship?

Since at least the time of the landmark case **Marbury v. Madison** (1803), the Supreme Court has assumed the responsibility for interpreting the Constitution and having the final legal say, short of the amending process, as to the meaning of the fundamental law.[10] Although Chief Justice John Marshall's version of judicial review was mild in comparison to the scope of review today, his justifications for the power remain convincing. Marshall asserted:

> It is emphatically the province and the duty of the judiciary to say what the law is. Those who apply the rule to a particular case, must of necessity expound and interpret that rule.

A question of law was involved because an ordinary statute conflicted with the Constitution. The judicial duty was (and is) to determine which should prevail. Again, in Marshall's words:

> 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 the very essence of judicial duty.* (emphasis added)[11]

Of course, for Marshall, the Constitution was paramount and the conflicting law must yield. But why must the Court pronounce this? Judges had no choice, according to Marshall. They had taken an oath to support the Constitution, they were responsible for deciding all cases and controversies arising under the Constitution, and, finally, Article 6 proclaimed that all laws must be in pursuance of the Constitution—the supreme law of the land. Judges were therefore obligated to observe and uphold the Constitution, not the conflicting law.

Both before and after **Marbury,** the debate raged as to whether the courts should have the *final* say regarding the Constitution or whether Congress had an equal role in judging the constitutionality of its own enactments.[12] Despite the intensity of the debate, John Marshall's decision (if not the reasoning) has withstood the assault.[13]

However, judicial review has evolved into an instrument of power not envisaged by John Marshall in 1803. In comparison with the practice today, **Marbury** must be viewed as a

mild form of review. All Marshall stated was that courts were obligated to enforce the provisions of the Constitution rather than the conflicting statute. Further, the Supreme Court had prime responsibility for reviewing enactments that concerned the courts. At issue in **Marbury** were provisions of the Judiciary Act of 1789, not any general law emanating from the powers found in Articles 1 or 2 (Legislature or Executive). In contrast, the modern Supreme Court's review has, from time to time, become engulfed in issues of power that the Constitution assigned Congress under Article 1 (see **Powell v. MacCormack,** 1969), reserved to the states under the Tenth Amendment (e.g., **Garcia v. San Antonio Metropolitan Transit Authority,** 1985), or granted the president under Article 2 (e.g., **U.S. v. Nixon,** 1974).[14]

Despite the fact that Congress today gives grave consideration to the issue of constitutionality and presidents exercise the power of veto often based on their view of the constitutional validity of legislation, the Supreme Court's word is most often the final authority on all constitutional questions.

Common sense also dictates that if, as the Founders thought, the greatest danger to individual freedom comes from the lawmakers, some agency with an independent power base must be able to check the legislature. Without this check, the Bill of Rights—which states that "Congress shall make no laws"—would be meaningless. Either the president or the courts must assume the checking responsibility. Since, as Marshall pointed out in **Marbury,** the Court's special purview is the law specifically and the Constitution as the ultimate law, the justices rather than the president have that responsibility.

Although, as we shall see, the justices of the Supreme Court are not entirely free to impose their will on the other agencies of government, the study of the Constitution principally entails a study of Supreme Court cases.

Organization of the Book

Chapter 2 places the justices within a broad political context. It concerns the potential of judicial review and the political restraints placed on the justices that prevent an untoward exercise of judicial review leading to "government by the judiciary." Chapter 3 analyzes the constitutional compact and how it has fluctuated between social and political versions, and how it has been variably viewed as a product of the states or of the whole people. Chapter 4 concerns the separation of powers and discusses how a mixed and a separated mode of this component has been developed. Chapter 5 discusses, with case examples, the variation of federalism between a dual sovereignty and a national supremacy orientation and toward equality among the states. Chapter 6 constitutes an analysis of representation, focusing on what is represented (constituency), how constituency interests are transmitted to elected and career service public officials (participation), and, finally, who the parties responsible for effectuating those interests are (delegation). Chapter 7 focuses on how the interpretations of provisions of the Bill of Rights have varied between an individualist and a collectivist mode, and between procedural and substantive content considerations. Finally, Chapter 8 analyzes cases of higher complexity in which two or more of the components of the Constitution interact and the holistic nature of the fundamental law is made evident. A copy of the Constitution is provided in the Appendix for easy reference, as is a Case Index, which gives official case citations.

Notes

1. P. N. Goldstene, *The Collapse of Liberal Empire* (New Haven: Yale University Press, 1977), p. 3.

2. Edward S. Corwin, "The Constitution as Instrument and as Symbol," *American Political Science Review* (December, 1936): 1072.

3. Ibid.

4. 1 *Cranch* 137, 176.

5. Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," *Harvard Law Review* 42 (December–January, 1928–1929): 149.

6. 1 *Cranch* 137, 176.

7. Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (New York: W. W. Norton, 1969), p. 16.

8. Quoted in ibid., p. 5.

9. Corwin, "The Constitution as Instrument," p. 1080.

10. Although state courts on a few occasions had exercised judicial review of state legislation (e.g., **Rutgers v. Waddington** [N.Y.C. Mayor's Ct., 1784]; **Bayard v. Singleton** [1 Martin 42 N.C., 1787]; and **Trevett v. Weeden** [R.I., 1787]) and the U.S. Supreme Court had reviewed the constitutionality of a congressional enactment in **Hylton v. U.S.** (3 DALL. 171, 1796) and of a state law in **Cooper v. Telfair** (4 DALL. 14, 1800), the **Marbury** case constitutes the first time the Supreme Court invalidated a law. It was not until **Dred Scott v. Sandford** (19 HOW. 393, 1857) that another law was struck down. Nonetheless, the power of judicial review was assumed to be held by the justices.

11. 1 *Cranch* 137, 176.

12. See, for example, Christopher Wolfe, *The Rise of Modern Judicial Review* (New York: Basic Books, 1986), pp. 73–89.

13. The classic argument against Marshall's reasoning was presented by Justice John B. Gibson of the Pennsylvania Supreme Court in a dissenting opinion in **Eakin v. Raub,** 12 Seargent & Rawle 330 (1925).

14. For an account of the evolution of judicial review, see Wolfe, *The Rise of Modern Judicial Review.*

2

The Politics of Judicial Review: Accountability Versus Independence

As a working definition, we will take judicial review to mean the practice of the Supreme Court and other courts in reviewing state and federal legislative enactments and executive rules and actions in order to determine whether they are in accord with the expressed or implied provisions of the written Constitution. If not in accord, they are declared null and void.[1]

Judicial Review and Public Policy

From the beginning, the debate over the Supreme Court's use of judicial review focused mostly on the results of the decisions rather than on the role of the Court in American government. If the decision was viewed favorably, judicial review was deemed acceptable. If the results went against one's preferences, judicial review was condemned. For example, many liberals were highly critical of the pre-1937 Supreme Court's rulings that struck down much of Roosevelt's New Deal legislation. Those same persons may well have praised

the Warren Court's use of judicial review for its liberal decisions. Critics of the Warren Court's liberal activism may today be favorably drawn to the conservative activism of the Rehnquist bench.

The debate over judicial review stems from the Supreme Court's public policy decisions. When the high court renders a decision that affects a majority of the people or a large segment thereof, the justices are making public policy. By reinforcing, changing, or rejecting congressional and state laws through judicial review, the Supreme Court acts as a superlegislature of sorts. Several examples are available. In **Pollock v. Farmers' Loan & Trust Company** (1895), the high court struck down a federal income tax as being in violation of the Constitution. An income tax indeed affected millions of the citizenry, and apparently a majority disagreed with the court's decision. The Sixteenth Amendment corrected the error into which many thought the court had fallen. In **Brown v. Board of Education** (1954, 1955) schools were ordered to dismantle those systems that had separated white children from African-American children. And in **Roe v. Wade** (1973), the Court majority struck down most state laws regulating abortions and established a public policy that is still a subject of intense political and legal activity. The Supreme Court's ruling in **Reno v. American Civil Liberties Union** (1997) declared a congressional act regulating "decency" on the Internet to be a violation of the First Amendment; clearly, this is a decision that affects public policy in a significant way. Again, millions who access the Internet have been affected. Because of the policy implications of cases such as these, *majoritarian democracy* dictates that the justices somehow be held accountable for such decisions.

However, *the rule of law* dictates that judges must remain aloof from politics and avoid joining the debates surrounding policy issues. They must do this in order to render objec-

tive and just decisions and in order to protect the rights of minorities and individuals who have been threatened by unwarranted actions of the majority. The pressures of majoritarian democracy, felt so acutely by Congress, ought not to be a factor in the Supreme Court's considerations. To settle disputes and scrutinize threats to individuals, the judges must remain distant from the biases and interests represented in a case and ignore the strident shouts of the majority outside the courthouse. Consequently, the Court, unlike Congress or the executive, must satisfy two contradictory demands. Judicial independence or rule of law competes with public accountability or majoritarian democracy for the attention of the justices. Rather than arguing over the correctness of the outcome of any particular case, the debate over judicial review should focus on where a series of constitutional decisions places the justices on a continuum between accountability and independence. Ideally, they should be dead center.

Although the Supreme Court gives close constitutional scrutiny to executive orders and to state legislation, by far the most controversial aspect of judicial review concerns the Court's constitutional supervision over congressional laws. The critical leadership in a majoritarian democracy is provided by the legislature; elected representatives of the people enact the public's business and are held accountable for enactments by the people in periodic elections and by public opinion and interest group activity. When laws enacted by the people's representatives generate constitutional issues and the Supreme Court is brought in to resolve the issues, a direct confrontation between judicial independence and public accountability is evident. Should the justices remain accountable to the public by accepting the congressional version of the law or should independent judgment be exercised and the law, if the courts deem it necessary, be invalidated? The controversy over judicial review, then, is intensified when the re-

sults of congressional deliberations are in question. However, the Constitution, tradition, and politics all encourage the justices to exercise independent judgment, despite the demands of majoritarian democracy.

Constitutional Provisions That Encourage Judicial Independence

To ensure judicial independence, the Constitution dictates that justices of the Supreme Court and all federal judges be appointed by the president and confirmed by the Senate and not elected, as are most of their state counterparts. Federal judges remain in office during good behavior, whereas state judges often have fixed terms of four to six years. Those fixed terms must be renewed by election. Article 2 reads: "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . judges of the supreme Court." Article 3 adds, "The judges . . . shall hold their Office during good Behavior." This has come to mean that by the time a president submits the name of a Supreme Court nominee to the Senate, that person has survived an intensive screening process and in most cases his or her confirmation is assured. The appointee has the security of serving on the high court as long as he or she is willing and able.[2] However, the appointment process can also be used to make the Court more accountable by conveying the views and expectation of those who appoint and confirm.

Article 3 of the Constitution also assures that the justices' salaries will not be "diminished during their Continuance in Office." Thus, high court appointees, after suffering through a thorough and political process, have lifetime tenures and salaries free from the threat of cuts. They and other federal judges are in a position to exercise judgment free from fear of reprisals.[3]

Article 3 also dictates that the "judicial power shall extend to all Cases [and] Controversies." The justices must, thereby, wait for disputes to be brought to them. Unlike Congress or the president, the Court is unable to seek out legal issues for resolution. Being reactive instead of proactive shields the justices from many controversial political issues. Advisory opinions, feigned controversies (cases by parties who agree with each other to obtain a legal answer), cases brought by persons lacking standing, moot cases, and disputes not yet sufficiently concrete are not true "Cases and Controversies" and thus are beyond judges' authority to decide them.

Federalism also protects the justices. State cases based upon explicit, independent, and adequate state grounds are largely unreviewable by the nation's high bench. These limitations tend to keep the Court out of many pressing political disputes, helping to perpetuate the justices' independence. As one of the three branches of government under the principle of separation of powers, the Court has become both apart from and equal to the president and Congress, assuring its independence. Beyond the constitutional provisions, however, other protections also push the justices toward the independence end of the independence–accountability continuum.

Extra-Constitutional Factors Contributing to the Court's Independence

The Supreme Court's process of deliberation remains largely a mystery, hidden from public scrutiny. Except for those days when attorneys argue their cases before the justices and when the justices announce their final decisions, the crucial deliberations take place in the conference room and in chambers, secure from the prying eyes of the press and public. With the decisional process free from close public observation, the jus-

tices are not held accountable for what they say in conference and how they arrive at their decisions.

The mystique of the law also protects judges. The idea that the law is an objective standard and that the justices are merely applying this standard to issues brought to them despite their preferences and despite the demands of the public helps the jurists to remain independent. "A government of laws, not of men" symbolizes this myth.

The black robes worn by the jurists and the ceremony surrounding the solemn proceedings typical of hearings before the nation's high bench and their ornate and impressive courtroom also set the justices aside from the unseemly machinations of partisan politics. The withdrawal of the judges from partisanship and active politics reinforces their independence. When justices continue as backdoor advisers to presidents, objectivity appears to be lost and suspicion is brought on the Court.[4] Not only do the jurists withdraw from politics, but they are also prevented from continuing the private practice of law with the aim of protecting them from potential conflicts of interest. Also, the collective nature of Supreme Court decisions tends to protect single justices from much criticism. Of course, the tradition of dissenting opinions highlights the individual aspect of the Court's process, but a majority opinion is signed by five or more justices, all sharing responsibility for the decision.

Since the Judiciary Act of 1925, the Supreme Court has gained virtually complete control over its own docket. The justices take only those cases they wish to review. With the ability to set their own agenda, the jurists are able to remain independent of many of the litigation demands made on them. Jurisdictional requirements also protect the high bench from cases that may bring them in conflict with state courts. Federal cases remain in federal courts while the vast majority

of state legal disputes are resolved by state courts. All of these factors tend to isolate the justices from public scrutiny and from political accountability.

Internal Factors That Hold the Justices Accountable

Despite the awesome power of judicial review that has led some critics to fear "government by the judiciary," the justices of the Supreme Court are not totally free to read their personal preferences into the Constitution.[5] Both internal Court checks and external political pressures give pause to justices in cases that involve controversial policy issues.

Although largely dependent upon whether the justices themselves observe these restraints, internal court checks can be formidable. Judges, by tradition and training, are compelled to separate themselves from their preferences and biases when settling legal disputes. When lawyers don the robes of judicial office, they forgo the role of advocates and assume the objective, third-party stance of a judge, accountable to the law or to those who make the law. Of course, there appears to be a natural tendency for the judges to strive for independence, but a number of restraints remind them of their responsibilities to other policymakers and to the public.

In the Anglo-American common law system, lawyers and judges search for prior decisions to justify their arguments in the case under consideration. *Stare decisis* means following precedent, following what earlier judges decided in similar cases. In our legal system, these precedents have the authority of law. Should precedent be lacking or should prior doctrine be used inappropriately in a justice's opinion, the critics are quick to respond.

Decisions by appellate courts, involving the participation of from three to nine judges (or more in a circuit court *en*

banc hearing), require an agreement among at least a majority. In the Supreme Court, four justices must agree to hear a case and five must iron out differences sufficiently to arrive at a majority decision. This requirement means that personal preferences and biases of a single justice must be set aside in order to forge a decision and written opinion that satisfies at least four other jurists. The decisional process, from the filing of petitions for review to the final written opinions, is designed to arrive at a collective decision, encouraging discussion, compromise, and bargaining, and discouraging isolation, independence, and rigidity.

External Factors That Hold the Justices Accountable

Although the decisional process of the justices is largely hidden, the end result of the deliberations is known. In important cases decided on their merits, Supreme Court justices are required to accompany their final decisions with written justifications that become part of the public record and are subject to close critical scrutiny from other judges, lawyers, politicians, the media, and the public. Although less obvious, the written opinions are accompanied by recorded votes. Each justice is accountable for his or her final vote in each case even though he or she has not written the opinion.

External political restraints on the justices such as a threat to the tenure of a particular justice or criticism of the Court as an institution and efforts to restrict its jurisdiction are significant, although infrequently utilized. Should a justice persistently remain unresponsive to criticism of his or her actions, impeachment may result. According to Article 1:

> The House of Representatives . . . shall have the sole Power of Impeachment. . . . The Senate shall have the sole Power to try

> all Impeachments. . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Justice Samuel Chase was impeached in 1804 and found not guilty by the Senate. Only two other justices have recently been seriously threatened with impeachment, and no others have been forced to undergo the process. Justice Abe Fortas resigned from the high bench in 1969 when his relations with an industrialist convicted of securities fraud subjected the jurist to heavy criticism.[6] Had he not resigned, he might well have been subject to impeachment proceedings. Justice William O. Douglas survived two serious impeachment threats. In 1953 he stayed the execution of two convicted spies, much to the disgust of many members of Congress who called for his impeachment. However, the impeachment motion was tabled by a House subcommittee. Again, in 1970 he was singled out as the symbol of the perceived liberal excesses of the Warren Court and was targeted for removal. Douglas's apparent inappropriate off-bench behavior, his independence, and several of his controversial publications added fuel to the impeachment flames. Again, a special subcommittee of the House Judiciary Committee failed to find sufficient grounds for impeachment. Despite the infrequency of impeachment threats, they remain an ultimate weapon of accountability. Likely, the threat of being a subject of impeachment, however unwarranted, may deter some ill-advised judicial behavior.

Should a decision of the Court be significantly out of line with the prevailing opinion, Article 5—the amending process—supplies recourse. Although amending the Constitution to correct a Court interpretation fails to punish the jurists, it clearly suggests that they should mend their ways. The Eleventh Amendment corrected the Court's opinion in **Chisholm v. Georgia** (1793) that had allowed citizens of one state to sue another state in federal court for breach of contract. The amendment reads:

> 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.

The disastrous **Dred Scott v. Sandford** case of 1857, which ruled that African-Americans never were and never could be citizens, was undone by the Fourteenth Amendment, but not until after the Civil War. The amendment reads: "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."

After the Court had declared the income tax to be in violation of the Constitution in **Pollock v. Farmers' Loan & Trust Company** (1895), in 1913 the requisite number of states ratified the Sixteenth Amendment, which reads simply: "The Congress shall have power to lay and collect taxes on incomes . . . without apportionment among the several States, and without regard to any census or enumeration."

In 1970 Congress lowered the voting age to eighteen for all federal, state, and local elections. The Court, in **Mitchell v. Oregon** (1970), held that Congress could lower the age only in federal elections; the states retained responsibility for the age requirement for all other elections. By 1971 the Twenty-sixth Amendment to the Constitution was ratified, lowering the age for all elections to eighteen with these words:

> 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.

Although these are the only successful attempts to correct a Supreme Court's reading of the Constitution by amendments, other fairly serious efforts have been mounted. Deci-

sions reapportioning state legislatures (**Baker v. Carr,** 1962), outlawing the reading of prayers in public schools (**Engel v. Vitale,** 1962), upholding busing to integrate schools (**Swann v. Charlotte-Mecklenburg Board of Education,** 1971), giving freedom of choice in abortion (**Roe v. Wade,** 1973), and protecting burning of the American flag as a form of expression (**Texas v. Johnson,** 1989) have all generated various proposals to change the Supreme Court's interpretation of the Constitution. Thus far, none has received the two-thirds requirement to place the proposals before the states for ratification. Because of the fundamental nature of the Constitution, amending the agreement is, rightfully so, a laborious enterprise. Congress does, however, have other less drastic methods for holding the Court accountable.

The Constitution assigns the powers of the purse to Congress. Although a critical Congress cannot tamper with the current salaries of the justices, pay increases can be denied. Also, Congress controls the overall budget of the Court. Needed staffing, facilities renovations, equipment updating and the like can be put on hold, indirectly chastising the Court for ignoring demands that the Court get more in line with majority views. The needs of lower courts can also be ignored, making the position of the Supreme Court, at the head of the federal judiciary, awkward.

If the Supreme Court interprets a law in such a manner as to bring it into conflict with the Constitution, Congress can quickly and simply reenact a new version of the law, correcting the wording that led to the Court's ruling. Legislative reversals of high court cases are not uncommon. Perhaps the most notable, and long overdue, legislative reversal was when the 1964 Civil Rights Act relied on the interstate commerce clause to outlaw racial discrimination in public accommodations and thus reinstated a 1873 civil rights law that had been invalidated by the Court in the **Civil Rights**

Cases (1883) on the ground that Congress, in enacting it, had incorrectly relied on the Thirteenth and Fourteenth Amendments.

In **Alyeska Pipeline** (1975), the high court ruled that the law prevented winning litigants from collecting the cost of lawyers' fees from the losers unless Congress so provided. Congress quickly passed the statute authorizing the award of attorneys' fees in civil rights cases. Similarly, in **Grove City College v. Bell** (1984), the Supreme Court majority applied Title IX of the Education Amendment Act of 1972 narrowly, ruling that federal funds could be withdrawn only from the unit of a college guilty of gender discrimination rather than from the entire institution. In 1988 Congress enacted the broader coverage of the penalties. The Civil Rights Act of 1991, finally signed by the president after an earlier version was vetoed for fear of racial quotas being imposed on employers, reversed six Supreme Court decisions on job discrimination. The Religious Freedom Restoration Act of 1993 reversed the high court's decision that states could have neutral laws that had a negative effect on religious practice (**Employment Division v. Smith,** 1990). However, in **City of Boerne v. Flores** (1997), a 6–3 majority ruled that the act was an unconstitutional intrusion on state powers (federalism) and an usurpation of judicial power (separation of powers), as the only way to override the Court's interpretation of the Constitution was by a constitutional amendment, not a statute.

Congress also controls the appellate jurisdiction of the Court. According to Article 3:

> In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appel-

late Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

In **Ex Parte McCardle** (1869), the Court recognized Congress's power to withdraw *habeas corpus* cases from the appellate docket through Congress's power to regulate what lower court cases can be reviewed. In recent years, efforts have been made to remove the high court's appellate jurisdiction over several categories of cases, for example, abortion, but none was enacted. Although the **McCardle** case perhaps will remain an oft-cited example of Congress withdrawing certain cases from the appellate jurisdiction of the high court, several serious threats to the "Great Writ" of *habeas corpus* were mounted during the Warren Court era. Recently, Congress, in the Anti-Terrorism and Effective Death Penalty Act of 1996, placed some limits on the availability of *habeas corpus* to state death-penalty inmates wishing to have the federal courts hear their cases.

Congress also controls the size of the Supreme Court. Since 1787, Congress has changed the number of justices sitting on the high bench seven times. Generally, the decreases were designed to withhold an appointment from a president, while increases were attempts to alter the philosophical leanings of the high bench. Accountability was the motivation behind both types of congressional action. The most drastic proposal was that of President Franklin Roosevelt's court-packing plan of 1937: The president's hope was to increase the Supreme Court's size to fifteen in order to counter the anti–New Deal attitudes of a number of the older justices. The proposal was defeated by Congress, but apparently its threat led the Court to express a more favorable view of New Deal legislation, as evidenced by the Court's rulings on minimum wage laws (**West Coast Hotel v. Parrish,** 1937) and federal government regulation of the economy (**N.L.R.B. v.**

Jones and Laughlin Steel Corp, 1937). It is most unlikely that Congress will meddle with the now traditional number of nine, however.

Congress can also attempt to overcome the independence of the jurists by changing when the Court begins its sessions. In one instance in 1802, a suspicious Congress canceled an entire term of the Court. A Republican Congress hoped to prevent the justices from declaring unconstitutional a repeal of a previous judiciary act that had added a number of Federalist judges to the courts. The action apparently worked, as in 1803 the Supreme Court upheld the repeal in **Stuart v. Laird.** In recent times Congress has not tampered with the Court's hearing schedule, which begins each year on the first Monday in October.

The president and Congress work together to bring more accountability to the nation's high bench through the appointment process.[7] When compared with the election of judges, common at the state level, the appointment of federal judges shields them from voter accountability. However, presidential appointments are most often motivated by accountability considerations. Through the appointment of a sympathetic justice, presidents can continue to influence policy long after they have left office. For example, President Richard Nixon, fulfilling one of his major campaign promises, appointed those he hoped would be conservative "law and order" justices. Franklin Roosevelt's initial appointments replaced the conservative activists on the bench with pro–New Deal jurists. The view was that the "Nine Old Men" were far too independent, ignoring the needs of the time, public opinion, and the popular policies of Roosevelt.

Certainly, by the time an appointee to the Supreme Court survives all of the careful scrutiny in the screening process—involving the Justice Department and Attorney General, the FBI, the American Bar Association, the Senate Judiciary Committee, numerous interested groups, the media, and the

full Senate—he or she will not likely be an extremist or one who would not feel some concern for accountability. Senators' questions and interest group statements are efforts to remind the nominee of the views of those who confirmed the justice, and thus to hold the justice accountable in advance. Of course, once appointed, justices are free agents. Nonetheless, few forge an independent course by turning away from those who placed them on the Court.

Attempts to hold the Supreme Court accountable by the appointment process extend to the selection of lower court judges. Presidents appoint lower federal court judges whose decisions are subject to appeal to the Supreme Court. A reciprocal relationship is involved; lower court decisions are reviewed by the high court, setting its agenda, and in turn, federal district court judges are responsible for carrying out orders of the high court, and district court judges, along with circuit court judges, are bound to follow the sometimes flexible precedents set by the Court.

Those appointed to federal benches retain values that allowed them to survive the recruitment process and perhaps acquire some new values from the lessons they learned from that experience. President Carter sought a more representative judiciary by appointing more women and minorities. President Reagan's and the first President Bush's lower court appointees tended to be conservative, white, male, and young, able to perpetuate the "Reagan Revolution" long after the president had left office. President Clinton has elevated moderates to the Supreme Court and lower federal benches, perhaps easing the ideological results of previous appointments. These lower court appointments are especially decisive when Congress enacts an "Omnibus Judges Bill," giving the president the authority to appoint a considerable number of new judges to the federal benches.

Ultimately, the president is responsible for enforcing the decisions of the Supreme Court. Should the chief executive

disagree with the high bench, the ruling could in the extreme be ignored; a more likely outcome would be that the decision would be carried out only reluctantly and perhaps belatedly. For example, President Eisenhower had some misgivings about the desegregation decisions of the Warren Court, and only after violence broke out in the Little Rock, Arkansas, high school under court order to desegregate did he bring in the National Guard to assure the safety of the children.

Nearly all of these controls over the Supreme Court are aspects of the primary constitutional structure of separation of powers. Congress and the president, as coequal branches of government, attempt—often with success—to check the high court justices, should the jurists extend their powers of judicial review too far into the direct concerns of the legislature and the executive. Usually the success of these checks depends upon cooperation between the president and Congress, an infrequent situation with a government divided along party lines. Also, most of these checks on the Court or its members are available but regarded as drastic. Nearly always less severe restraints, both internal and external, lead to the desired high court behavior.

Federalism also plays a checking role on the independence of the Supreme Court. Under the label of "new judicial federalism," state courts have shown they are not helpless pawns of the Supreme Court. State judges, being closer to their constituents, often susceptible to electoral pressures and likely products of the state's political system, tend to be more accountable to their state jurisdictions than to the dictates of the Supreme Court. State courts have increasingly turned to their own constitutions to avoid review by the nation's high court or occasionally to actually defy a ruling by the Supreme Court. If state judges rely expressly on independent and adequate state grounds for their decisions, their rulings are not reviewable by the U.S. Supreme Court. In **Michigan**

v. Long (1983), the Supreme Court reaffirmed this aspect of federalism in these words:

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground.
>
> * * *
>
> If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Even after review by the Supreme Court, upon remand, state courts can apply provisions of the state constitution; this sometimes leads to undercutting of the Supreme Court's ruling. In Bill of Rights issues, state jurists cannot be more restrictive in their rulings than what the U.S. Supreme Court has permitted, but they can expand freedoms based on their interpretation of state constitutional rights. For example, in **State v. Chrisman** (1982), the Washington Supreme Court ignored the U.S. Supreme Court's use of the Fourth Amendment of the Bill of Rights dealing with search and seizure and turned, instead, to the more stringent requirements of the state's Declaration of Rights.[8] When the U.S. Supreme Court remanded **Witters v. Washington Department of Services for the Blind** (1986) to the Washington Supreme Court, the state justices again defied the nation's high bench. Although the U.S. Supreme Court had approved the use of public funds for a blind student to attend a church seminary, the state court of last resort pointed to the state's restrictive religion provision and withheld state funds for such purposes. As explained in the **Michigan v. Long** opinion, some areas of state law other than Bill of Rights issues will also remain primarily on the

dockets of state courts and will not be reviewed by the Supreme Court. Even if the requirements are met to appeal to the nation's high bench, only a very small percentage of requests for review *(writs of certiorari)* are granted. This whole area of federalism as it applies to the relations between state and federal constitutions and courts has revitalized another check on the independence of the Supreme Court.[9] The justices of the high bench do not always have the final word on the law.

Perhaps as a last resort, but not as uncommonly as we might expect, losers at the Supreme Court level may simply ignore the justices' ruling and fail to comply. Certainly, the long and reluctant process of desegregation in the South was partially due to noncompliance. In **Engel v. Vitale** (1962), the high bench declared prayers in public schools to be in violation of the First Amendment, and yet at least twenty years later, school board officials continued informally to either approve or purposely ignore the use of school time for prayer.[10] Similarly, the Court declared legislative vetoes unconstitutional in **INS v. Chadha** (1983), but Congress has continued the practice, although on a somewhat reduced basis; as yet, their noncompliance has not been challenged in the nation's high bench.

As with other branches of the government, the Supreme Court does not ignore public opinion. This can be seen in the Court's 1937 switch on the constitutionality of economic regulation and in dissents by justices who feel the Court majority has succumbed to public pressure. In an angry dissenting opinion in **Dennis v. U.S.** (1951), Justice Hugo Black chided his Supreme Court colleagues for giving in to the public's fear of domestic Communists:

> There is hope that in calmer times, when present pressures, passions and fears subside, that this or some later Court will

> restore the First Amendment liberties to the high preferred place where they belong in a free society.

Justice William O. Douglas echoed Black's words in **Scales v. U.S.** (1961): "What we lose by majority vote today may be reclaimed at a future time when the fear of advocacy, dissent, and non-conformity no longer cast a shadow over us."

Despite the numerous restraints on the justices of the Supreme Court, arguably the most effective instrument for holding the Court accountable is self-imposed. Judicial self-restraint versus judicial activism is simply another way to characterize judicial accountability versus judicial independence.

Judicial Review and Self- (and Other) Restraint

Judicial self-restraint has a long-honored tradition most closely associated with Justices Oliver Wendell Holmes, Louis D. Brandeis, and Felix Frankfurter.[11] Awareness of the disruptive power of judicial review should, in the view of these restraintist jurists, lead justices only reluctantly—and only when absolutely necessary—to declare a congressional enactment to be unconstitutional. A careful exercise of restraint permits the Court to build "good will," protecting it from untoward criticism in those rare exercises of activism when the justices may directly defy the demands of Congress, the president, or the public. Chief Justice Charles Evans Hughes correctly reasoned that:

> The success of the work of the Supreme Court in maintaining the necessary balance between State and Nation, and between individual rights as guaranteed by the Constitution and social interest as expressed in legislation, has been due largely to the deliberate determination of the Court to confine itself to its ju-

> dicial task, and while careful to maintain its authority as the interpreter of the Constitution, the Court has not sought to aggrandize itself at the expense of either executive or legislature.[12]

Self-restraint can take several forms. Through its control of its docket, the Court can simply not accept for review a case that might place it in jeopardy with Congress, such as a challenge to the Vietnam War (e.g., **Massachusetts v. Laird,** 1970). Technical reasons may explain the denial of review but, at bottom, the Court may simply wish to avoid involvement in a highly controversial issue. Justice Felix Frankfurter admitted as much in his opinion written in support of a denial of *certiorari* in **Maryland v. Baltimore Radio Show** (1950):

> Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final; it may not be the judgment of the state court of last resort; the decision may be supportable as a matter of State law, not subject to review by this Court. . . . The decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. *Pertinent considerations of judicial policy here come into play.* (emphasis added)

Although the Court assumed an activist stance in **Baker** by saying that judges could decide questions regarding state reapportionment, the "rules" for political questions permit the Court to avoid deciding a divisive case on its merits. For example, in **U.S. v. Nixon** (1974), the president's lawyers argued that the filing of a subpoena for presidential tapes issued by the special prosecutor was covered by the **Baker** rules as a conflict between the president and his subordinates and thus the dispute, solely within the executive branch, was

a "political question." However, the Court saw the issue of who should determine the availability of evidence in criminal cases as the concern of the courts, not the president, and rejected the argument, ruling against the embattled president.

Once they accept a case, the justices may still exercise restraint. The classic statement of the rules that can be relied upon to avoid deciding more than is necessary when a case is accepted was provided by Justice Brandeis in a concurring opinion in **Ashwander v. T.V.A.** (1936):

> The Court developed for its own governance in cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are [1] The Court will not pass upon the constitutionality of legislation in a friendly nonadversary, proceeding . . . [2] The Court will not "anticipate a question of constitutional law in the advance of the necessity of deciding it." . . . [3] The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is applied." . . . [4] The Court will not pass on the constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . [5] The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. . . . [6] The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. . . . [7] When the validity of an act of the Congress is drawn in question . . . it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Justices could argue that the dispute involves a "political question," and, thus, it is nonjusticiable or beyond the power of the Court to decide using judicial sources. In the landmark

case of **Baker v. Carr** (1962), Justice William Brennan explained the rules by which political questions are identified. They were generally questions of separation of powers:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

In addition, the justices could delay scheduling oral arguments, delay deciding the issue so that the dispute would be resolved in the meantime or at least become less of a decisive issue, or delay implementing the decision. Although an extreme example, the desegregation case, **Brown v. Board of Education** (1954, 1955) represents all three versions of "delay."[13] Most often cited as an example of the Warren Court's activism, it illustrates the uses of delay by the Court. Because of the political, economic, and social sensitivity of the issue, great care was required no matter what the outcome of the decision. A three-judge panel of the federal district court first heard the case on June 25, 1951, and five weeks later decided in favor of continued segregation. Appeal to the Supreme Court could be direct because of the decision by the special three-judge panel. But delay, this time, was the "handmaiden of justice." The appeal from the **Brown** ruling was not accepted by the Supreme Court until a year later. Oral arguments were scheduled for the October

term of the Court. However, just days before the hearings, the Court postponed them and rescheduled them for December. Finally, on December 9, 1952, the high court was ready to hear oral arguments on **Brown** and three other companion cases. Despite a thorough presentation of all issues, the lack of any strong agreement either to reverse or affirm and a perceived need to postpone prompted the justices to delay a formal vote on the merits. Eventually (in June), they agreed to hold the **Brown** case over for re-argument scheduled for the 1953 terms.

On December 7, 1953, the Supreme Court, now with Chief Justice Earl Warren at the helm, heard the re-arguments on specific questions the Court had posed to the litigants. Sometime in March (no record was made of the exact date), the justices voted on the **Brown** case. A dissent and possibly two concurrences were indicated. Chief Justice Warren rightly concluded that unanimity was required. He held the case over, extending discussions among the justices in a number of conferences. Not until May 17, 1954, was the unanimous opinion of the Court announced, striking down segregation in public education. Even at this point, restraint encouraged still further delay. The justices asked for further arguments on how to implement the decision. In April 1955, oral arguments on methods for desegregation were held, and on May 31 of the same year, the Chief Justice announced the Court's unanimous decision that public schools were to be integrated "with all deliberate speed." For over a decade, mostly "deliberate" and little "speed" were the rule on the part of many school systems. In October 1969 the Supreme Court, under new Chief Justice Warren Burger, ruled that "with all deliberate speed" was no longer part of the implementation formula. Every dual school system was to integrate "at once" (**Alexander v. Holmes County Board of Education**, 1969). Thus, from the district court's initial decision in **Brown** in 1951 until the **Alexander** ruling in 1969, delay played a cru-

cial role in the Court's deliberations. Given the controversial nature of the issue, perhaps delay was a wise tactic.

Once a decision has to be made and delay is no longer an alternative or is judged inappropriate, the Court still has several restraintist responses available when forced to decide a divisive case on its merits. By using vague language, the Court will leave some doubt and assure that the question will show up again on its docket. Or only part of the issue may be decided, thus gaining the justices more time before other elements have to be dealt with.

The justices also may fend off some pressures by not applying decisions retroactively. In **Gideon v. Wainwright** (1963), a unanimous Court ruled that the Sixth Amendment required states to extend right to counsel to indigents brought to trial for felonies. The general support for the decision permitted the justices to apply right to counsel retroactively. Criminals held by states could appeal their conviction if they had not been provided an attorney at their trial. The **Gideon** ruling, however, was generally accepted by the states.[14] This was not the case with subsequent Sixth Amendment opinions. The uproar following the rulings in **Escobedo v. Illinois** (1964) and **Miranda v. Arizona** (1966) may help explain why they were not made fully retroactive.[15]

If the Court feels compelled to reverse an unpopular decision, the justices can simply admit they have changed their minds and announce the reversal. Again, the **Gideon** case is a good example. The Court specifically reversed **Betts v. Brady** (1942), which had required right to counsel only under special circumstances. Of course, reversals can cut two ways. If the reversal is in line with the views of Congress or the president, the Court may be expressing some tendency toward accountability. At times the Court backs off from an unpopular ruling without saying so, perhaps by "distinguishing" the earlier case. This is what happened when members of Congress attacked the Court for some rulings said to favor

Communists. With Chief Justice Warren openly criticizing congressional activity, the Court had said no one could be held in contempt of Congress for refusing to answer a legislative investigating committee's questions unless the committee made their relevance clear (**Watkins v. United States,** 1956). That decision and others, including one that the states could not prosecute someone for internal subversion because the federal Smith Act "pre-empted" that subject (**Pennsylvania v. Nelson,** 1956)—produced congressional ire and nearly successful efforts to strip the high court of jurisdiction over internal security issues. Faced with that legislative effort to diminish its power, the Supreme Court backed off. It said someone called before a legislative committee had no "right to silence" and must answer relevant questions (**Barenblatt v. United States,** 1959) and then ruled that the states could indeed regulate subversion aimed at them (**Wyman v. Uphaus,** 1959).

A case-by-case approach to disputes over interpretations of the Constitution such as right to counsel issues that remained unresolved in **Gideon**[16] leads to an incremental development of doctrine. Such a practice lends itself well to justices who are reluctant to boldly assert abrupt changes in constitutional law. Their ultimate aim is achieved eventually but gradually and with less chance of provoking serious negative reaction.

Judicial self-restraint, whether exercised early in the process, when the Court may deny review, or even after a decision has been rendered, has a number of virtues. Primary among these is self-preservation. On those few occasions when the justices feel they must ignore public opinion or Congress, their authority will likely not be diminished if they have previously exercised sufficient restraint. By largely accepting the versions of the law expressed by the president and enacted by Congress and the states, the justices enhance their image among the public sufficiently to allow them to make an occasional unpopular decision. Should judicial in-

dependence (judicial activism) not be balanced by public accountability (self-restraint), the public's confidence in the Court's view of the Constitution—and the Constitution itself—will be lost. Likely, the several means available to Congress and the president to hold the Court or a justice accountable may then be brought to bear.

Notes

1. The definition is a paraphrase of that used by Charles Grove Haines, *The American Doctrine of Judicial Supremacy* (Berkeley: University of California, 1932), p. 1.

2. Only 28 presidential nominations for the Court out of 147 sent to the Senate have failed to receive the advice and consent of the upper house.

3. In 1997 the justices' salaries were $175,400 for the chief justice and $167,900 for the eight associate justices, now over $181,000 and $173,000, respectively.

4. For example, Justice Abe Fortas came under attack for continuing to advise President Johnson on policy matters. Chief Justice Earl Warren's chairmanship of the Warren Commission was regarded by many as ill-advised for the same reason. Justice Louis Brandeis's efforts to shape policy similarly appeared unseemly.

5. E.g., Raoul Berger, *Government by Judiciary* (Cambridge: Harvard University Press, 1977).

6. Also, congressional critics of the Warren Court viewed Fortas as a willing participant in its excessively liberal decisions.

7. See Charles H. Sheldon and Linda Maule, *Choosing Justice: The Recruitment of Federal and State Judges* (Pullman: Washington State University Press, 1998).

8. For a complete account of the **Chrisman** case, see Walfred Peterson, *Dormitories, Drug Dens, and Due Process: The Law of Search in the Federal System* (Bristol, IN: Wyndham Hall Press, 1986).

9. See, for example, the discussions in "Symposium: The Washington Constitution," *University of Puget Sound Law Review* 8 (1985): 157; B. McGraw (ed.), *Developments in State Constitutional Law* (Williamsburg, VA: National Center for State Courts, 1984) and Symposium, "State Constitutional Commentary," *Albany Law Review* 59 (1996): 1539–1940.

10. For this and other examples of checks on the Supreme Court, see Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton: Princeton University Press, 1988) and his *American Constitutional Law* (New York: McGraw-Hill, 1995).

11. Samuel J. Konefsky, *The Legacy of Holmes and Brandeis: A Study in the Influence of Ideas* (New York: Collier Books, 1964). However, see Harold J. Spaeth, "The Judicial Restraint of Mr. Justice Frankfurter—Myth or Reality," *Midwest Journal of Political Science* 8 (February 1962): 22.

12. Charles Evans Hughes, *The Supreme Court of the United States* (Garden City, NY: Garden City Publishers, 1936), pp. 40–41.

13. Richard Kluger, *Simple Justice* (New York: Alfred Knopf, 1976).

14. Twenty-two states had filed *amicus* briefs in **Gideon** supporting right to counsel, and only Florida and two other states argued against applying the Sixth Amendment so broadly. The generally favorable reception to **Gideon** was in sharp contrast to the negative reactions to **Escobedo** and **Miranda.**

15. **Escobedo** ruled that only voluntary confessions were to be admitted at trial. **Miranda** required that, upon arrest, persons be informed of their constitutional rights.

16. For example, when in the criminal process should a lawyer be appointed, and does right to counsel apply to juveniles and in civil cases?

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3

The Compact: "We the People . . . do ordain and establish this Constitution for the United States of America"

The compact, or constitutional covenant, is an open or public agreement between members who share a common bond and enjoy equal status.[1] Consent anchors the compact. The compact assigns mutual obligations between the parties to the agreement—those who sign the agreement or perhaps those who give up certain private rights in order for the collectivity to protect other rights and work toward collective goals.

While the terms "compact," "covenant," and "public contract" can be used interchangeably, the compact is different from the textual constitution or charter. The compact is what gives the details of the charter legitimacy. The compact is analogous to the handshake that seals private agreements. It is not part of the agreement but indeed makes that agreement valid.

The idea of the compact as applied to government in the United States is generally associated with John Locke, an

eighteenth-century English philosopher who based his theory of government on a compact. As he explained in his *Second Treatise of Government:*

> For when any number of men have, by consent of every individual, made a community . . . Whosoever, therefore, out of a state of nature united into a community must be understood to give up all power necessary to the ends for which they unite in society to the majority of the community. . . . And this is done by barely agreeing to unite into one political society.[2]

However, the tradition of agreement between the governed and the governors is as ancient as the Greek city-state.[3] It held early religious congregations together[4] and constituted the basis for colonial America.

> In the Name of God, Amen. We, whose names are underwritten, . . . do by our presence, solemnly and mutually in the Presence of God and one another, covenent and combine ourselves together into a civil Body Politik: for our better Ordering and Preserving, and Furtherance of Ends aforesaid; And by Virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Offices, . . . as shall be thought most meet and convenient for the general Good of the Colony.

A compact has also been used to justified monarchies or dictators.[5]

Modern theories of the compact originated in the Age of Enlightenment. In order to assure public support for a government devoted to the "public good" or general welfare, that government must be based on consent. Further, in order for the citizenry willingly to assume obligations needed to make the government viable, again, it must be based on con-

sent. Members of the community agree to give to government certain rights they had held as individuals in order for government to have power and authority to protect other rights and pursue collective goals. The foundation for a republic, then, is self-government. The basis for such a government is the compact. However, the nature of the compact can vary depending upon (1) who the parties to the agreement are and (2) what is created by the agreement.

Who Are the Parties Agreeing to the Compact?

Initially, in the United States, it was conceded by many that the parties to the compact were the states. The thirteen independent and sovereign states predated the Constitution and even as colonies had been independent of each other. Following the American Revolution, their lack of cooperation doomed America's first compact, the Articles of Confederation, which lacked the wherewithal to govern effectively. Recognizing a need to work together more effectively, the states, some eagerly and others reluctantly, agreed to the constitutional compact, by which they relinquished certain rights to the Union in order to promote collective goals. The states took precedent over the Union that was formed after the states had already existed as sovereign entities. What power the Union possessed had been granted to it by the states. The state primacy advocates contended:

> It was the individual and separate states, not "one people," that declared independence of Great Britain, from which it follows that the states preceded the United States in time. Thus, . . . the states, and not "we the people," created the United States, and more specifically, the United States is a compact entered into by the sovereign states with each other.[6]

Although the Preamble refers to "We the People" and not the states, James Madison, in *Federalist* 39, argued that "We the People" meant the people of the separate states. Madison admitted that the whole people assented to the Constitution, but:

> This assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State—the authority of the people themselves. The act, therefore, establishing the Constitution will not be a *national* but a *federal act.*[7]

Patrick Henry, suspicious of the results of the Framers' efforts, demanded "What right had they to say, *We the People*. . . . Who authorized them to speak the language of *We, the People,* instead of *We, the States?*"[8] The Constitution, however, did seem to give recognition to Patrick Henry's view of state primacy in Article 8: "The Ratification of the Conventions *of nine States,* shall be sufficient for the Establishment of this Constitution *between the States*" (emphasis added).

Further support for the state primacy view was evident in the Kentucky and Virginia Resolutions of 1798, written by Thomas Jefferson and James Madison in protest over the notorious Alien and Sedition Acts. In the Kentucky Resolution, Jefferson asserted that each state of "the several States composing the United States of America" had "acceded as a State" to the compact and was "an integral party, its co-States forming, as to itself, the other party." Madison similarly wrote in the Virginia Resolution that the "powers of the Federal Government as resulting from the compact to which the states are parties" were limited by that agreement.[9]

Notwithstanding these early assertions that the sovereign states had agreed to the constitutional compact, the Supreme Court argued otherwise. Although who was responsible for the Constitution was not at issue, Chief Justice John Marshall left little doubt as to his view when he wrote in **Marbury v. Madison** (1803): "The people have the original right" to establish government. As discussed below, Marshall argued that this gave the Constitution its primacy and permanency. Soon thereafter the justices strengthened their view that the people rather than the states were responsible for the compact.

In 1816, Justice Story in **Martin v. Hunter's Lessee** recognized the "importance and delicacy" of the issue, but he was unequivocal concerning who was responsible for endowing the Constitution with legitimacy.

> The Constitution . . . was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary, to extend or restrain these powers according to their own good pleasure and to give them paramount and supreme authority.

The political and legal struggle over the national bank, culminating in the great case of **McCulloch v. Maryland** (1819), provided Marshall an opportunity to strengthen the nation-first view. Maryland argued in a losing cause that the states were responsible for authorizing the U.S. Constitution. Those powers possessed by the general government "are delegated by the states, who alone are truly sovereign." If a conflict between the two governments arises, the federal government's powers "must be exercised

in subordination to the states, who alone possess supreme dominion."

Unimpressed by Maryland's argument, Marshall responded, "It would be difficult to sustain this proposition." For him, it mattered not that the delegates to the Philadelphia Convention were elected by and could be (and some were) recalled by the states. It was hardly relevant that at the convention the delegates voted by states and that the charter they wrote and finally approved was submitted to Congress, which without approving or disapproving referred it to the states. Marshall viewed the results of all of the efforts at the Constitutional Convention as a set of proposals. Ratification was the crucial step to him. It was only for practical reasons that each state elected delegates to separate state-ratifying conventions. How else were the people to assemble and approve the Constitution? For the chief justice, the actions of the state ratifying conventions did not

> [c]ease to be the measures of the people themselves. . . . From these conventions, the constitution derives its whole authority. The government proceeds directly from the people, is "ordained and established," in the name of the people. . . . The Government of the Union, then . . . is emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

Remaining consistent with his view of who signed on to the compact, Marshall later wrote in **Cohens v. Virginia** (1821) that both the states and the people believed a close and firm Union was crucial, and consequently, "the American people, in the conventions of their respective States, adopted the . . . constitution."

As a protest against increased tariffs imposed by the national government beginning in 1816, John C. Calhoun pro-

posed a doctrine of nullification that, like the earlier Kentucky and Virginia Resolutions, argued the Constitution was a product of the states. By the mid-1800s, nullification had been replaced in the South by secession, with, of course, slavery as the issue. The Civil War settled the question of both slavery and the legitimacy of secession with the Supreme Court following with **Texas v. White** (1869), denying secession as a constitutional alternative.

The Tenth Amendment has remained the linchpin of federalism, but it has come to mean that the people, as opposed to the states, were parties to the compact. Justice David J. Brewer, in **Kansas v. Colorado** (1907), wrote that the purpose of the Tenth Amendment was not to distribute

> [p]ower between the United States and the states, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it—"We, the people of the United States," and not the people of one state, but the people of all the states.

Although by the turn of the century the Supreme Court had largely abandoned the state-primacy concept of the compact, some lip-service was still given to it. In **Hammer v. Dagenhart** (1918), Justice William Rufus Day, supported by a majority of the justices, insisted:

> In interpreting the Constitution, it must never be forgotten that the nation is made up of states. . . . The power of the states to regulate their purely internal affairs . . . has never been surrendered to the general government.

Also, the Court reminded us in **U.S. v. Curtiss-Wright** (1936) that not only did the Union exist "before the Constitution" but "the primary purpose of the Constitution was to carve from the general mass of legislative powers *then pos-*

sessed by the states" only such powers deemed necessary to vest in the federal government, leaving the remainder "still in the states" (emphasis in original).

More recently, showing that the states as parties to the compact had not been forgotten, several of the Southern states protested **Brown v. Board of Education** (1954, 1955) by resurrecting the interposition or nullification doctrines. For example, the Alabama legislature's resolution sounded much like the Kentucky and Virginia Resolutions of 1798:

> WHEREAS the states, being the parties to the constitutional compact, it follows of necessity that there can be no tribunal above their authority to decide, in the last resort, whether the compact made by them be violated.
>
> The decisions of the Supreme Court of the United States related to the separation of races in the public schools are "null, void, and of no effect."[10]

Despite the indirect endorsement of the states found in such decisions as **Dagenhart** and **Curtiss-Wright** and the nullification doctrine of the 1950s, the compact that endowed the Constitution with legitimacy has been recognized as a product of the people, not the states.

Although in very recent times the Supreme Court has viewed with favor arguments supporting state power (e.g., **U.S. v. Lopez,** 1995), it has yet to revisit this dimension of the compact.

What Is Created by the Compact: Society or Government?

Apart from who signed the original agreement, it is equally important to determine what was thereby created. If the original agreement creates a social entity, community or society,

it is a *social* compact. The preamble to the 1780 Massachusetts Constitution sets forth this concept:

> The body-politic is formed by a voluntary association of individuals. It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.

If the compact is viewed more narrowly as an agreement between the government and those being governed, it is a *political* compact. Such a compact legitimates government and sets forth what government is obligated to do and what it is forbidden from doing. Society (people) retains the ultimate sovereignty; this allows governments to be changed without the loss of the common bonds that hold a society together.

Chief Justice Marshall recognized this distinction between a social agreement and a political agreement in **Cohens v. Virginia** (1821):

> The people made the constitution, and people can unmake it. It is a creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake resides only in the whole body of the people; not in any subdivision of them.

John Locke's influence on the Founders and on American political theory is clear, and for him it was important that the compact have both a social and a political dimension. As we have seen in the previous quote from his *Second Treatise of Government,* he speaks of two contracts, one between the people (his *community*) and then one between the people and the government (his *political society*).

Despite the important difference between the social and political compact, American constitutional history tends to mix the two. Donald Lutz's study of the first state constitutions upon which the theory of the federal charter largely relies concludes that state constitutions place the two compacts "in the same document as if they are not separable in practice."

> Americans were quite aware that one did not create government in a vacuum. Government is instituted by a people in order to reach collective decisions, and before you have a government you must have a people. The distinction is a logical, not a temporal one. Both compacts can be created at the same time, but the distinction is a powerful reminder that government is a servant of the people.[11]

This is also the case with the federal Constitution. The Preamble to the Constitution symbolizes the combined version of the compacts. "We the People" constitutes recognition of the social compact and "ordain and establish" symbolizes the political agreement that created government. Thus, in exercising judicial review, the justices could rely heavily on the nature of the social compact in their resolution of a particular constitutional dispute or they could concern themselves with agreement between the people and their government and emphasize the political compact.

Marbury v. Madison (1803) provides an example of both the political and social versions. Marshall's assertion that "the people have an original right" suggests that the people as an entity or society exist prior to when they purposefully "establish" the "principles" for their "future government."

> 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.

Of course, his concern is with the political compact. However, Marshall refers to those fundamental principles that hold a people together as a society. The great chief justice continues in **Marbury** with a description of the political compact that, however, emanates from a preexisting collectivity, society—conceptualized as "the people":

> 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 this latter description. (emphasis added)

Sixteen years after his landmark **Marbury** decision, Marshall gave priority to the political compact in **McCulloch v. Maryland** (1819). His emphasis there was on the people as being parties to the compact rather than the states, but he also emphasized the political nature of that compact, which, again, follows from the social agreement. He concluded:

> The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained "in order to form a more perfect union, establish justice, ensure domestic tranquility, and secure the blessings of liberty."

The government is charged with forming "a more perfect union," not creating the initial union.

A social emphasis is also evident in subsequent Supreme Court rulings. In **Munn v. Illinois** (1877), Chief Justice Waite prefaced his opinion with a discussion of a social compact, relying heavily on the preamble to the Massachusetts Constitution:

> When the people of the United Colonies separated from Great Britain, . . . they retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good. . . .
>
> * * *
>
> When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact."

Whether the fundamental agreement is a social compact or a political compact may well have an impact on whether the constitutional powers extend beyond government and impinge upon social concerns of the people. For example, to protect society, can government force individuals to have smallpox vaccinations, or must government abstain from private intervention (**Jacobson v. Massachusetts,** 1905)? Can government control the farmer's private consumption of bread made from wheat harvested on his own land (**Wickard v. Filburn,** 1942)?

The nature of the constitutional compact is, then, determined by four characteristics, as portrayed by Figure 3.1.

FIGURE 3.1 Dimensions of the Constitutional Compact

Parties to the Agreement	Results of the Agreement	
	Social System	Political System
States	●	●
People	●	●

However, the compact makes an essential contribution to American constitutionalism whether it is a product of the states or the people, or whether it creates a social or a political system. The compact is much more than a simple agreement. The constitutional compact is fundamental. It is often referred to as the basic law, the organic law, the supreme law of the land, or the higher law. To achieve this fundamental character, the compact must embody characteristics that are special, giving it an authority far exceeding ordinary acts of government. This is achieved by two complex processes, one substantive and the other procedural.

The compact designates the Constitution as a product of the highest source: that which is sovereign. During the formative years of the American republic, representative government as an expression of sovereignty was gradually replaced with the concept of the sovereignty of the people, whether the people of the states individually or of the entire nation.

> If sovereignty had to reside somewhere in the state and the best political science of the eighteenth century said it did—then many Americans concluded that it must reside only in the people-at-large. The legislature could never be sovereign; no

set of men, representatives or not, could "set themselves up against the general voice of the people."[12]

In substance, then, the compact is based upon the consent of the sovereign. A charter based on a compact that had the consent of the people surpasses in importance products of the legislature (national or state), which only represents the people indirectly. For this reason alone, the compact gives to the Constitution its primacy.

The procedure by which an agreement on the compact is reached adds to the fundamental character of the Constitution. Before the compact is completed and the charter legitimated, the act of approval must progress through an extraordinarily demanding process. As John Marshall described it in **Marbury**: "The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated." Nearly every provision of the Constitution written in Philadelphia was subject to debate, committee review, and rewrite and was voted on separately before final approval. The proposed charter was submitted to Congress and then referred to delegates to special state conventions who had been elected specifically for the purpose of studying and deciding on the Constitution. During the campaign for ratification, an intense debate in the newspapers of the day was generated. After at least nine of the original thirteen state conventions ratified the document, the new government was instituted.[13] Indeed, the Constitution is a product of an elongated process fraught with formidable obstacles.

Even before the Philadelphia convention and the state-ratifying gatherings, a unique tradition of constitutional conventions had evolved at the state level. Gordon S. Wood writes, "It was an extraordinary invention, the most distinctive institutional contribution" that "enabled the constitu-

tion to rest on an authority different from the legislature's."[14] Given the prevailing belief in the sovereignty of the people and the view that conventions were the people assembled, not only were the results of such conventions different from what legislatures produced but those results took precedence. They could override ordinary legislative enactments. If the compact is to be changed, the changes must survive another formidable amending process as outlined in Article V. Two-thirds of Congress or state legislatures must agree on any proposals and three-fourths of state legislatures or state conventions must agree to those proposals before the terms of the original compact can be altered.

To summarize, the fundamental nature of the Constitution is to be attributed to the compact. Based as it is on the people's consent (either directly or through the states) in a system that regards the people as sovereign, and given the extraordinary process that led to the final acceptance of the compact, the Supreme Court has little trouble in arguing the Constitution's primacy over congressional enactments, executive rules and actions, and state statutes and ordinances. Of course, Article 6, the supremacy clause, gains it authority because of the substantive and procedural characteristics of the compact.

> 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 judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

In reviewing Supreme Court cases dealing with the compact—the compact being one of the basic five components of the Constitution—one should keep in mind whether the par-

ties to the compact are the people or the states and whether the political or the social aspects of the compact are emphasized. Whatever version of the compact prevails, it provides the foundation for all the other constitutional components. If one is forced to admit which of the five components is most important, that status belongs to the compact. In a fundamental sense, it is the compact that gives the final authority to the Constitution.

Notes

1. Our definition follows Daniel J. Elazar's: The compact is a "morally-informed agreement or pact between people or parties having an independent and sufficiently equal status, based upon voluntary consent and established by mutual oaths or promises witnessed by the relevant higher authority." "The Political Theory of the Covenant: Biblical Origins and Modern Development," *Publius* 10 (Fall, 1980): 6.

2. John Locke, *The Second Treatise of Government* (New York: The Liberal Arts Press, 1952), pp. 55, 56.

3. E.g., Plato, in his *Dialogues,* has Socrates refuting Glacon, who attributes the beginnings of government to the compact. Plato, *The Republic* (New York: Oxford University Press, 1945), p. 44.

4. See Elazar, "The Political Theory of the Covenant."

5. Thomas Hobbes, *The Leviathan* (London: J. M. Dent & Sons, 1950).

6. Walter Berns, "The Meaning of the Tenth Amendment," in Robert A. Goldwin, *A Nation of States* (Chicago: Rand McNally, 1961), p. 129.

7. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: New American Library, 1961), p. 243.

8. Quoted in Edmund S. Morgan, "Constitutional History Before 1776," in Leonard W. Levy (ed.), *American Constitutional History* (New York: McMillan, 1989), p. 1.

9. Henry Steele Commager (ed.), *Documents of American History* (New York: F. S. Crofts, 1944), pp. 178, 182. In the 1799 Report on the Resolutions, Madison wrote that the "states, then, being the parties to the constitutional compact, [must] in their sovereign capacity" be the judges of violations of the compact. Berns, "The Meaning of the Tenth Amendment," p. 130.

10. Quoted in David O'Brien, *Constitutional Law and Politics,* vol. 1 (New York: Norton, 1991), p. 601.

11. Donald S. Lutz, "From Covenant to Constitution in American Political Thought," *Publius* 10 (Fall, 1980): 104.

12. Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (New York: W. W. Norton, 1969), p. 382.

13. Article VII of the Constitution reads: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." After the requisite nine had ratified the Constitution, New York and Virginia had yet to agree. The reluctance of these two important states prompted Jay, Hamilton, and Madison to write *The Federalist Papers.*

14. Wood, *Creation of the American Republic,* p. 342.

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4

Separation of Powers: Exclusive or Mixed?

Perhaps no principle of American constitutionalism has attracted more attention than that of separation of powers. It has in fact come to define the very character of the American political system. . . . Yet separation of powers continued to possess many meanings.

—*Gordon S. Wood, 1969*[1]

Throughout the years of experience with separation of powers, the Supreme Court and, for that matter, the other branches of government have tended to attach meanings that would place this constitutional component somewhere between two extremes. Viewed as a continuum, interpretations of separation of powers have varied from the extreme of *exclusive,* or separated, governmental functions to the other extreme of *mixed,* or shared, functions. What initially appeared to be a fairly straightforward principle became an ever-changing and sometimes confusing concept prompted by the fear of too much or not enough governmental power. Politics, then, has often determined the Supreme Court's responses to separation of powers issues. Is Congress assuming too much

of the president's responsibilities? Has the president exercised lawmaking powers? Should the Court intervene?

The Exclusive Version of Separation of Powers

Separation of the legislative, executive, and judicial functions was a practice that, if not common, certainly was familiar to the Framers of the Constitution. Six of the earlier state constitutions gave recognition to the principle. John Locke, whose *Second Treatise* was well known to the Founders, advocated a separation of the government into legislative, executive, and federative departments, the latter department focused on foreign affairs. But the primary source for the American constitutional writers was Charles-Louis de Secondat, Baron de Montesquieu, who had written in his *De l'Esprit des Lois* that the greatest threat to liberty is when legislative and executive or judicial powers are "united."

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative or executive. Were it joined with the legislative, the life and the liberty of the subject would be exposed to arbitrary control; for the judge then might behave with violence and oppression.[2]

The result of a separation of functions, for Montesquieu, was an equilibrium among three centers of power leading to moderation in government. Moderation meant liberty.

The "exclusive" version of separation of powers dictates that the government be divided into three separately functioning departments or branches—lawmaking, law enforcement, and law interpretation—with each branch confined to

its own function and, consequently, unable to infringe upon the functions of the other branches. With power so dispersed, there is less of a chance for a monopoly developing that would inevitably lead to abuse and the loss of liberty.[3]

Of course, what made the separation necessary and workable was that, as an early American pamphleteer wrote, "all men" by nature were "fond of power" and "unwilling to part with the possession of it. . . . [N]o man, or body of men, ought to be invested with the united powers of Government" or with more power than needed to perform that which was absolutely necessary.[4] The "exclusive" version of separation of powers is the antithesis of totalitarian government, which, by definition, means the concentration of power in the form of the "Leviathan," or a single omnipotent leader or political party.

As explained by M.J.C. Vile, the exclusive form of separation is based on four assumptions, each essential to this version of the constitutional component. First, exclusiveness assumes that government can be broken into distinct parts. Government has diverse responsibilities that can be separated into segments or parts, rather than functioning as a seamless whole. Whatever assignment is given to government could be completed by one of the parts without help from another.

The principle of exclusive powers also means that there are three natural and distinct parts to government, not two or four. The legislature makes law and can concentrate on its lawmaking functions without concern for the enforcing or interpreting of the laws, and needed governmental responsibilities will continue to be carried out. "All government acts, it is claimed, can be classified as an exercise of the legislative, executive, or judicial functions."[5]

The third element of exclusive powers, according to Vile, requires that each of these three functions be performed by three distinct sets of officials. This "separation of persons"

means no person would hold office in more than one of the three departments of government.[6] A legislator remains a legislator and does not, at the same time, accept an appointment as a cabinet member or a judge.

Finally, as long as each branch performs its designated function, a balanced system would result. A need for one department to intervene in the duties of the other branches or departments would not exist. The result would be a balanced government unable to threaten liberty. The greatest threat to liberty comes from the center of power—that is, government—and the separation of powers within government would render it largely ineffective in concerns beyond a few necessary duties. Confronted by a serious crisis such as war, the branches would coordinate efforts to do whatever was necessary at the moment.

It has been argued that the adoption of separation of powers by the delegates at the Constitutional Convention was done in part to provide a more efficient government. Under the Articles of Confederation, Congress was the sole branch of national government and that body was unable to exercise even its limited powers efficiently, largely due to the absence of administrative and judicial assistance. Others have argued that the goal of separation of powers was to assure inefficiency in the new government. Normally, government would be paralyzed by a deadlock between branches, and only under dire circumstances would they act in unison.

Between 1776 and 1780, all of the thirteen newly independent states had fashioned constitutions for their governments. It was from the earlier state experiences that the Founders in Philadelphia drew their examples and arguments. Separated powers characterized six of these fledgling state basic laws. For example, the Virginia Constitution ordained that "[t]he legislative, executive and judiciary departments shall be separate and distinct" and no one department will exercise "powers belonging to the other." It also held

that no person shall "exercise the powers of more than one of [the departments] at the same time."[7]

However, James Madison's review of these state constitutions led him to argue that although they may have declared that the branches were "separate and distinct," they actually permitted some mixing of functions.[8]

The Mixed Version of Separation of Powers

The Framers not only were students of the leading political theorists of the time, but they were practical politicians as well. They recognized that even when functions are separated, given human nature, the drive for power remains. This meant members of the legislature would be compelled to expand beyond the confines of their single function, as would executive and judicial officials. It was reasoned, then, that each branch should be allowed to perform some duties assigned to the others, not to widen the opportunity for intervention but rather to provide a means of defense. Thus, checks and balances were built into the American version of separation of powers. The president, for example, could veto legislation as a protection against the forays of Congress. The legislature could punish the president by refusing "advice and consent" to executive or judicial appointments. The courts could defend their judicial prerogatives by rendering congressional enactments or executive practices unconstitutional, and so on. What was in its pure form a clear division of governmental functions now became a mixing or sharing of responsibilities.

James Madison, an astute observer of politics and aware of many of the consequences of the product the Founders had fashioned in Philadelphia, recognized the two approaches to separation of powers. He wrote that one of the principal "objections" to the Constitution was "its supposed violation of the maxim that the legislative, executive and judicial de-

partments ought to be separate and distinct." Madison admitted that "no political truth is certainly of greater intrinsic value," but the maxim upon which it relies had been "totally misconceived and misapplied."[9] His review of state constitutions revealed that, although claiming a separate and distinct division, some mixing of the responsibilities of the three branches was a common practice.[10] This led him to conclude in *Federalist* 48 that the sharing of some powers was not only acceptable but also necessary:

> Unless these [three] departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.[11]

Madison continued his argument for a mixed version of separation of powers in *Federalist* 51:

> The great security against a gradual concentration of the several powers in the same department consists in giving those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for the defense must in this, as in all other cases, be made commensurate to the danger of the attack.[12]

From the beginning of the republic, the Supreme Court has had a wide range of choice among the pure exclusive and the mixed versions of separation of powers as it has attempted to resolve conflicts among Congress, the president, and the judiciary.

Separation of Powers and Foreign Affairs

The difference between the exclusive and mixed versions of separation of powers is a difference of degree. As it confronts

issues dividing the branches of government, the Supreme Court focuses on its view of the need for governmental efficiency. When certain actions or laws appear to the Court to be warranted, a tendency toward shared power is tolerated. When Congress or the president act beyond what is required, exclusive power tends to be emphasized. Also, the Court leans toward exclusiveness when the issue under review involves military and foreign affairs, while the Court's response to interbranch conflicts over domestic policies remains uncertain.

In answer to a challenge concerning the president's power in foreign affairs, the Supreme Court in **U.S. v. Curtiss-Wright** (1936) gave the chief executive nearly exclusive powers in external affairs, leaving little for Congress to claim beyond involvement in treaties and declaring war. Congress had passed a resolution authorizing the president to embargo military equipment destined for warring countries in South America if in his judgment the embargo would contribute to peace. Was this an unconstitutional delegation of lawmaking powers because, to implement the resolution, the president possessed nearly unlimited discretion? In answering the question did the Supreme Court adopt an exclusive or a mixed application of separation of powers?

According to Justice George Sutherland, the president "alone has the power to speak or listen as a representative of the nation." Reinforcing his argument, Sutherland quoted John Marshall, who, as a member of the House of Representatives, argued that "the President is the sole organ of the nation in its external relations and its sole representative with foreign nations." This led Sutherland to conclude:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the

> sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.

Even though the Court gave the president nearly complete exclusive powers in dealing with other nations, such discretion and freedom from Congressional oversight "would not be admissible were domestic affairs alone involved."[13] But what if a domestic crises affects foreign relations? Can external and internal affairs be easily distinguished?

The issue of presidential powers in the domestic scene in pursuit of a foreign policy goal arose during the Korean War in 1952. President Harry Truman, under his powers in foreign affairs and as commander in chief, unilaterally intervened in a domestic labor conflict in order to keep steel mills in full production to supply raw materials for the military. In **Youngstown Sheet and Tube v. Sawyer** (1952), the Court invalidated President Truman's seizure of steel mills. The president had ordered the steelworkers back to the production line under supervision of the national guard, ignoring what Congress had provided or could have provided for such situations.

Justice Hugo Black, for the Court majority, reprimanded the president:

> In the framework of our Constitution the President's power to see that the laws are faithfully executed refutes the idea that he is a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.

What was important in the issue was that Congress had made available less drastic means to deal with an industry-wide labor strike, and the president had chosen to act alone. Separation of powers, wrote Justice William O. Douglas in

his concurring opinion, "did not make each branch completely autonomous."

Justice Robert Jackson, in a concurring opinion in **Youngstown,** placed the two versions of separation of powers in a clear alignment, illustrating the high court's alternative choices.

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.

In contrast with the exclusiveness of the president's power in foreign affairs, in the realm of domestic affairs a more responsive Congress adds substantially to the separation of powers formula. When the president's powers are mixed with congressional authorization, "his authority is at its maximum." When he acts without authorization from Congress and without an expressed denial of authority, "he can rely only upon his own independent powers" but he must act with care. When the president acts in a manner "incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." This he had done in taking over the steel mills.

The President and the "Advice and Consent" of Congress

When the president appoints a person to an executive office with the advice and consent of the Senate, must the chief executive share the power of removal of that official with the Senate? The Supreme Court's answer is: "It depends."

In 1926 the high court provided an answer that tended to support an exclusive powers concept. In **Myers v. U.S.** (1926), the Court ruled that some purely administrative officials can be removed by the president without seeking Senate approval, even though the statute creating the office stated that appointment and removal were to be with the advice and consent of the Senate. If the president does not have the exclusive power to remove officers within the administration, "he does not discharge his own constituted duty of seeing that the laws are faithfully executed."

However, Justice Oliver Wendell Holmes in dissent saw a need for greater mix of the branches: "[T]o see the laws are faithfully executed . . . does not go beyond the laws or require him to achieve more than Congress sees fit." Justice Louis D. Brandeis also disagreed with giving the president this exclusive power of dismissal simply because the official in question performs administrative duties only. He admitted that not being able to remove an administrative officer without congressional approval created problems. Nonetheless, said Brandeis,

> Checks and balances were established in order that this should be a "government of laws not of men." . . . The doctrine of separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Generally, the president's power to appoint individuals, although often with the advice and consent of the Senate, is an Article 2 power. Nonetheless, the power to dismiss rather than the power to appoint determines who has authority over that official. After the **Myers** case it seemed as if the

president had nearly exclusive removal authority over those he appointed. But should individuals in government perform some functions that are legislative or judicial in nature, the president's removal power is inoperative, as evidenced by **Humphrey's Executor v. United States** (1935). Because a member of the Federal Trade Commission performed quasi-legislative and quasi-judicial functions, the president was unable to dismiss the official without cause as defined by Congress. The justices limited their decision only to independent regulatory commissions such as the Federal Trade Commission, leaving to future cases the determination of which other offices fell under the **Humphrey** ruling and, consequently, leaving unresolved where removal powers fell on the exclusive–mixed separation of powers continuum.

Of course, Congress is not free to extend its power too far into the concerns of the other branches. In separation of powers there are limits to the mixing of powers as well as limits to the exclusive powers. For years Congress had found it efficient to attach to statutes a "legislative veto" provision whereby either the Senate or the House (or both jointly) could simply pass a resolution to veto how the executive branch was applying the law. In **INS v. Chadha** (1983), the Court ruled that this practice, however efficient, violated the presentment clause found in Article 1, section 7, requiring that all orders, resolutions, or votes of Congress "be presented to the President" for his or her signature, and also that a one-House veto violated the principle of bicameralism. The ruling technically invalidated legislative veto provisions in 196 different statutes.[14]

A review of the intent of the Framers of the Constitution convinced Chief Justice Warren Burger and a majority of his colleagues that "[i]t is beyond doubt that law-making was a power to be shared by both houses and the President." Bypassing the president in the resolution process may be functional and efficient, but "convenience and efficiency are not

the primary objectives—or hallmarks—of democratic government." The chief justice cautioned that the natural tendency for each branch to intervene in the concerns of the other must be watched closely:

> The Constitution sought to divide the delegation of powers . . . into three defined categories, Legislative, Executive and Judicial, to assure as nearly as possible that each branch . . . would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

Burger recognized that branches cannot be "hermetically" separated, but in **Chadha** the mixing of congressional powers with presidential presentment powers was too much.

But how much can the judiciary mix its power of judicial review over the constitutional prerogatives of the legislature or executive? The landmark case **Baker v. Carr** (1962) provided an answer. The case is most often associated with the issue of malapportioned representation in state legislatures, but in the process of confronting that issue, the Court established the contemporary rules for the role of the Court in separation of powers issues. "Political questions," which are beyond the jurisdiction of the judiciary, involve: (1) a commitment of the question to another branch of government as evidenced by the text of the Constitution; (2) a lack of judicial and legal standards for resolving the issue; (3) a need for a policy determination by another branch; (4) a judicial resolution that would express a lack of respect for Congress or the president; (5) a need to adhere to a previous political decision; and (6) a fear of potential embarrassment by the addition of the Court's resolution to an already confusing set of pronouncements from the other coordinate branches of government.

Despite the **Baker** rules, the Court found little difficulty in deciding against Congress in **Powell v. MacCormack** (1969).[15] The contention was that the justices, according to the first **Baker** rule, were wrongly intervening in a constitutional responsibility assigned exclusively to another branch. The House had withheld the oath of office from a duly elected member under its Article 1, section 5, power to "be the Judge of the . . . Qualifications of its own Members." Also, the House was immune from judicial scrutiny because of the "Speech and Debate" clause. Under the clause, members of Congress are not held legally accountable for what is said and done on the floor of the House or Senate. For the Court majority, Chief Justice Earl Warren wrote that mixing the Court's power with that of Congress was sometimes required:

> Our system of government requires the federal courts on occasion [to] interpret the Constitution in a manner at variance with a construction given by another branch. . . . [I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution.

The Justices did exactly that by ruling that Representative Adam Clayton Powell had been unconstitutionally deprived of his seat in the House.

In the "Watergate Tapes" case, **U.S. v. Nixon** (1974), which also contains a Bill of Rights issue, the Court this time confronted the issue of whether a claim of exclusive presidential powers prevented the judiciary from intervening. Chief Justice Warren Burger recognized that a "workable government" meant that the president could not claim exclusive powers of "executive privilege" under Article 2 in order to quash a subpoena for presidential tapes needed by the courts. The tapes were evidence in a judicial trial and without them the judiciary could not fulfill its responsibilities under the Constitution.

Notes

1. Gordon S. Wood, *The Creation of the American Republic: 1776–1787* (New York: W. W. Norton, 1969), p. 151.
2. Montesquieu, *The Spirit of the Laws* (1748).
3. M.J.C. Vile, *Constitutionalism and the Separation of Powers* (New York: Oxford, 1967), p. 13.
4. Quoted in Wood, *Creation of the American Republic,* p. 150.
5. Vile, *Constitutionalism,* p. 16.
6. Ibid., p. 17. See Article I, section 6, of the Constitution.
7. Ibid., p. 119. However, Virginia allowed justices of the peace to serve in the legislature.
8. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: New American Library, 1961), pp. 304–307.
9. Ibid., p. 301.
10. Madison might have exaggerated the blending of the state constitutions. According to Vile, these earlier efforts at constitutionalism "rejected, to a greater or lesser degree, the concept of checks and balances." Vile, *Constitutionalism,* p. 133.
11. Hamilton, Madison, and Jay, *Federalist Papers,* p. 308.
12. See Justice Scalia's dissent in **Morrison v. Olson** (1988).
13. **Curtiss-Wright** also contains references to federalism and the compact.
14. Some forms of the legislative vetoes are still included in legislation without being challenged.
15. Representation is also discussed in the **Powell** decision.

5

Federalism: The Constitutional Division of Powers

Federalism has been regarded as America's greatest contribution to the art of governing. K. C. Wheare, in his comparative study of federalism, wrote: "The modern idea of what federal government is has been determined by the United States of America. . . . Many consider it the most important and most successful example."[1] From a geographical perspective, this place of eminence can be attributed to the Framers' skill in providing a system that was able to bring together into a large functional area (ultimately including half of a continent and two noncontiguous units) a considerable number of independent, diverse, and often antagonistic states. From a theoretical perspective, division of powers represents a compromise between democracy and republicanism. Majority rule at the national level was tempered by small governments composed of elected officials closest to the people enacting laws that reflected the concerns of their unique constituencies. From a political perspective, the Founders had no choice but to construct some such combination. Given the parochial jealousies of the states in the 1780s, their diversity, varied origins, relative isolation, and different social and economic interests, the Founders knew

that little hope remained for ratification of the Constitution and for any stability in government should states not be given ample independence under the new charter.[2]

The legacy of federalism has been a constant struggle between and among governments for advantage and sometimes survival. Conflict and cooperation between federalism and the Bill of Rights as well as representation explain much of the ebb and flow of state and federal sovereignty. The importance of the Supreme Court's role in mediating the conflicts is reflected in Justice Holmes's statement that if the Court lost its power of review over acts of Congress, the American system would not come to an end but "the Union would be imperiled if we could not make that declaration as to the laws of the several states."[3]

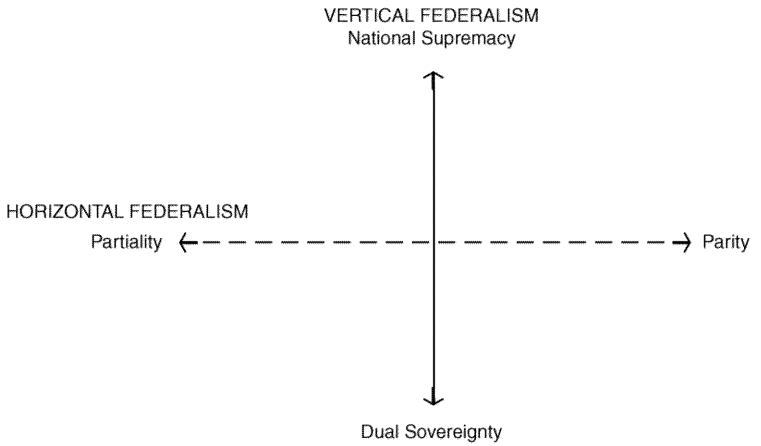
Vertical and Horizontal Versions of Federalism

Constitutional issues associated with *federalism* are of two kinds. Most issues are generated by attempts to determine the appropriate distribution of power between the federal government and state governments. However, important issues also arise when efforts are made to harmonize the power relations among the states.

The states and the nation are in perpetual conflict because they are both responsible for the same citizenry. The citizens of Ohio, for example, are "beholden" to both the federal government in Washington, D.C., and the state government in Columbus.[4] As the Fourteenth Amendment to the Constitution requires: "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."

Struggles between states are concerned with *partiality* or *parity.* Should a more populous or wealthier state be treated differently from its poorer and sparsely inhabited neighbor?

FIGURE 5.1 Two Dimensions of Federalism



There is also the often contentious problem of which privileges a person (individuals and corporations) retains when coming under the jurisdiction of another state. Is a decision of one state court honored equally by the courts of another state, or are some conditions attached to decisions? Even though Article 4 requires that "Full Faith and Credit" be given to one state's decrees by another and that "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," conflicts over applications of these constitutional clauses are not uncommon.

The two dimensions of federalism can be distinguished by references to "vertical federalism," involving the troublesome nation–state power relationships, and "horizontal federalism," involving the sometimes adversarial relations among the states.[5] The Supreme Court has moved the division of powers both along the vertical continuum between national supremacy and dual federalism as well as along the horizontal continuum between partiality and parity, as portrayed in Figure 5.1.

Some regard both vertical and horizontal federalism as largely of historical interest because now Congress with the

high court's support can virtually dictate to the states what it wishes. Ever since President Franklin Roosevelt's New Deal administration, the federal government has so dominated relations with states that most scholars would have agreed with the conclusion of Geoffrey R. Stone and his collaborators. They concluded that the few limits the Constitution and the Court have placed on Congress "have only a minor impact on Congress's ability to establish an essentially unitary national system of government."[6]

On the other hand, many see federalism as alive, if not entirely well. Accountability, liberty, experimentation, participation, and protection against tyranny are regarded as attributes of this division between governments.[7] At the very least, the states play crucial roles in political party organizations and, thus, the all-important role in the elections of presidents and, of course, Congress. Federal bureaucracies are organized around states and regions; federal programs are often administered by state agencies; state courts enforce federal rights; and the Senate is based on equal representation of states and the House of Representatives is composed of state representatives. Whatever the appraisal of the strengths of federalism at the moment, it has been and will be subject to change and must be regarded as a viable and dynamic constitutional component.

Vertical Federalism and Separation of Powers

For over 200 years, vertical federalism has experienced swings between domination by the federal government—confirming Professor Stone's view—and a modicum of independence for the states, possibly providing the valuable attributes that keep the states as viable units. Admittedly, the federal orientation has dominated, but the states are far from helpless pawns of Congress, the Supreme Court, and the president. Nonetheless, the push and pull between the two

centers of power places the Supreme Court in a position of having to fend off or accept intervention by the national government. The states are repeatedly asking the Supreme Court to rebuff these incursions into their sovereignty.

In vertical federalism, power conflicts arise between the federal and state jurisdictions when under their respective powers the Congress, the president, or the Supreme Court attempt to impose their will on the states. The structure of the federal government, as we have seen, is separated into three branches, and these branches have had their own conflicts with state governments. The most common issue involves congressional enactments that are challenged by the states. But states have on occasion questioned presidential actions, and state courts have sometimes defied the rulings of the nation's high bench.

Congress and the States

Most reactions by the states to federal interventions are based on the Tenth Amendment to the U.S. Constitution: "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." Generally, these reserved or residual powers are referred to as the police powers, including the responsibility for the health, safety, morals, and welfare of citizens of the state. The Supreme Court has, case by case, included and excluded subjects covered by the Tenth Amendment. The only pattern that persists is a gradual but fluctuating takeover by the federal government of what were previously state responsibilities. Nevertheless, significant concurrent and reserved powers have remained in the hands of the states. Such functions as mandatory vaccinations, zoning laws, regulating professions, criminal law, and education are either shared with the federal government (e.g., criminal statutes) or, within a broad federal framework, re-

main primarily within the purview of the Tenth Amendment. Chief Justice Charles Evans Hughes described the state police powers broadly but at the same time recognized their limits. Time has proven him correct.

> It is the power to care for the health, safety, morals and welfare of the people. In a general way, it extends to all the great public needs. It is subject in its exercise to the limitations of both the State and Federal constitutions. It is a fallacy to suppose that it cannot be overridden by Federal power.[8]

In some areas, concurrent or shared powers characterize nation–state relations. For example, both governments share powers of taxation, and, at least since the Sixteenth Amendment, may both levy on individuals' income, as residents of states that have an income tax well know as they agonize over state and federal tax forms each April.

As will be explained in Chapter 7, perhaps on an equal basis with the commerce clause and the "necessary and proper" clause, the selective incorporation of the Bill of Rights into the meaning of due process in the Fourteenth Amendment has had a profound effect on federal–state relations. The incorporation has dictated that nearly all of the provisions of the Bill of Rights be observed by the states. Again, as we shall see, this process of selective incorporation is a fine example of two components (federalism and the Bill of Rights) working together to reshape the Constitution.

Most of the specifically *enumerated* powers listed in the Constitution that belong to the federal government gain plenary status by means of Article 6:

> 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 intent of the Founders was to grant to the national government only specifically listed or enumerated powers such as found in Article 1, section 8, of the Constitution, leaving to the states what is not enumerated. It was hoped a balance between national and state governments would be realized, preventing, of course, a monopoly of power and, as they thought, its inevitable abuse. For many states the imbalance is due to Congress's use of the commerce clause and, of course, the Court's support of this use.

The commerce clause of Article 1, section 8, which grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" became arguably the most inclusive constitutional provision bringing governmental matters under the power of the federal government. As early as 1824 in **Gibbons v. Ogden,** the Supreme Court began the process that eventually gave the federal government expanded power. A state law granting a monopoly to navigate New York waters ran into conflict with a federal "coasting" law requiring a federal license to navigate along the coast. Chief Justice Marshall wrote for the Court in **Gibbons** that the "power over commerce" was one of the major reasons "for which the people of America adopted their government." And this power granted to Congress "is complete in itself and acknowledges no limitation." Consequently, the federal "coasting" law preempted the New York statute. However, those commercial transactions that were purely intrastate remained under the jurisdiction of the state.

The question has always been where to draw the line between interstate and intrastate commerce. That line has moved increasingly to expand congressional power at the expense of the states, although the Court has very recently hes-

itated in further expansion. Illustrative of how much more inclusive the commerce clause has become is the Court's reaction to the Civil Rights Act of 1964. Upholding the law, a unanimous Court ruled that Congress could validly decide that racial discrimination practiced by motels and restaurants hampered interstate commerce. As Justice Tom Clark wrote for the Court in **Katzenbach v. McClung** (1964), "The power of Congress in [interstate commerce] is broad and sweeping." Racial discrimination in public restaurants has a "direct and adverse effect" on interstate commerce, the Court said, and thus can be regulated by Congress (see also **Heart of Atlanta Motel v. U.S.,** 1964).

The relations between the federal and state governments have not remained static. This is illustrated by the efforts of the federal government under the commerce clause to regulate wages and working conditions for local government employees. In **National League of Cities v. Usery** (1976), Justice William Rehnquist, writing for a divided Court, recognized the dominance of Congress in commerce issues, but when in direct conflict with the Tenth Amendment, the states prevail. Congress had gone too far when it infringed upon state "functions essential to [a] separate and independent existence," so that setting hours and wages for state employees was an "exercise of congressional authority [that] does not comport with the federal system of government embodied in the Constitution," because it served "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."

Nonetheless, nine years later in **Garcia v. San Antonio Metropolitan Transit Authority** (1985), the Court reversed itself and swung back toward federal dominance, stating that determining "traditional [state] governmental functions is not only unworkable" but is "inconsistent with established principles of federalism." States, according to the Court majority, are protected as states through the political process in

Congress, a process that is dominated by state interests. That is, Senators and representatives, elected from state constituencies, provide "state participation in federal governmental action." The policies that emanate from Congress have already considered state interests, and it is improper for courts to intervene.[9]

Other recent decisions clearly indicate that the Court majority has had second thoughts about what can be incorporated under congressional power over commerce. In **U.S. v. Lopez** (1995), the federal government failed to persuade a high court majority that there was a connection between carrying a handgun within "gun-free zones" around schools and interstate commerce. Later, in 1997 the justices voided provisions of the "Brady Law" that required state law enforcement officials to conduct background checks on persons applying for gun permits. Justice Antonin Scalia, writing for the 5–4 majority in **Printz v. U.S.** (1997), asserted, "Such commands are fundamentally incompatible with our constitutional system of dual sovereignty." And the Court continued to limit the federal government's power to regulate when it struck down the Violence Against Women Act (**U.S. v. Morrison,** 2000). The Court said that Congress could not regulate that subject under the commerce clause. And Congress also could not use the provision allowing congressional enforcement of the Fourteenth Amendment. This further limited the constitutional tools available to Congress to regulate the states.

As these changes in direction suggest, a permanent line has yet to be sharply drawn between what the Court includes in the congressional powers over commerce and what state governments retain under the Tenth Amendment. Nevertheless, when the Court accepts a particular act to be within the definition of interstate commerce, that act becomes one of the plenary powers of Congress.

The Court has also used the Eleventh Amendment to protect the states' freedom from federal restriction:

> 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.

The Amendment was passed in response to Justice Marshall's decision in **Chisholm v. Georgia.** It was intended to prevent states from being sued in federal court by citizens of another state. Over the years the justices extended the amendment beyond that purpose to provide "sovereign immunity," protection to the state from being sued without its consent. The Court has used this idea as a further limit on Congress's power. Initially, the states were shielded from suit by the Court's rule that only if the Congress is very clear can it overcome that immunity (e.g., **Atascadero State Hospital v. Scanlon,** 1985). More recently, the Court imposed more limits. For example, it said Congress couldn't use the Indian commerce clause to abrogate states' Eleventh Amendment immunity, so native American tribes couldn't sue the states for violation of federal law (**Seminole Tribe of Florida v. Florida,** 1996). Then it went further by saying that Congress could not allow workers to sue the states even in state court for violating the federal wages-and-hours law (**Alden v. Maine,** 1999).

In its present swing toward limiting Congress's power to regulate and to protect the states from federal intrusion, the Court sometimes draws on more than one constitutional provision. Thus, it interpreted both the commerce clause and the Fourteenth Amendment to stop suits under federal law for violence against women (**Morrison**). And it used the same combination to strike down a federal law that allowed suits against the states for violating other laws on false advertising (**College Savings Bank,** 1999).

Congress has assumed for the federal government a number of additional responsibilities under its use of the "elastic clause" found in Article 1, section 8, clause 18. Congress has

the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated powers]."

The "necessary and proper" clause has competed with the commerce clause for expanding the federal government's power.

As we have seen, the debate over one dimension of the compact was whether the states or the people were the original parties to the agreement. Was the charter a product of the states, as Maryland argued in **McCulloch v. Maryland** (1819), or was it a product of the people? Chief Justice Marshall's ruling was in favor of the people and as a consequence the "necessary and proper" clause was brought into play, authorizing the federal government to establish a national bank within a state even though such power was not among those listed in the Constitution. Nonetheless, concerning the efforts of the federal government, John Marshall ruled:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and the spirit of the constitution, are constitutional.

McCulloch shows that federalism remains an active contributor to the holistic Constitution. The outcome in that case rides on who agreed to the provisions of the compact—the people or the states.

The federal government retains plenary jurisdiction over a number of powers over which there has been little controversy. The Constitution in Article 1, section 8, dictates that Congress "shall have Power . . . to borrow money on the Credit of the United States"; to establish rules for immigration, to coin money, to set up post offices, and the like; these functions are largely taken for granted today.

The states have retained jurisdiction over so-called "police powers," those over the health, morals, welfare, and safety of their citizens. Included are states' requiring smallpox vaccinations, regulating the legal and medical professions, enacting zoning regulations, passing and enforcing criminal statues, setting building codes, and agreeing on grade school curriculum; the list grows as we think of the "rules" we run into in our ordinary everyday existence. However, the validity of such state legislation has often turned on whether "due process," "equal protection," or "interstate commerce" is involved or whether the law is "necessary and proper." Nonetheless, states may lose or gain in the politics of federalism (and much of what is lost is by choice); they still have considerable responsibilities requiring their attention.

The President and the States

The federal government does not permit states to meddle in foreign affairs, leaving such concerns to the plenary power of the federal government, mostly, as we have seen, under the guidance of the president (**Curtis-Wright Export Corporation v. U.S.,** 1936).[10] Under some circumstances, the president's power to make treaties with the approval of two-thirds of the Senate can override state law and even regulate matters upon which Congress alone may be helpless to act. For example, the conflict in **Missouri v. Holland** (1920) was between the states' Tenth Amendment powers and the federal government's power in foreign affairs. The United States and Canada had signed a treaty, approved by the Senate, to protect migratory birds on their flights to and from the two countries and over the several states. Missouri had asserted its Tenth Amendment claim to regulate hunting seasons while the birds were within its borders. However, sole power of the federal government under Article 1 and the "supremacy clause" of Article 6 took precedent over Missouri's

claim. Justice Oliver Wendell Holmes was firm in his explanation for the ruling:

> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with another power. The subject matter [—migratory birds—] is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute [implementing the treaty] there soon might be no birds for any powers to deal with.

From another perspective, the president has overridden the concerns of states. Without authorization from Congress, the president can assign U.S. marshals to protect federal officials as they conduct their lawful duties. In **In re Neagle** (1890), the president assigned a marshal to protect Supreme Court Justice Stephen J. Field while he rode circuit in California.[11] While on duty, the marshal (Neagle) shot and killed a person who had threatened the judge. Neagle was arrested for murder under California law. The Supreme Court ruled he could not to be held by the state for performing the duties assigned him by the president. This inherent power in the presidency includes "all rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of government under the Constitution." In a sense, Neagle was acting under the authority of the president, who must see that the "laws are faithfully executed."

The Supreme Court and State Courts

Article 3, section 2, reads: "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 . . . under their Authority."

Additionally, the appellate jurisdiction of the high court is determined by Congress. The Judiciary Act of 1789 authorized the Supreme Court to review those state court decisions that bring into question a federal law or validate a state law that appears to be inconsistent with the federal Constitution. This authority to review the decisions of state courts of last resort initially caused considerable controversy.

In 1813 the Supreme Court was confronted with a case from a defiant state court of last resort. Virginia's high court justices had refused to follow an earlier Supreme Court decision, arguing that they had the final word on the meaning of federal law in Virginia. Justice Joseph Story, writing for the Court in **Martin v. Hunter's Lessee** (1816), reminded Virginia of Article 6, which dictates that the "judges in every State shall be bound thereby [by the Constitution and laws in pursuance thereof], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Under the Constitution's tripartite system, Courts were necessary to "expound and enforce" laws, and to do this, Congress had to "vest" courts with appellate jurisdiction. Should decisions of state courts involve applications of federal law, final appeals are to be available to the U.S. Supreme Court in order to assure uniformity throughout the states. Also, as Justice Story reasserted, the Constitution and consequently its grant of judicial power was not designed to benefit one state or another, but rather, it was "designed for the common and equal benefit of all the people of the United States."

State courts are presumed to follow the supremacy clause (Article 6) and enforce federal rights. But to protect those rights, not only is the Supreme Court permitted to review cases decided by state courts, but some cases involving federal rights can be taken ("removed") from state court to federal court.

State courts are, however, also allowed to depart from national uniformity in providing rights. They may not stray

below the protections of the federal Bill of Rights as applied by the nation's high bench. Yet state courts can avoid, if not defy, the Supreme Court by basing their decisions specifically and solely on state laws and constitutions with no reference to federal law. They thus can provide greater protection to rights under their own state constitutions than the U.S. Constitution provides, and the Supreme Court allows them to do this. But to avoid Supreme Court review of its judgment, as Justice Sandra Day O'Connor ruled for the majority in **Michigan v. Long** (1983), a state court must make a "plain statement" in its opinion that the case rested on "adequate and independent state grounds."

The difficulty with vertical power relationships is in defining the categories involved and, thus, drawing clear lines of responsibility. For example, what is interstate commerce? Or is this an issue of foreign affairs? Does a state wiretap law violate the Fourth Amendment to the U.S. Constitution? Or does it violate only the Declaration of Rights of the state constitution? This means, of course, that the Supreme Court must continuously monitor the relations between nation and state as new—and old—situations create continuing conflict demanding clarification. The high court's choice has largely been between balancing the responsibilities or assigning more of them to the federal government. As Raoul Berger expresses it, it is a choice between "National Supremacy or Dual Sovereignty."[12]

Horizontal Federalism: State Versus State

Beyond the equal representation of states in the U.S. Senate (see Chapter 6), horizontal federalism continually confronts the Supreme Court with questions of uniformity or uniqueness, questions of parity or partiality between states. Does one state have an advantage over another? Is there a need for uniformity? Should not the larger states in terms of popula-

tion, wealth, or area be treated differently from the smaller and perhaps poorer states?

Article 4, section 3, of the Constitution gives Congress the power to admit new states into "this" Union as long as the new state is not the result of dividing an existing state or formed from parts of other states without their consent. This means, as a result of **Coyle v. Smith** (1911), that new states enter the Union on an equal basis with those that are already members.

> "This Union" was and is a union of States, equal in power, dignity and authority, each competent to exert the residuum of sovereignty not delegated in the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a Union of States unequal in power.

Article 4 also guarantees each state a republican form of government. This means each state must have a representative government. However, who is responsible for the guarantee? The Supreme Court has determined that cases arising out of this clause present it with nonjustifiable political questions, leaving to Congress what constitutes a republican government.

Congress can impose uniformity on the states through its power over commerce as well as its power to spend (Article 1, section 8, clause 1). Under threat of losing federal highway funds, South Dakota raised its drinking age from 18 to 21 to be on parity with neighboring states. In **South Dakota v. Dole** (1987) the Court reasoned that "Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages." Pursuant to Article 1, section 8, clause 1, "Congress may attach conditions on the receipt of federal funds," not to compel but to encourage compliance with legislation directed toward the "general welfare." The

Twenty-first Amendment, which repealed the Eighteenth Amendment (Prohibition), had turned the regulation of liquor and alcohol products over to the states, but

> Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and this interstate problem required a national solution.

Consequently, parity in drinking ages was "encouraged" in the name of the general welfare. Since the withholding of federal highway funds only indirectly impinged on the states' Twenty-first Amendment power, the author of the majority opinion, Chief Justice William Rehnquist, usually a supporter, gave the states a difficult choice in the **Dole** decision: Accept uniformity or choose to be different, but at a price.

Federalism features of the Constitution, which aid in accommodating state independence and assuring cooperation among the states, are found in Article 4, sections 1, 2, and 4.

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. . . . The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. . . . The United States shall guarantee to every State in this Union a Republican Form of Government.

This means that a state's court records, decrees, and judgments, however unique, are to be honored by other states. Nevada could keep its unique marriage or divorce laws and, with some exceptions, other states must honor those laws. In the name of cooperation, full faith and credit permits some uniqueness or partiality.

The privileges and immunities clause acts somewhat in the same manner, ensuring a modicum of uniformity among the

states by guaranteeing the rights to travel, to own property, to be protected from crimes, and to bring lawsuits. Uniqueness prevails by leaving to each state the definition of individual rights, although, as we shall see, the due process clause of the Fourteenth Amendment has significantly replaced individual rights defined by the states with national rights.

Not only does the commerce clause dictate federal dominance over the states, but the Supreme Court has used it to enforce state uniformity. In **Edwards v. California** (1941), the Court used the commerce clause to invalidate California's "Anti-Okie Law," which prevented people from entering the state without visible means of support. Of the constitutional provisions dealing with federalism, "none is more certain than the prohibition against attempts on the part of any state to isolate itself from difficulties common to all of them." Some advantage to a state may be initially gained "by shutting its gates," but, in the words of Mr. Justice Cardozo, "The constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[13]

The two dimensions of federalism—nation versus state and state versus state—have varied over the 200 years of constitutional evolution. The former conflict has fluctuated between the extremes, resulting in either a strong central government (national supremacy) or somewhat autonomous state government (dual federalism), recently settling on a midpoint referred to as cooperative federalism. The federal government dominates, but some powers are retained by the states, largely at the tolerance of Congress and the Court. When it is needed, the two centers of power cooperate. In horizontal federalism, the Supreme Court attempts to avoid granting advantage to one or another of the states.

Notes

1. K. C. Wheare, *Federal Government* (New York: Oxford University Press, 1964), p. 1.

2. "Had the people believed that the Constitution would 'reduce the [States] to little more than geographical subdivisions of the National domain . . . it never would have been ratified.'" Quoted in Raoul Berger, *Government by Judiciary* (Cambridge: Harvard University Press, 1977), p. 55.

3. Quoted in C. Herman Pritchett, *The American Constitution* (New York: McGraw Hill, 1968), p. 159.

4. County and municipal governments are instruments of state governments.

5. Horizontal federalism is not to be confused with what has been called a "'horizontal division' among the national executive, legislature, and judiciary" or, more correctly, separation of powers. See, for example, John H. Garvey and T. Alexander Aleinikoff (eds.), *Modern Constitutional Theory: A Reader* (St. Paul, MN: West Publishing Co., 1989), p. 177.

6. Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, *Constitutional Law* (Boston: Little, Brown and Company, 1986), p. 126.

7. Lewis B. Kaden, "Politics, Money, and State Sovereignty: The Judicial Role" and Andrzej Rapaczynski, "From Sovereignty to Process: The Jurisprudence of Federalism after **Garcia**," in Garvey and Aleinikoff, *Modern Constitutional Theory*, pp. 130, 141.

8. Charles Evans Hughes, *The Supreme Court of the United States* (New York: Garden City, 1936), p. 155.

9. The **Garcia** decision also involves aspects of representation and separation of powers.

10. Section 10 of Article 1 reads, "No State shall enter into a Treaty, Alliance, or Confederation." The **Curtiss-Wright** case also contains remarks about the compact and separation of powers.

11. **Neagle** also mentions aspects of separation of powers.

12. Raoul Berger, *Federalism: The Founders' Design* (Norman: University of Oklahoma Press, 1987), p. 48.

13. **Baldwin v. Seelig**, 294 U.S. 511, 523 (1935).

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6

Representation

[W]e may define a Republic to be, or at least we may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their office during pleasure for a limited period, or during good behavior. It is essential to such a government that it be derived from the great body of society, not from an inconsiderable proportion or a favored class of it. . . . It is sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people.

—*James Madison,* Federalist *39*[1]

The initial and necessary consent anchoring Madison's republic has been provided by the constitutional compact. However, an additional prerequisite of a republic is, as Madison noted, that periodic renewal of this consent through direct or indirect elections be present. *Representation* is the component that provides this dimension to the Constitution. A republican form of government means representative government.

Except for small governments or units of government, the people do not and cannot gather together and conduct the business of governing as in the ancient city-state or the New

England town meeting. The responsibility is turned over to a few who are to represent the many. But the persistent constitutional issue is how to assure that those few truly represent the many.

The Constitution makes only one direct reference to a republic. In Article 4, section 4, the basic law dictates: "The United States shall guarantee to every State in this Union a Republican Form of government." The Supreme Court has failed concisely to define a "Republican Form of government"; instead the task is left to Congress. The Court views any questions as to what constitutes such a form as "political questions," beyond the jurisdiction of courts (**Pacific State Tel. and Tel. v. Oregon,** 1912).

The effectiveness of representation in a democracy depends upon how those authorized to govern remain accountable to those being governed for their policy decisions. Ideal or *pure representation* is achieved if a one-to-one ratio exists between the interests—wants and needs—of those being governed and the policies enacted by those governing. The governors are then indeed accountable. At the other extreme, *polluted representation* exists when the policies of public officials are in opposition or oblivious to the interests of those being represented.

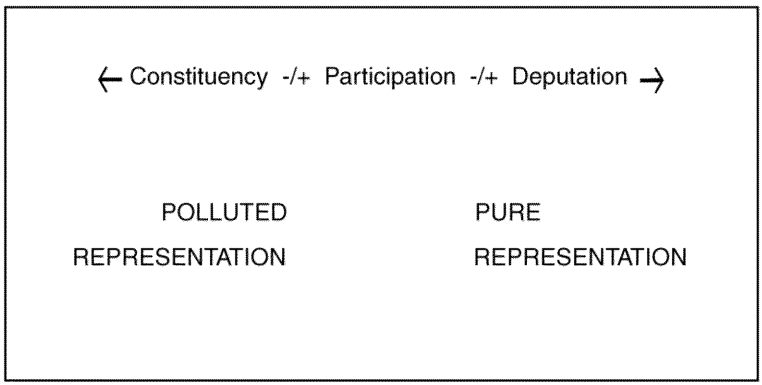
Of course, pure representation could be achieved by a benevolent dictator. That is, a Hitler, Stalin, or Saddam Hussein could provide the people with whatever they need or desire without having to be elected, confirmed, or reelected. However, as we have seen, the assumption underlying the Constitution and necessitating the distribution of power throughout the government is that humans are not benevolent. They tend to seek power and will abuse that power once it is gained. Thus, representatives cannot be wholly trusted. They need to be held accountable by some practical and direct methods.

Also important, however, is that some degree of trust be given the governors. In order for public officials to administer government and to enact public policies, a sufficient level of public support is necessary. The idea of popular consent provides both the accountability and the support. Government by consent assures sufficient support for and trust in those who govern, permitting them to perform their assigned duties with the legitimacy of duly vested agents of the citizenry. Nonetheless, that support or legitimacy needs to be expressed periodically. Consent can be withdrawn and the governors replaced, should the trust be violated or the public needs ignored.

Representation—whether pure or polluted, or some approximation thereof—depends upon the coincidence of three factors, factors to which the Supreme Court has had to give content over the years. First, *constituency* refers to *what* is being represented. Second, *participation* refers to *how* the constituency expresses its interests. Third, *deputation* refers to *who* is delegated to carry out the constituency's business. Should a close coincidence or balance among constituency, participation, and deputation obtain, an approximation of pure representation would result. In contrast, should the three representation factors be in discord, a degree of polluted representation would exist. Representation as a constitutional component can be portrayed as in Figure 6.1.

Constituency concerns itself with persons and jurisdictions. Participation involves the constitutional status of elections and political party and interest group activities. Deputation refers to the constitutional qualifications and tenure of elected and appointed officials. Should the major interests of the particular constituency be reflected in full participation in the selection of qualified public officials, pure representation would likely prevail. Of course, should segments of the constituency be ignored and limited participation present, the public officials selected would likely be less qualified to dis-

FIGURE 6.1 Representation



cern the needs of the constituency, and consequently, a degree of polluted representation would result.

The history of representation under the leadership of either Congress or the Supreme Court has meant that there has been a hesitant movement from a questionable, if not polluted, version toward an open, or near pure, representation, that is, a movement from a closed to an open process. To a great extent what ails representation is not constituency access but rather constituency apathy.

Citizenship and Constituency

What is to be represented—people, citizens, aliens, organizations, geography, economic interests or only segments thereof—and to what degree? Certainly citizens are to be part of the republic's constituency. Citizenship is gained by three methods. *Jus soli* determines citizenship when one, despite the citizenship of parents, is born on U.S. soil and subject to the jurisdiction of the United States. *Jus sanguinis* confers citizenship by parentage. If one's parents are citizens, then despite where a person may be born, he or she is a citizen. The Fourteenth Amendment legitimated the two cus-

tomary forms of gaining citizenship: "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."

Congress, under Article 1, section 8, has the power "[t]o establish a uniform Rule of Naturalization." Obviously, a variety of circumstances complicates these principles, but one of these three methods provides the basis for any question about citizenship. A citizen can also lose that status through denaturalization, a process withdrawing the privilege for cause originally granted under naturalization. Expatriation can lead to a rescinding of citizenship by the person's own action. For example, citizenship is lost if one voluntarily gives up citizenship and swears allegiance to another country. Whatever the details of a sometimes complicated factual situation that has confronted the Court, citizens constitute one segment of the constituency.

Initially, Native Americans were treated as noncitizens, even though they fulfilled the requirements of the Fourteenth Amendment. They were viewed as citizens of a foreign nation with their status defined by treaties. The idea of tribes as autonomous nations soon lost credence, however. In **Cherokee Nation v. Georgia** (1831), John Marshall designated Indian tribes as "domestic dependent nations," neither states nor foreign nations. Although subjects of the United States, Native Americans were neither aliens nor citizens.

Eventually, Congress, through a series of enactments, some prompted by Supreme Court cases such as **Ex parte Crow Dog** (1883), brought Native Americans into full citizenship. The Dawes Act of 1887, in an effort to break up tribes, encouraged Indians to take private property allotments out of their tribal lands and therewith gain American citizenship. Others who voluntarily left their tribe were also awarded citizenship. In 1901 Congress granted citizenship to all Native Americans living in the Indian Territory (later Oklahoma). In

1919 those who fought in World War I were made citizens, and, finally, in 1924 all other Native Americans were granted citizenship, completing the process of inclusion in the constitutional constituency.

The inclusion of African-Americans into citizenship traveled a similarly troubled path but involved the Supreme Court to a more intimate degree. In the infamous **Dred Scott v. Sandford** (1857), the issue was slavery, and the immediate question was whether African-Americans could be citizens and thereby sue in federal courts. First, according to Chief Justice Roger Taney, when the Constitution speaks of "people," it means "citizens." Given this basic assertion, the query became:

> whether the descendants of . . . slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the constitution?

Taney's answer was a resounding "No!" Since slaves were not regarded as citizens when the compact was agreed to, they could not later be included among the citizenry.

> [T]hey are not included, and were not intended to be included, under the word "citizens" in the constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings . . . and, whether emancipated or not . . . had no rights or privileges but such as those who held the power and the government might choose to grant them.

The response to **Dred Scott** was provided by the Union's victory in the Civil War, resulting in the first section of the

Fourteenth Amendment, which reversed the **Dred Scott** decision by granting national and state citizenship to African-Americans.

Although the Fourteenth Amendment settled the citizenship issue, the history of full participation in the privileges granted citizenship for African-Americans has meant a hesitant realization of the full potential of the amendment. As discussed below, full participation for African-Americans as members of the constitutional constituency has followed a troublesome path.

Although aliens—resident or visiting—do not enjoy the right to vote, they enjoy the protections of the Bill of Rights and the privileges and immunities of citizens. They may of course become naturalized citizens under certain conditions as defined by Congress.

More than citizenship constitutes the content of constituency. What is to be represented? Federalism requires that geography be a constituency factor. According to Article 1, section 3, "The Senate of the United States shall be composed of two Senators from each State" and as declared in Article 4, section 3, any alteration of this provision requires the "Consent of the Legislatures of the States concerned as well as of the Congress." Article 5 dictates that no state "shall be deprived of its equal Suffrage in the Senate" without its consent.

Federalism also requires members of the U.S. House of Representatives to be residents of the state they represent. Although the state or district places geographical boundaries around what is to be represented, in **Reynolds v. Sims** (1964), the Court ruled: "Legislators represent people, not trees or acres. Legislators are selected by voters, not farms or cities or economic interests." However, despite a significant difference in size, Connecticut, with a fairly concentrated population, sends two senators to Washington, D.C., and vast and largely unpopulated Alaska sends a like number to the na-

tion's upper house. Of course, population is to be represented, but in the U.S. Senate, trees and acres are inadvertently brought into the constituency formula.

Although citizens and geography remain crucial constituency factors, population has always been a consideration. Members of the House of Representatives come from districts in their respective states, but the number of representatives coming from those states is based upon the numbers of people, not voters or citizens. Especially after redistricting following the census figures every ten years, the importance of population becomes evident. For example, although limited to two senators, highly populated California has forty-nine representatives, and New Hampshire has but one member in the House of Representatives.

In **Wesberry v. Sanders** (1964), the Court reaffirmed the primary constituency role of population:

> The history of the Constitution, particularly the part of it relating to the adoption of Article I, section 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, . . . it was population which was to be the basis of the House of Representatives.

No matter how inclusive a constituency can become, cries for attention will go unheeded without the means of translating them into tangible governmental requests. Participation is an essential corollary to constituency.

Participation: Voting, Political Parties, and Pressure Groups

Translating constituency interests into policy demands that will be heeded takes at least three distinct forms—voting, the activities of political party organizations, and the efforts of interest groups. The Supreme Court and the Constitution have indeed been intimately involved with each form.

In deference to the states, the Founders chose to include in Article 1, section 2, the stipulation that the voters for members of the House of Representatives shall "have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Also, the "Times, Places and Manner of holding Elections" would depend upon what state legislatures decide.[2]

The Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments to the Constitution provide the foundation for voting rights. For example, the Fifteenth Amendment reads:

> 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.

Congress is given the power to enforce the amendment through appropriate legislation. However, full voting participation by African-Americans did not come automatically with the ratification of the amendment.

Under cover of Article 1, section 2, states have been provided the opportunity to drag their feet regarding full participation of minorities through the manipulation of how primary elections are conducted and the status of political parties defined. Initially, the Supreme Court regarded primary elections as private activities and consequently outside the dictates of the Constitution (**Newberry v. U.S.,** 1921 and **Grovey v. Townsend,** 1935). These rulings allowed several states to limit participation in the primary elections to whites only. However, "state action" became involved when states enacted laws regulating primary elections. Then any effort by voting personnel to deny the vote to African-Americans was viewed as an official action by the states and thus in violation of the Fourteenth Amendment (**Nixon v. Herndon,** 1927).

Within a few years, the Court looked again at the "private club" concept of political party primary elections that had remained free from state regulation and were thus able to discriminate. The Court majority in **Smith v. Allwright** (1944) reasoned that the primary elections significantly shaped the results of the general election no matter how private they may have appeared. Any discriminatory actions against nonwhite voters by officials of political parties—private or public—constituted unconstitutional state action.

> The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State . . . casting its electoral process . . . as a private organization.

To subvert the **Allwright** decision, Texas moved the discrimination further back in the electoral process. All-white private pre-primary clubs were formed, resulting in a private agreement to support only white candidates in the subsequent Democratic primary. This "private club" agreement meant that candidates picked by these "Jay Bird Associations" always won the Democratic Party's primary and, consequently, with but few exceptions were assured victory in general elections. Justice Hugo Black, writing in **Terry v. Adams** (1953), observed:

> The only election that has counted in this Texas county for more than fifty years has been held by the Jaybirds. . . . For a state to permit such duplication of its election processes is to permit a flagrant abuse [of] the 15th Amendment.

Under the pressure resulting from the Supreme Court's attention to participation rights, Congress took over the re-

sponsibility in a series of Civil Rights Acts and Voting Rights Acts beginning in 1957, authorized by the enforcement provisions of the Fourteenth and Fifteenth Amendments. The Court readily approved. In upholding the Voting Rights Act of 1965, Chief Justice Warren wrote in **South Carolina v. Katzenbach:**

> Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. The basic test to be applied . . . is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States.

According to Warren, the enforcement provisions of the Fifteenth Amendment overrode the reserved powers of the states, because as John Marshall had written in **Gibbons v. Ogden** (1824):

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed by the constitution.

Poll taxes and literacy tests were also used by some states to narrow voting participation. The Twenty-fourth Amendment eliminated poll taxes in federal elections and the Voting Rights Act of 1965 forbade such taxes at the state level. This portion of the 1965 law was upheld by the Supreme Court in **Harper v. Virginia Board of Elections** (1966). Congress outlawed literacy tests in the 1970 amendments to the 1965 Voting Rights Act.

Altering the boundaries of voting constituencies, or gerrymandering, was, and interestingly still is, a method for influencing participation in elections. Redrawing representative districts to give an advantage to the ruling political party remains a valid tradition. However, constituency boundaries

may not be drawn along racial lines in order to discourage—or to encourage—participation in elections. In **Gomillion v. Lightfoot** (1960), the Supreme Court invalidated an "uncouth twenty-eight sided figure" drawn to place residents in a African-American residential area outside the city limits and, consequently, excluding them from city elections.

The Voting Rights Act of 1965 as amended required states after the latest census figures to redraw congressional districts to more clearly represent minority populations. However, race alone seems not to be a constituency factor if the redrawn congressional district disregards logic, geography, and traditional political subdivisions such as counties or municipalities. In **Bush v. Vera** (1996), Justice Sandra Day O'Connor, writing for the Court, gave close and "strict scrutiny" to a Texas redistricting scheme and found it wanting. It was based primarily on race without any convincing argument that a compelling state interest was involved in the redistricting.

Strict scrutiny applies when "redistricting legislation . . . is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles."

Earlier in **Shaw v. Reno** (1993), Justice O'Connor had stated clearly the problems redistricting can cause for participation of African-Americans in the electoral process:

> Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.

The resistance to the right of women to vote after the ratification of the Nineteenth Amendment in 1920 did not generate the evasion tactics that had followed the Fifteenth Amendment, even though both amendments were worded to leave little doubt as to their intent. The Nineteenth Amendment reads: "The right of citizens of the United States to vote shall not be abridged by the United States or by any State on account of sex." Enforcement of the amendment met little opposition that required Supreme Court intervention. However, the amendment did not grant gender equality regarding such rights as jury service, property ownership, workplace protections, marriage and divorce, and the like. An equal rights amendment (ERA) that would have firmly placed such rights into the Constitution failed to be ratified in the 1970s, although it had initially received overwhelming support when proposed by Congress, and the time limit for ratification had been extended. Many thought that legislatures had eliminated some of the inequities and that the equal protection clause in the hands of the Supreme Court would fill any gaps. However, the Supreme Court paid little attention to discrimination based on gender in areas other than voting until the 1970s (See **Reed v. Reed,** 1971 and **Roe v. Wade,** 1973).

The Court also authorized Congress to set residency and age requirements (eighteen) for voters, at least as they pertained to federal elections (**Oregon v. Mitchell,** 1970). The Twenty-sixth Amendment set eighteen as the voting age in state and local elections. By the 1980s virtually all impediments to voting had been removed, and this aspect of participation had over the years moved from a fairly restricted franchise to an open process that encourages full participation at the polls or voting through absentee ballots.[3]

Of course, participation becomes distorted if one person's vote is not equal to another person's vote. Until **Baker v. Carr**

(1962) state legislatures, which were often dominated by rural representatives, resisted equalizing seats among rural, suburban, and urban districts. As we have seen, in **Baker** the Court withdrew the question of apportioning state legislatures from its list of untouchable political questions and plunged into the "political thicket," as Justice Felix Frankfurter called the whole issue of reapportionment. Soon the "one person, one vote" principle (**Gray v. Sanders,** 1963) was established and both houses of the state legislatures as well as the federal House of Representatives were ordered to assure that the results of elections were reflected in proportion to the population in electoral districts.[4]

Another form of participation has provided the nation's high bench with a number of representation questions. Constituency interests are often translated into policy demands by the activities of interest groups. But are such groups protected by the Constitution? Are full and equal participation enjoyed by all politically active groups?

As we shall see, the Bill of Rights reinforces the participation provisions of representation. For example, the First Amendment refers to the rights of assembly and to petition government for redress of grievances. Generally, along with the speech and press provisions of the First Amendment, this has meant freedom of association, which translates into the right to form groups and to pressure government for favorable policies. As early as 1937 (**DeJonge v. Oregon**), the Supreme Court saw a need to protect *association* rights and to incorporate them into the Fourteenth Amendment to provide a shield against state action. Chief Justice Hughes wrote that "[t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental" and any state laws restricting the right are "repugnant to the due process clause of the Fourteenth Amendment."

In efforts to restrict the participation of African-Americans organizations in the political processes, some Southern states

turned to placing limits on the activities of the National Association for the Advancement of Colored People (NAACP), the leading political and legal organization for African-Americans. Alabama claimed that the NAACP had not registered with the state as an out-of-state corporation and was banned from doing business in the state. Alabama demanded disclosure of the names and addresses of Alabama NAACP members and activists. In **NAACP v. Alabama ex rel. Patterson** (1958), the Court rejected the demand as a violation of the right of association. According to Justice John Harlan:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undoubtedly enhanced by group association . . . State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny [under the Fourteenth Amendment].

As we shall see in the following chapter, when the Court gives "close scrutiny" to governmental acts against persons or groups, those acts are most often declared unconstitutional.

Although political party activities have on a few occasions been directed toward limiting voting for some categories of citizens, they most often encourage participation. Without political parties, constituency interests would find it much more difficult to be heard by the representatives in government. The two forms of participation—voting and political parties—work in tandem and constitute an integral part of participation. The Supreme Court noted this relationship in **Williams v. Rhodes** (1968). Under the Fourteenth Amendment equal protection clause, the high bench invalidated an Ohio statute that required minority parties to follow a difficult and complicated process to have their candidates placed on the election ballots. Justice Black, for the Court, wrote that "the totality of these laws" constituted "an invidious

discrimination," giving the majority parties a "complete monopoly." Unconstitutional burdens had been placed on "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters . . . to cast their votes effectively."

Open voting, responsive political parties, and active interest groups lead to a participatory process characteristic of a republic. However, some limits are placed on who is to be elected to public office.

Representation and Deputation

To complete the representation sequence beginning with constituency and involving participation, consideration must be given to the final results of the process. What are the constitutional parameters for members of Congress and the presidency? Who has been deputized by the voters, and to whom do groups and party officials go to have their interests translated into policy?

For an approximation of pure representation, those who are chosen to represent constituency interests advocated by voters, parties, and groups should either represent a cross-section of the attributes of the constituency or be sensitive to those attributes. For example, if a constituency is largely a farming area, most of the legislative deputies or delegates should be farmers. If 20 percent of a state is African-American, a comparable percentage of the state legislature or representatives in Congress should be African-American. If deputies are not a cross-section of the ethnic, social, or economic segments of a constituency, they should nonetheless be aware of and sensitive to those interests and be able to understand them sufficiently to translate them into policies. Their legislative behavior should be a reflection of the constituency interests. Both forms of deputation or some combi-

nation thereof are possible under the Constitution, although some prerequisites narrow the possibilities.

Article 1, section 2, requires:

> 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 . . .

Section 3 requires that senators must be at least thirty-five years old, a minimum of nine years a citizen, and an inhabitant of the state. The president, according to Article 2, must be a natural born citizen, thirty-five years or older, and a resident of the United States for at least fourteen years. The constitutional requirements for deputation are quite clear and appear irrevocable. The Supreme Court confirmed their importance in **Powell v. MacCormack** (1969). The question involved the qualifications for membership in the House of Representatives. Chief Justice Earl Warren wrote that a study of history led to the conclusion that "the Constitution leaves the House without authority to exclude any person duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution," namely, age, residency, and citizenship.

A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them." Again, as Madison pointed out at the Constitutional Convention, this principle is undermined as much by limiting who the people can select as by limiting the franchise itself. This principle of qualifications limited to the requisite age, residency, and citizenship was reaffirmed in **U.S. Term Limits Inc. v. Thornton** (1995), and the close nexus between voting and who is elected is

made stronger. The qualifications of the representatives must not limit the choices available to the voters:

> That the right of the electors to be represented by men of their own choice, was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our Constitution.

Another aspect of deputation involves whether a duly elected legislator, although representing unacceptable politics, should be sworn in as a member of a hostile legislature.

Despite the politics of a constituency, a majority of the members of a lawmaking body are not permitted to exclude a person elected by that constituency. The First Amendment's free speech provision overrode the rule that a legislature determines the qualifications of its members (**Bond v. Floyd,** 1966).

> The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators. Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them.

It is clear that members of Congress and state legislatures are representatives and fulfill the requirements of deputation, but what about judges? Judges must be independent in order to apply the law fairly and objectively. Does this need for independence mean that judges are exempt from constituency concerns and that participation in their selection is limited? In **Chisolm v. Roemer** (1991), the Court provided an answer. The justices interpreted the intent of Congress to include

judges in the coverage of the Voting Rights Act of 1965 as amended. (As previously explained, the Voting Rights Act was enacted to enforce the Fifteenth Amendment.) In reaching its decision, the Court provided the nexus between participation and deputation, and in the process included at least elected state judges as fulfilling the requirements of deputation. "We think," wrote Justice John Paul Stevens for the majority, "that the better reading of the word 'representatives' [in the statute] describes winners of representative popular elections." By using that word, "Congress intended the [statute] to cover more than legislative elections." If officials, judges, or legislators are elected, they are "representatives" and that system of election must be open, with the opportunity for full participation by voters. Appointed judges, such as those on the federal benches, however, are not regarded as representatives.

The evolution of representation as a viable constitutional component has been hesitant but inexorable. Federalism has tended to hinder its unfolding, while Congress (through the enforcement provisions of the Fourteenth and Fifteenth Amendments) and the Supreme Court (through the qualification clauses, the Bill of Rights, and equal protection clause of the Fourteenth Amendment) have encouraged its movement toward a purer version of representation.

Notes

1. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: New American Library, 1961), p. 241.

2. From the perspective of the holistic Constitution, many representation issues are also issues affecting federalism.

3. Oregon successfully experimented with a mail-in election in 1996. Also, there has recently been an increase in the use of absentee ballots.

4. **Baker v. Carr** involves three of the constitutional components while also illustrating the activism of the bench. Questions involving separation of powers, federalism, and representation confront the Court.

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7

The Bill of Rights: What Belongs to the Individual and What Belongs to Society?

Although not added to the original Constitution until four years after the requisite number of states had ratified the basic law, the Bill of Rights is to be regarded as part of the original document. George Mason had unsuccessfully urged the Founders at the Philadelphia Convention to adopt provisions protecting people's rights from invasion by the federal government. Without much discussion, his urgings were unanimously rejected. Such protections were regarded as unnecessary because eleven of the thirteen states already had some form of a Bill of Rights shielding citizens from state governments. It was argued that protection from the abuse of power by the federal government was already provided by the dispersal of power throughout by separation of powers, federalism, and a bicameral legislature. Besides, the national government could exercise only its enumerated powers, and as Alexander Hamilton expressed it, "Why declare that things shall not be done which there is no power to do?" Others thought there was no need for a separate Bill of Rights because individual rights were included in provisions

of the Constitution like protections against Bills of Attainder and *ex post facto* laws (see Article 1, section 9). Also, by enumerating certain rights and not others, it was feared this would leave those not listed unenforceable. It was best to leave them unspecified. In any case, the debate arose late in the Philadelphia Convention and the delegates were tired and eager to get home. The issue rested until the proposed Constitution was circulated among the states for ratification.

The anti-federalists, in their efforts to discredit the Constitution, focused their criticism on the absence of a listing of rights, although they also were fearful that the central government's power to tax and to control interstate commerce would threaten state sovereignty. The absence of a Bill of Rights dominated the criticisms especially in New York, Massachusetts, and Virginia. People were suspicious of the new Constitution as much for what it did not contain as for what it did contain.

Thomas Jefferson urged James Madison to promise adding a Bill of Rights: "A Bill of Rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference." Under pressure, Madison, who had originally rejected the idea, pledged to bring a Bill of Rights proposal before Congress as soon as the new government was in operation. Debates at state ratifying conventions led to promises to revisit the issue in Congress.

Seventeen amendments largely borrowed from Massachusetts' and Virginia's Declarations of Rights were submitted to Congress on June 8, 1789. After consolidating several into what became the First Amendment, both houses approved twelve amendments on September 24, 1789. It is worth noting that during the debates over the Bill, Congress had considered placing the rights within the body of the Constitution, but to avoid unnecessary controversy, the members

opted for attaching them at the end as amendments. On December 15, 1791, Virginia became the deciding state to ratify the amendments, and the Bill of Rights became part of the Constitution.[1]

That the Constitution was ratified with promises to add a Bill of Rights and that Congress had seriously considered placing it within the text of the basic document attest to its being regarded as part of the original. On several occasions, the Supreme Court has also confirmed this original status for the Bill of Rights, justifying placing it among the fundamental components of the Constitution. For example, in **Barron v. Baltimore** (1833), Chief Justice Marshall recounted the history of the Bill:

> [I]t is part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to the union, and to the attainment of those invaluable objects for which the union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. . . . In compliance with the sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the states.

Similarly, in **West Virginia Board of Education v. Barnette** (1943), the Court reminded us: "Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification." But what choices has the Bill of Rights given the Supreme Court as it

contemplates issues of the rights of individuals versus the rights of society and the role of government in the conflict?

Procedural and Substantive Rights

Perhaps the most obvious distinction to be drawn among the various provisions found in the first nine amendments to the Constitution is between *substantive* and *procedural rights.* The First Amendment's provisions of free exercise of religion, free speech, press, assembly, and petition and its prohibition against an established religion, along with the Ninth Amendment's admonishment that the enumeration of rights does not deny the existence of others and the recently enunciated right of privacy, constitute the *substantive* rights. In contrast, the Fourth Amendment's protections against unreasonable search and seizure and double jeopardy, the Fifth Amendment's due process, speedy public trial, just compensation provisions, and protection against self-incrimination; the Sixth Amendment's right to counsel; the provision for the right to a jury in a civil trial in the Seventh Amendment; and the Eighth Amendment's admonishments against excessive bail and fines and cruel and unusual punishment constitute the *procedural* aspects of the Bill of Rights.

Substantive Rights

Western political thought, from the time of the Greeks to the present, has assumed the reasonableness of humans. Although circumstances may be such that passions override reason, humans have the potential to determine their own political fate. It is the purpose of the Bill of Rights to create and maintain the optimum conditions for the exercise of reason. In order to make decisions about our political fate, we must be able to read, write, worship, gather together with others to discuss issues, and, if need be, act upon decisions by

petitioning government. Experimenting, contemplating, and reasoning without intervention from government are also encouraged by a high degree of privacy. John Stuart Mill, in his classic book *On Liberty,* prefaced his argument concerning freedom of opinion with words that reflect this assumption about the need for optimum conditions for the exercise of reason: "The necessity of freedom of opinion to the mental well-being of mankind on which all other well-being depends rests on [tolerance if not encouragement of opposing views]."

Reason will ultimately prevail, given an open and free political environment. Justice Oliver Wendell Holmes expressed it well in **Abrams v. U.S.** (1919):

> When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundation of their own conduct that the ultimate good desired is better reached by a free trade in ideas—that the best test of the truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

By seeking the results of the competition of ideas in the marketplace, government is provided with guidelines for policies as it pursues the high-sounding goals found in the Preamble to the Constitution. Justice Hugo Black, who consistently asserted that when the First Amendment says "Congress shall make no law," it means "no law" restricting speech or press, argued, "Freedom to speak and write about public questions is as important to the life of our government as is the heart of the human body" (**Milk Wagon Drivers Union v. Meadowmoor Dairies,** 1941).

The rights found largely in the First Amendment in and of themselves are of value. They have substance. It matters little

whether these rights are natural rights that define us as human beings or whether they are rights that we have created to enhance our political existence. These substantive rights remain paramount for a free individual and a free society. The function of government is to observe these rights and, if necessary, to intervene if those rights are threatened.

Nonetheless, freedom without restraint can mean anarchy: "The most stringent protection of free speech would not protect a man in falsely shouting fire in the theater and causing panic" (**Schenck v. U.S.,** 1919). Of course, the issue is where to draw the line between what is to be protected to keep the marketplace open and what is to be restrained as an obstruction to the free exchange of ideas. The Supreme Court, often prompted by Congress or the states, has assumed the responsibility for drawing the line. Of course, as the circumstances confronting the political system change, so wavers the line between what is permissible and what is not.

Substantive Rights and Societal Obligations

As we have seen (Chapter 3), not only is the compact an agreement among the parties in order to protect individual rights, but also, to that end, some freedoms must be relinquished to the collectivity. First Amendment rights have constantly presented the Supreme Court with issues of the individual versus society:

> Congress shall make no law respecting 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.

Freedom of religion is protected through two clauses in the First Amendment: the *establishment* clause and the *free exer-*

cise clause. If government supports one religion over another, a violation of the establishment clause is likely. If government coerces a religion, free exercise is in jeopardy.

With the hope that they could begin to provide some guidelines for judging the degree of separation of church and state to be tolerated, the justices designed a three-pronged test for establishment clause cases in **Lemon v. Kurtzman** (1971):

> First, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances or inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

As different fact situations have confronted the Court, the **Lemon** test for establishment issues has undergone modification. The "excessive entanglement" criterion has been made less demanding and more recently has been consolidated with other elements of the test. (See, for example, **Agostini v. Board of Education of the City of New York,** 1997.)

In contrast with establishment issues that weigh the degree and nature of government support, free exercise cases are concerned with government regulation or coercion of religious practices. Under the free exercise clause, the power of government cannot be used to force "affirmation of religious belief," to punish someone for expressing a "religious doctrine it believes to be false," to place at a disadvantage a person based on his or her "religious views or religious status," or to join on one side in "controversies over religious authority or dogma" (**Oregon Department of Human Resources v. Smith,** 1990). Further, the power to exempt religious practices from the requirements of a criminal law that generally applies to all citizens remains with the states, as Congress cannot, as it did in the Religious Freedom Restoration Act, attempt to change the constitutional law on this matter (**Boerne v. Flores,** 1997).[2]

Like the religion clauses, the freedom of expression (speech and press) clauses have presented the Court with diverse and challenging circumstances that have shaped the constitutional responses. However, unlike issues of religion, exercise of freedom of expression affects government directly because often the words being spoken or printed angrily criticize or challenge the authority of government itself. Most of the troublesome circumstances arise during wartime or during heightened fears of internal subversion, compelling the Court to come to society's aid at the expense of the individual. As in religion cases, several tests have been formulated to assist courts and legislatures in dealing with speech and press issues.

In order to draw a line between the kinds of expression that government can tolerate and those intolerable expressions that threaten society, Justice Holmes formulated the "clear and present danger" test (**Schenck v. U.S.,** 1919):

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Confronted with the threat to a free society from international communism, the Court replaced the clear and present danger test with the "bad tendency" test (**Gitlow v. New York,** 1925). Words that were "inimical to the public welfare, tending to corrupt public morals, inciting to crime or disturb public peace" had bad tendencies. The "proximity" of the **Schenck** test was no longer part of the formula. The cold war with the Soviet Union spawned another test to protect society in the name of national security. In **Dennis v. U.S.** (1951), the Court adopted a mathematical formula to deal with threatening words: "In each case [courts] must ask

whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

In **Noto v. U.S.** (1961) and **Brandenburg v. Ohio** (1969), the Court separated harmful action from the mere advocacy of such action. Citizens are able to believe and talk about whatever they wish as long as violent action is not taken to further those beliefs:

> The mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.

A speaker could argue for the use of violence against the government but do nothing about bringing about that violence. A line is drawn "between ideas and overt acts." Connecting the former with the latter is far from easy, but the justices are called upon to make that judgment.

In order to allow for a consideration of a variety of circumstances in which freedom of expression might have to be curtailed, the Court developed a more flexible and actually more problematic balancing test. Simply stated, the need to suppress certain forms of expression that threaten a peaceable society is weighed against the need to keep an open and free society. The balancing of needs does not really constitute a test. Each case is decided on an *ad hoc* basis, with each situation and form of expression measured against the damage such expression may cause to society.

Freedom of *assembly* involves the right of social, political, or religious groups to gather together to pursue the lawful objectives that drew them together initially. Freedom of *association* refers to the rights of persons to belong to a particular organization without fear of persecution or prosecution. The right of assembly is most often mixed with free speech

issues. It would be of little value for people to get together and then fail to communicate. Free speech is of little use to the recluse.

Whether government intervenes on behalf of individuals or on behalf of society, assembly, or association depends in large measure upon answers to three questions. First, was the forum for the gathering a public or a private forum? Was the gathering held in a public building, like a school, or was the meeting held in someone's home? Certain regulations may govern access to and use of public buildings, whereas meetings in a private home for lawful purposes remain unfettered.

Second, the Supreme Court asks how many people were involved. Government may need to maintain a peaceable assembly where the flow of traffic is unhampered. A gathering of a large number of persons in a hostile environment may cause a breach of the peace, something government is authorized to prevent.

Third, the Court asks what sorts of activities were being conducted at the meeting. Were the activities conducted at the meeting lawful? Freedom of *association* means that membership in organizations that pursue lawful goals may be proscribed. Was there an incitement to riot? Should a person be pulled off his or her soapbox for personal protection, or should the police make sure that the individual remains on the box, exercising his or her First Amendment rights despite a large and hostile crowd?

In **DeJonge v. Oregon** (1937), the Court wrote that the fate of freedom of assembly is tightly intertwined with freedom of speech and of press.

> The right of assembly is a right cognate to those of free speech and free press and is equally fundamental. . . . The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect of public affairs and to petition for a redress of grievances.

The right of privacy is not specifically mentioned in the Bill of Rights, but it has become a right on a par with the freedoms of expression and association. The right has been formed from the implications of other rights in the Bill of Rights. For example, protecting individual privacy from governmental intrusions could well be among those rights implied from the Ninth Amendment: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." Concurring in **Griswold v. Connecticut** (1965), Justice Arthur J. Goldberg wrote that the marriage relationship was a right "retained by the people" according to the Ninth Amendment and beyond the scope of governmental concerns, and Justice Douglas, writing for the Court in **Griswold,** saw the right of privacy "emanating" from the First, Third, Fourth, Fifth, and Ninth Amendments, which together "create zones of privacy."

In **Roe v. Wade** (1973), the right of privacy was extended to guarantee the right of women in the first three months of pregnancy to decide whether to carry a pregnancy to term or to abort the fetus. Thereafter, if the state could prove a compelling interest in regulating abortions, the regulation would be permitted. Concerning the final three months of pregnancy, the Court recognized that the state may have a compelling interest in regulating abortions. Privacy in the **Roe** case did not rely on zones of privacy or on the Ninth Amendment, however. Rather, Justice Harry A. Blackmun wrote that a long line of precedent established by the Court clearly documented that privacy is a "fundamental" right or is "implicit in the concept of ordered liberty" and must be observed by government.

Some justices have regarded the substantive rights as "preferred rights." They all have accepted them as substantive and fundamental and as a deterrent against governmental intrusion. Often, however, the issue for the Court is to determine what constitutes public or governmental intrusion and

what constitutes private intrusion. Unless some government intrusion or "state action" is evident, those private threats to freedom may continue.

Procedural Rights

When confronted with the power of government or when relying on the legal system for redress, individuals are to be treated equally and fairly. Procedural rights are designed to assure that the justice system, civil or criminal, treats all alike. If the process is diligently followed, if each step of the criminal process from accusation, trial, conviction, and punishment is observed, justice is served. If the process is carefully followed in civil cases, fault is found and redress awarded, despite the status of litigants. The Supreme Court has over the years attempted to maintain a free system and to assure equal treatment through diligent scrutiny of legal procedures.

Procedural Rights

Fourth Amendment: no unreasonable searches and seizures; search warrant requirements.

Fifth Amendment: indictment by grand jury required; no double jeopardy; no self-incrimination; no loss of life, liberty, or property without due process; just compensation for property taken for public purposes.

Sixth Amendment: speedy and public trial by jury; right to be informed of charges and to be confronted with witness against; compulsory process to obtain witnesses for; right to counsel.

Seventh Amendment: right to trial by jury in suits in common law; jury is trier of fact.

Eighth Amendment: no excessive bail; no cruel and unusual punishment.

The Sixth Amendment has provided a number of opportunities for the Court to assure that individuals accused of a crime have an equal status with those who accuse:

> 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 by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The landmark case of **Gideon v. Wainwright** (1963) is an example of the need for procedural rights to assure equality before the law as declared in the Sixth Amendment. A unanimous Court applied a provision of the amendment to states by pointing out the need for an accused to have a lawyer in order to be treated equally. Justice Black wrote:

> From the very beginning, our state and national constitutions have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before an impartial tribunal in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him.

It can be generally assumed that whether there has been a violation of procedural protections by government—federal or state—is relatively obvious. Did the accused have an at-

torney present? Was there a speedy and public trial? However, for substantive rights the Court may have to exercise some judgment. Did the speech or the printed pamphlet constitute a "clear and present danger" that Congress had the right to prevent? Was a judge denied freedom of expression when he or she was censured for speaking before an anti-abortion gathering, appearing to assure them of his support?

But is the distinction between procedural rights and substantive rights reflected in how the Supreme Court behaves? Has the distinction made a difference? When confronted with a Sixth Amendment issue, has the Court responded differently than when confronted with a First Amendment issue?

Federalism and the Bill of Rights

The difference between substantive rights and procedural rights arises when the Bill of Rights is considered in conjunction with federalism. Although the First Amendment dictates that "*Congress* shall make no law," provisions of the Bill of Rights have been selectively incorporated into the *due process* clause of the Fourteenth Amendment to become applicable to states. The Fourteenth Amendment, in contrast with the Bill of Rights, dictates: "No *State* shall . . . deprive any person of life, liberty, or property, without due process of law." When complete, this process of incorporation assures that each state must observe the freedoms (substantive or procedural) of the Bill.[3]

Initially, the Supreme Court denied that provisions of the Bill of Rights were applicable to the states. In **Barron,** Chief Justice Marshall pointed out that the compact was between the federal government and the people and "not for the government of the individual States." Consequently, the Bill of Rights, as part of the original Constitution, applies only to those who agreed to the compact.

However, beginning as early as 1896, the Court began to "nationalize" the Bill. The "public use" and "just compensation" provisions of the Fifth Amendment were imposed on the states in 1896 and 1897. (See **Missouri Pacific Railway Co. v. Nebraska,** 1896 and **Chicago, Burlington & Quincy Railway Co. v. Chicago,** 1897). The Court's concern then for protecting private property dictated these decisions. The incorporation process did not really take hold until 1925, although several justices had expressed an interest in the process. For example, in dissent in **Gilbert v. Minnesota** (1920), Justice Louis Brandeis argued that the Fourteenth Amendment protections of "liberty" against state intervention should certainly include protection of the First Amendment:

> I have difficulty in believing that the liberty guaranteed by the Constitution . . . does not include liberty to teach, either in the privacy of the home or publicly, the doctrine of pacifism; so long, at least, as Congress has not declared that the public safety demands its suppression. I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property.

In 1925 the free speech provision of the First Amendment was "assume[d]" to be imposed on states through the Fourteenth Amendment's due process clause. **Gitlow** constituted the beginnings of this incorporation process whereby the *due process* clause of the Fourteenth Amendment requires states to observe what the federal government must obey under the Bill of Rights. Six years later in **Near v. Minnesota** (1931), freedom of the press was incorporated, followed by freedom of religion in 1934 (**Hamilton v. Regents of University of California**), assembly and petition (**DeJonge v. Oregon,** 1937), and separation of church and state (**Everson v. Board of Education,** 1947). Nearly all the *substantive* rights were

made universal before any of the procedural rights of the Bill of Rights were to be observed by all the states. The right to a public trial provision of the Sixth Amendment in **In re Oliver** (1948) was incorporated into the Fourteenth Amendment.[4] Gradually, from 1948 to 1968 the high bench imposed the procedural rights upon states, long after the substantive rights had been nationalized. Thus, where federalism entered the picture, the distinction between substantive and procedural rights became important. Substantive rights are viewed as universal, while procedural rights depend more on the need for diversity and experimentation among the states. From the beginning, states were responsible for criminal justice issues. Not until Congress began to federalize several aspects of criminal law in the latter half of the twentieth century did universal criminal procedures seem necessary. Also, deference to the states remained throughout the incorporation process, making the task of standardizing criminal procedures among the states all the more difficult.

The reluctance of the high bench to incorporate procedural rights even years after the substantive rights were imposed on states is illustrated by **Adamson v. California** (1947). Earlier, the justices casually incorporated free speech in **Gitlow** with these words:

> For the present purposes we may and do assume that freedom of speech and of the press—which are protected by the 1st Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the 14th Amendment from impairment by the states.

But in **Adamson** the debate over incorporation and the intent of the framers of the Fourteenth Amendment raged on two decades after **Gitlow**. The Court majority just as casu-

ally rejected incorporation of the Fifth Amendment's self-incrimination protection with these words:

> The due process clause of the Fourteenth Amendment . . . does not draw all the rights of the Bill of Rights under its protection. . . . Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution.

The difference is that **Gitlow** involves a substantive right and **Adamson** a procedural right.

Communitarian or Individual Rights?

All states' criminal statutes have some provisions dealing with drunk driving. DWI (driving while intoxicated) or DUI (driving under the influence) statutes were designed to protect persons from the irresponsible drinker who does not have control over his or her vehicle. Most deaths on the nation's highways can be attributed to drinking and driving. Thus, the community rightfully controls an individual's behavior to protect the community and only secondarily to protect the drinker. On the other hand, many states have laws requiring bicycle and motorcycle riders and passengers to wear helmets. Head injuries are common in bike accidents. Thus, the helmet laws are designed to protect the individual and only secondarily the community. The two emphases are also available to interpretations of the Bill of Rights.

Which approach pertains—communitarian or individualist—depends upon certain assumptions. Individualists assume that the *individual* is the focus of society, that the consent of the individual, perhaps in some symbolic or real

compact, gives the society and state its legitimacy, and that the state has the obligation to protect individual rights at the expense of society. Rights—natural or otherwise—predate society and government. The community holds its existence and legitimacy through the consent of the individuals who make up that community. David Schuman describes this individualistic view of society as follows:

> The basic unit of society is the rational, self-interested person. Self-interest sometimes dictates that an individual, to acquire some benefits necessary for survival, give up a certain amount of freedom and autonomy by joining groups of people pursuing similar ends. . . . Politics . . . is a type of free market process through which individuals or interest groups pursue their preferences by bargaining, accommodation, and manipulation.[5]

According to this view, society threatens individuals and government must keep society at bay.

At the other extreme, it is assumed that individuals acquire their identity, status, and security from being a member of a *community.* If most attributes individuals enjoy are the result of membership in a group, community, or society, then individual rights become secondary to the needs and demands of society. Interdependence, not independence, dictates the focus of rights. The state may be obligated to apply coercion to protect and encourage interdependence. Rights become social obligations. Again, as expressed by Schuman:

> The community situates us and binds us together in a web of support and obligation, providing us identities and different roles. . . . The community is not necessarily evil where individuals join forces for their own convenience; rather, it is the institution through which talking animals become human beings.[6]

The Bill of Rights, then, has two dimensions: procedural, or substantive, and communitarian, or individualistic.

In **Jacobson v. Massachusetts** (1905), the issue was drawn between an individual's right to refuse to take a smallpox vaccination and the community's need to be protected from an epidemic. Jacobson had argued that a coerced vaccination would violate his individual right under the Preamble to the Constitution, the privilege and immunities, the equal protection, and the due process clauses of the Fourteenth Amendment. Additionally, the vaccination statute was "opposed to the spirit of the Constitution." The Court rejected Jacobson's argument and threw the weight of its thinking on the communitarian side of the scale.

Jacobson had asserted that the compulsory vaccination statutes was "inconsistent with the liberty that the Constitution of the United States secures to every person against deprivation by the state." According to the first Justice John Marshall Harlan:

> The defendant insists that his liberty is invaded when the state subjects him to a fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is . . . hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that [a compulsory vaccination] . . . is nothing short of an assault on his person.

"But," wrote Harlan, "liberty . . . does not import an absolute right in each person . . . to be wholly free from restraint." Society's needs often override an individual's rights.

> Even liberty itself, the greatest of all rights is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoy-

ment of the same right by others. It is, then, liberty regulated by law.

However, as illustrated by **West Virginia Board of Education v. Barnette** (1943), an individual religious right, under the First Amendment, overrides the perceived needs of the nation. As Justice Robert Jackson wrote in **Barnette,** the requirement that children must salute the flag in public schools confronted the Court with "the sole conflict . . . between authority and rights of the individual," and the individual prevailed over the preferences of the community.

When the justices of the nation's high bench have confronted issues arising out of the application of the Bill of Rights, they have been influenced in their decisions by whether the right invoked is a procedural or a substantive right and whether the communitarian or individualistic view of society appears most appropriate.

Reverse Incorporation

Not only has the Bill of Rights been nationalized with standards that must be met by all states, but the federal government must, in turn, meet the requirements of the Fourteenth Amendment's *equal protection* clause: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Bill of Rights does not contain an equal protection provision, but incorporating it into the Fifth Amendment's due process clause corrects the oversight. Consequently, due process in the Fifth Amendment takes on the requirements of equal protection in the Fourteenth. In **Bolling v. Sharpe** (1954), the Supreme Court ruled that District of Columbia schools, the responsibility of the federal government, must desegregate as states were required to

under the equal protection clause (**Brown v. Board of Education,** 1954, 1955). Chief Justice Warren wrote in **Bolling:**

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.

What would be a violation by the states because of the denial of equal protection would constitute a violation by the federal government because of the due process clause of the Fifth Amendment (see also **Frontiero v. Richardson,** 1973).

Levels of Scrutiny

When the equal protection or the due process clauses are invoked to challenge statutes, the Court relies upon levels of scrutiny to resolve the challenge. If the justices see a "suspect classification" of persons involved in the law, such as race, the law is assumed to be unconstitutional and is given "strict scrutiny." The burden is on the government to show that the law is the least restrictive means available to achieve a compelling governmental need. Similarly, if a fundamental right such as speech or privacy is involved in the challenged statute, the same strict scrutiny requirements must be met. The Supreme Court has rarely upheld a law under this test. However, if a "rational basis" can be established between the law and a legitimate governmental purpose, the law likely will stand. An intermediate, or "heightened scrutiny," test lies between the strict scrutiny and rational basis tests. Under the intermediate test, the challenged law must be

shown to be substantially related to an important governmental purpose.

In most cases, the individual's right overrides society's concerns as represented by the statute when the high court invokes the strict scrutiny test. In contrast, if a rational basis test is adopted by the justices, society's interests replace the individual's. The heightened scrutiny test seems over time to balance the two extremes of interpretations of the Bill of Rights.

With the nationalization of substantive and procedural rights where all states, and the federal government, must observe these rights and with the changing circumstances within which these rights are exercised, the Bill of Rights component will continue to provide the Supreme Court with challenges. The line will continue to waver between what rights the individual may exercise and what restrictions the Supreme Court may impose in the name of society. What is important beyond the wavering line is how the Bill of Rights component meshes with the other four aspects of the American Constitution and how they add to an understanding of the holistic Constitution.

Notes

1. After 200 years, in 1992, the eleventh provision proposed by Madison and Congress achieved the necessary three-fourths vote from state legislatures and became the Twenty-seventh Amendment. The original wording of the amendment is: "No law, varying the compensation for services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." Ordinarily, Congress attaches a rider to proposed amendments limiting the number of years the ratifying process is valid, usually seven years. However, no limits were placed on the original "Article the second" or what now becomes the Twenty-seventh Amendment. The other amendment that failed to muster the requisite number of states and now is clearly out of date concerned the apportionment of the number of seats in the House each state would receive according to population.

2. The **Boerne** decision declared Congress's Religious Freedom Restoration Act unconstitutional and also reminded Congress that if it wishes to change Supreme Court doctrine pertaining to the Constitution, it must utilize Article V—the Constitutional amendment process—and it was for the courts, not Congress, to set doctrine. A separation of powers issue joins with the First Amendment in this case.

3. The only unincorporated rights in the bill are the requirement of an indictment by grand jury and the requirement of jury trial in civil cases.

4. Some constitutional textbooks attribute the first procedural incorporation to right to counsel in capital cases in **Powell v. Alabama** (1931). However, a close reading of the opinion indicates that the Court interpreted the due process clause of the Fourteenth standing alone without reliance upon the right-to-counsel provisions of the Sixth Amendment to mean the state must appoint counsel in order to guarantee a "fair trial."

5. David Schuman, "Our Fixation on Rights Is Dysfunctional and Deranged," *Chronicle of Higher Education.*

6. Ibid.

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8

The Holistic Constitution

Although the compact, separation of powers, federalism, representation, and the Bill of Rights each perform a separate function and varies in particular ways, together they constitute an integrated or holistic whole. When they work together, they give important shape to the Constitution. As one component interacts with another, both gain more clarity, and often one reinforces or sometimes changes the effects of the other. This interaction often dictates significantly the outcome of the case. Constitutional cases gain in importance, depending upon the number of components involved in the decision. Cases of prime importance, which consequently demand more of our attention, concern the interaction of two or more of the components. The components of these higher magnitude cases mesh to decide a particular issue and contribute to our understanding of the holistic Constitution. (For a list of sample cases illustrating this point, see Table 8.1 at the end of this chapter.)

Our concern is with how the interaction helps explain the components involved and, consequently, the nature of the American basic law. Our attention also is directed toward understanding how these interactions account for the outcome of the case. Several examples should confirm the use-

fulness of the holistic view of the Constitution. The purpose throughout this book is not necessarily to provide a framework for predicting case outcomes or for tracing constitutional doctrine. For example, we are not predicting that a shared version of separation of powers when meshed with a procedural aspect of the Bill of Rights will likely result in society prevailing over the individual. Our scheme is to be able to discover the important aspects of Supreme Court opinions and to be able to place those aspects into a convenient organizational framework. When all is said and done, we will have a better understanding of what might be called the "spirit of the Constitution."

This chapter deals only with a few examples of how the holistic Constitution works. The book provides the essentials by which students can analyze cases for themselves.

The Compact and Federalism

The nexus between the *compact* and *federalism* is evident in a number of early Supreme Court cases. In **Martin v. Hunter's Lessee** (1816), Justice Joseph Story announced a version of the compact that was reaffirmed by Chief Justice Marshall in the famous case **McCulloch v. Maryland** (1819), and generally as time passed, this became the acceptable version. The issue in **Martin** was whether state courts were constitutionally obligated to follow mandates rendered by the U.S. Supreme Court. Thus, vertical federalism was affected. Had the Court supported Virginia's defiance of the high bench, state sovereignty and the Tenth Amendment would have been reinforced. However, if the supremacy clause (Article 6) had been invoked, national supremacy would have prevailed. The answer to the question of what version of federalism was invoked was provided by the Court's view of the compact.

Justice Joseph Story laid the groundwork by disposing of what he called "some preliminary considerations."

> The Constitution of the United States was ordained and established, not by the states in their sovereign capacity, but emphatically, as the preamble . . . declares by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary. . . . [T]he people had the right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact.

Thus, we have a political compact agreed to by the people, not the states, which reinforces the federal prerogatives at the expense of states' rights.

In contrast, Virginia argued in **Martin** that the Supreme Court's "appellate jurisdiction over state courts is inconsistent with the genius of our governments and the spirit of the constitution." The Constitution was "never designed to act upon state sovereignties, but only on the people." Otherwise, "the sovereignty of the states, and the independence of their courts" would be materially impaired. However, the Court refused to "yield to the force of [Virginia's] reasoning" as "it assumes principles" and "draws conclusions" that remained unacceptable. Again, because of the emphasis upon the people as the source of the Constitution rather than the states, Article 6 came into play and state courts had to yield.

> [The] Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . 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 Compact, Federalism, and the Bill of Rights

In **Barron v. Baltimore** (1833), the *compact* is invoked to clarify aspects of *federalism* and the *Bill of Rights*. As we have seen, the Bill has been regarded as part of the original Constitution, even though it was later attached as a set of amendments. In **Barron**, the Court clarified the scope of the Bill of Rights. The justices noted that the fear prompting the Bill of Rights was that the new national government might exercise power "in a manner dangerous to liberty. . . . [T]o quiet fears, . . . amendments were proposed . . . and adopted by the States." Consequently, the provisions of the Bill of Rights applied only to the federal government.

However, John Barron had insisted on compensation for the damage to his property by the City of Baltimore. He pointed to the Fifth Amendment's "takings clause" ("nor shall private property be taken for public use, without just compensation") and argued that the amendment, "being in favor of liberty of the citizen, ought to be so construed as to restrain the legislative power of the State, as well as that of the United States." Not so, reasoned the Court.

> The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. . . . The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interest.

Had the Founders intended the Bill to apply to the states, they would "have expressed that intention." And besides, the states had their own constitutions to limit their state governments. According to John Marshall, who wrote the Court's opinion in **Barron,** the compact was an accord among the people to establish a federal government. Consequently, the

Bill of Rights limited only that government. It is not until nearly a century later that the Fourteenth Amendment incorporates federal rights into its due process clause, expanding the scope of the Bill of Rights to include the states.

Separation of Powers, Federalism, and Representation

The "political question" doctrine nearly always involves some aspect of *separation of powers*. If the Court recognizes an issue as clearly involving a conflict between branches of government, the dispute may be a political question preventing the justices' intervention. The issue is not "justiciable." In **Baker v. Carr** (1962), the Court reviewed the doctrine and reaffirmed that "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States," that determines a political question. Those cases making up the doctrine have "one or more elements which identify [the doctrine] as essentially a function of the separation of powers."

The issue before the Court in **Baker** was whether Tennessee's 1901 state legislative scheme of *representation* was still valid in the 1960s after significant population shifts. If not, could the federal courts correct the situation? Voters in counties that had gained in population but not in representation had complained that they "were denied the equal protection of the laws . . . by virtue of the debasement of their votes." These voters were denied full and equal participation in the political process. The Court saw the issue as a matter of *federalism* rather than *separation of powers*, permitting the Court to intervene. The majority agreed that indeed voters had been denied equal protection. The case was remanded to the lower court for redress.

Baker is notable for setting standards that constitute a separated version of separation of powers. By permitting federal courts to assure equal participation for state voters from

equal population constituencies, federalism was significantly affected. State sovereignty yields to national supremacy.

As Justice William O. Douglas noted in his concurring opinion, it was representation that tipped the federalism scales in favor of the national government: "[T]he right to vote is inherent in the republican form of government envisaged by Article 6 . . . of the Constitution." It is true that states have responsibility for regulating elections for federal and state officials,

> [y]et, as stated in **Ex parte Yarbrough** [1884] . . . those who vote for members of Congress do not "owe their right to vote to the State law in any sense that makes the exercise of that right to depend exclusively on the law of the State."

Although **Baker** did not concern itself with the power of Congress to override state law, Justice Douglas concluded, "It is, however, clear that by reason of the commands of the Constitution there are several qualifications that a State may not require" of voters. The Fifteenth Amendment forbids race, color, or previous condition of servitude as standards for voting. The Nineteenth Amendment outlaws gender considerations. "There is a third barrier to a State's freedom in prescribing qualifications of voters and that is the Equal Protection Clause of the Fourteenth Amendment." Equal representation was simply too important to leave to the states. History had shown that left alone, states in order to enhance political power tended to pollute legislative representation.

The political question doctrine or *separation of powers* again was at issue in **Powell v. MacCormack** (1969), as was the meaning of *representation*. As in **Baker,** the constitutional component of representation takes precedent, but this time it overrides separation of powers considerations.

Should the Court, a coequal partner in the tripartite system, intervene in the concerns of Congress, even though

Congress denied abusing its powers? The political question doctrine persuades against intervention. One of the **Baker** political question standards excludes the Court from deciding issues where a "textually demonstrable constitutional commitment" of a function is made to a coordinate branch of government. Article 1, section 5, states specifically that each house of Congress shall "Judge . . . Qualifications of its own Members." The House had done so and excluded Representative Powell from the Ninetieth session of Congress. But history told the Court that the House was without authority to exclude a duly elected person who met the constitutional requirements for representation: of age, residency, and citizenship.

As noted earlier, the Court quoted Hamilton's view that "the people should choose whom they please to govern them," and Madison's argument that limiting who the voters might choose is equal to limiting their vote. When constituency and participation considerations of representation interact with the separated version of separation of powers, representation prevails.

Separation of Powers and the Bill of Rights

The 1974 case **U.S. v. Nixon** confronted the question of the degree to which then sitting president Richard M. Nixon and several of his closest advisers were implicated in the so-called Watergate scandal. Must the president obey the special prosecutor's subpoena for tapes of conversations with his close advisers, or were the tapes protected from judicial excursions into executive matters? **Nixon** is a good example of the interaction between *separation of powers* and the *Bill of Rights.*

President Nixon argued among other things that his issue with the special prosecutor was an in-house issue and of no concern of the Court. It was for him, not the high bench, to

decide whether to obey the subpoena for tapes of conversations with his close advisers. For the president, the dispute was covered by the political question doctrine. On his part, the special prosecutor argued that he needed the tapes for a pending trial in federal courts. Thus, the executive branch under Article 2 protections was in a conflict with the judicial branch's Article 3 duties, clearly a separation of powers issue. The president asserted a separated version of separation of powers, while the special prosecutor urged upon the Court a shared version. Chief Justice Warren Burger for a 8–0 bench wrote that the president

> views the present dispute as essentially a "jurisdictional" dispute within the Executive Branch which he analogizes to a dispute between two congressional committees. Since the Executive Branch has exclusive authority and absolute discretion in deciding whether to prosecute a case, . . . it is contended that a President's decision is final in determining what evidence is to be used in a given criminal case.

The special prosecutor, however, argued that the tapes were needed "in a judicial proceeding in a federal court alleging violation of federal laws and is brought in the name of the United States as sovereign." The president must yield to courts carrying out their constitutional function.

Chief Justice Burger reasoned that the special prosecutor was a product of both the executive and legislative branches, appointed by the attorney general according to special legislation and not to be fired without the consensus of eight designated leaders of Congress. Further, the "matter is one arising in the regular course of a federal criminal prosecution" under Article 3 power. Clearly, the Court was viewing separation of powers from a mixed, or shared, perspective. All branches to some degree were involved, not just the presi-

dent's Article 2 powers to "take Care that the Laws are faithfully executed." More was at issue than simply a conflict between agencies of one branch required to qualify as a political question. Consequently, the dispute was justiciable under **Baker v. Carr** (1962).

Although losing on the political question issue, the president continued his assertion of a separated version of separation of powers. In order to protect the confidentiality of conversations with close advisers, the president invoked executive privilege. "[T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties." But the Court disagreed:

> In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

Thus, the Court could weigh the president's need for confidentiality of conversations with close advisers protected under his version of executive privilege against the Court's constitutional role to see that justice is done in a criminal trial.

The procedural rights in the Bill of Rights entered the discourse and tipped the scales toward the Court's need for the tapes.

> The right to the production of all evidence at a criminal trial . . . has constitutional grounds. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process.

The interaction of the shared version of separation of powers and the procedural protections of the Bill of Rights dictated the results. The president was obligated to observe the subpoena and deliver the tapes for use in the courts. It is worth knowing that in a large measure, the **Nixon** decision forced President Nixon to resign from office. In June 1974, he became the first president to resign from office before his term had been completed.

The Bill of Rights and Representation

In **Bond v. Floyd** (1966), the *First Amendment* helped clarify constituency requirements for legislative *representation.* Julian Bond, a duly elected Georgia state legislator, was refused the oath of office because of antidraft and antiwar statements attributed to him during protests against the war in Vietnam.

The Court felt that without the protections of the First Amendment, legislators could not adequately represent their constituencies.

> The First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment . . . is that "debate on public issues should be uninhibited, robust, and wide-open." Policy and the implementation of it must be similarly protected. . . . Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them.

Legislators may not be disqualified from office for exercising freedom of speech. Actually, **Bond** shows how the free

speech provision of the Bill of Rights works together with representation to avoid polluting representative democracy.

The Bill of Rights, Federalism, and Separation of Powers

A landmark case in which several of the constitutional components intersect is **West Virginia Board of Education v. Barnette** (1943). At issue was whether school officials could require students to salute the American flag despite their religious beliefs. Was the Bill of Rights, specifically the free exercise clause of the First Amendment, to be interpreted in favor of individuals' right to worship as they wish or in favor of the state's right to maintain support for the government? Also, was it for the Court to decide, or should such issues be left to elected state officials? Justice Robert Jackson, writing for the Court majority, observed initially:

> The freedom asserted by these [schoolchildren] does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention by the State to determine where the rights of one end and those of another begin.

Jackson recognized that the Bill of Rights grew out of a philosophy that the "individual was the center of society." Nonetheless, today there is a need for a "closer integration of society" accompanied by more "governmental controls." He left little doubt where he stood on the question. The Court chose the individual over society and declared the flag salute statute to be unconstitutional.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what is orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act therein. If there

> are any circumstances which permit an exception they do not now occur to us.

The Court had ruled in an earlier flag salute case (**Minersville School District v. Gobitis,** 1940) that it was the legislature, not the Court, that had responsibility for drawing the line between where one's rights collided with another's. However, now in **Barnette** the justices asserted that the Court must take the lead in protecting fundamental rights when they are threatened by public officials such as school boards.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials to establish them as legal principles to be applied by courts. One's . . . fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Although the Bill of Rights applied directly only to the federal government, the Fourteenth Amendment also came into play, permitting the Court to impose provisions of the Bill on states. Again, the alternative available to the Court under vertical federalism was resolved in favor of the federal government. The incorporation of the free exercise clause of the federal Bill of Rights into the due process provision of the Fourteenth Amendment was asserted.

Justice Frankfurter in his eloquent dissent argued in vain for permitting government to require children to learn patriotism and loyalty by means of a flag salute. Further, it was not for the courts to behave like a "super-legislature" and deprive government of an opportunity to teach good citizenship. Separation of powers, to Frankfurter, meant separating legislative function from judicial. Resolution of policy issues should be left to "the ballot and to the processes of democratic government."

TABLE 8.1 Selected Holistic Cases

Case	Compact	Separation of Powers	Federalism	Bill of Rights	Representation
Baker v. Carr 369 US 186 (1962)		•			•
Barron v. Baltimore 32 US 243 (1833)	•		•	•	
Cohens v. Virginia 19 US 264 (1821)	•		•		
Garcia v. San Antonio 469 US 528 (1985)		•	•		•
Gitlow v. New York 268 US 652 (1925)			•	•	
Marbury v. Madison 5 US 137 (1803)	•	•			
Martin v. Hunter's Lessee 1 US 304 (1816)	•				
McCulloch v. Maryland 17 US 316 (1819)	•		•		
Munn v. Illinois 94 US 113 (1877)	•	•	•		
Powell v. MacCormack 395 US 486 (1969)		•			•
Printz v. U.S. 521 US 898 (1997)	•		•		•
Reynolds v. Sims 377 US 533 (1964)			•		•
Texas v. White 74 US 700 (1869)	•		•		
U.S. v Nixon 418 US 683 (1974)		•		•	
U.S. Term Limits Inc. v. Thornton 514 US 779 (1995)	•		•		•
W. Virginia v. Barnett 319 US 624 (1943)			•	•	

Although decided in the 1940s, **West Virginia v. Barnette** captures the modern shape of the American Constitution. The Bill of Rights has generally accepted the individualistic interpretation and clearly the Bill applies to the states; and it has been the courts that have enforced this interpretation and application.

Jacobson v. Massachusetts (1905) is also illustrative of the interaction of the same set of constitutional components,

with the notion of the compact added. The case involved Henning Jacobson's refusal to be vaccinated for smallpox, as required under a Massachusetts statute. He contended that the forced vaccination statute "tended to subvert and defeat the purposes of the Constitution as declared in the preamble." It also subverted his rights as secured by the clauses in the Fourteenth Amendment representing the "spirit of the constitution."

Appendix
The Constitution of the United States

Preamble

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, 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 choose 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 choose 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

*Replaced by Fourteenth Amendment.

**Superceded by Seventeenth Amendment.

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 choose 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.

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*Modified by Seventeenth Amendment.

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 choosing 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 Behavior, 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

*Superceded by Twentieth Amendment.

**Modified by Twenty-Second Amendment.

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 increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. 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 Defense 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 it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

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*Modified by Sixteenth Amendment.

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 choose 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 choose 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. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall choose from them by Ballot the Vice President.*

The Congress may determine the Time of choosing 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 increased nor

*Superceded by Twelfth Amendment.

**Modified by Twenty-Fifth Amendment.

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 Behavior, 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

*Superceded by Eleventh Amendment.

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 Labor 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 Labor, but shall be delivered up on Claim of the Party to whom such Service or Labor 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.

The Word, "the," being interlined between the seventh and eighth Lines of the first Page, the Word "Thirty" being partly written on an Erazure in the fifteenth Line of the first Page, The Words "is tried" being interlined between the thirty second and thirty third Lines of the first Page and the Word "the" being interlined between the forty third and forty fourth Lines of the second Page.

Attest William Jackson Secretary

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names,

* * * *

Amendment I

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

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

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

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

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

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 defense.

Amendment VII

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 reexamined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

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

Amendment IX

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

Amendment X

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

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

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 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

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

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,

*Superceded by section 3 of the Twentieth Amendment.

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 pay-

*Changed by section 1 of the Twenty-Sixth Amendment.

ment 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 the power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV

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 the power to enforce this article by appropriate legislation.

Amendment XVI

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

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

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

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

Section 1. The terms of the President and the 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 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

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

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 President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by 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

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as 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

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 poll tax or other tax.

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

Amendment XXV

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

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

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of representatives shall have intervened.

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