Introduction

The Dynamic Constitution

> [O]ur Constitution . . . is an experiment, as all life is an experiment.
>
> – Justice Oliver Wendell Holmes Jr.[1]

ALTHOUGH THE CONSTITUTION OF THE UNITED STATES IS a single written document, American constitutional law – the subject of this book – is a complex social, cultural, and political practice that includes much more than the written Constitution. Courts, especially the Supreme Court, interpret the Constitution. So do legislators and other government officials as they consider their responsibilities. Very commonly, however, "interpretation" of the Constitution depends on a variety of considerations external to the text. These include the historical practices of Congress and the President, previous judicial decisions or "precedents," public expectations, practical considerations, and moral and political values. By talking about constitutional law as a "practice," I mean to signal that factors such as these are elements of the process from which constitutional law emerges.[2]

Strikingly, arguments about how to interpret the Constitution occur frequently in constitutional practice – not least among Justices of the

1 *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

2 For an especially rich practice-based account of law in general and applied to constitutional law in particular, see Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press of Harvard University Press, 1986).

Supreme Court. (Among the difficulties in studying constitutional law is that the rules of constitutional interpretation are nowhere written down in authoritative form, and any one person's attempt to formulate them would trigger dispute.) Nonetheless, a few fixed points command nearly universal agreement. First, at the center of the frequently argumentative practice of constitutional law stands the written Constitution of the United States. Second, when the Supreme Court decides a case, its ruling binds public officials as well as citizens, despite their possibly contrary views. Supreme Court rulings occasionally encounter resistance. In a few instances they have provoked actual or threatened defiance – matters that I discuss later in this book. Normally, however, the Court gets to say authoritatively what the Constitution means.

In subsequent chapters, I plunge directly into discussions of how particular provisions of the Constitution have been interpreted, especially but not exclusively by the Supreme Court. This introduction explores the textual and historical foundations of our constitutional practice. It first sketches the history that led to the Constitution's adoption, then briefly describes the central provisions of the Constitution itself. Today, we tend to take it for granted that the Supreme Court will interpret and enforce the Constitution. But it was once contested whether the Court should play this role at all, and how the Court should play it is a subject of continuing controversy. As background to current debates, the final sections of this introduction therefore outline a bit more relevant history. I discuss the case in which the Supreme Court first claimed the power of judicial review, *Marbury v. Madison*[3] (1803), and then conclude with a brief survey of the Court's use of its power.

History

At the time of the American Revolution, the fledgling nation seeking independence consisted of thirteen separate colonies. Brought together

3 5 U.S. 137 (1803).

by their common opposition to the taxing policies of the British Parliament, the colonies began sending delegates to a Continental Congress in 1774. This arrangement was initially quite informal. Delegates were elected by the assemblies of their respective colonies. Meeting in Congress, they could vote requests that the various colonies raise troops or furnish funds, but the Congress itself possessed no direct authority to enforce its demands.

In 1777, before the Revolutionary War concluded, the Continental Congress moved to formalize the relationship among the colonies by proposing Articles of Confederation, which were ratified by the assemblies of all thirteen states or colonies and took effect in 1781 as the developing nation's governing legal framework. Like the more informal scheme that had preceded them, the Articles of Confederation established a confederation of equal states, each with one vote in Congress. The national government, such as it was, still had to look to the states to enforce its directives. If it wished to lay a tax, for example, it had to ask the states to assess and collect it. The Articles carefully enumerated the purposes for which the states were united; any power not specifically given to the national Congress was denied to it. The Articles of Confederation did not create an independent executive branch, and there was almost no judicial system. For the Congress to make ordinary decisions, nine states needed to agree. More fundamental actions required unanimity.

As swiftly became clear, the government created by the Articles of Confederation was too weak. Although fighting with Britain stopped in 1781, and a formal peace followed in 1783, the European powers continued to pose threats that could be met only by decisive, coordinated action. At home, an economic downturn revealed the need for a national economic policy including a uniform currency and safeguards against inflation and nonpayment of debts.

To deal with these and related problems, the Continental Congress asked the colonies (or states) to send delegates to a convention in the summer of 1787 to draft proposed amendments to the Articles of

Confederation. When the Constitutional Convention met in Philadelphia, however, the delegates decided almost immediately to ignore their mandate and to draft an entirely new Constitution. The Convention also determined to ignore the Articles of Confederation insofar as they forbade major changes in the scheme of national government without the unanimous approval of the thirteen states voting in Congress. Article VII of the new, draft Constitution provided that it would take effect on ratification by nine states and further directed that the ratifications should be by "conventions" of the people of the states, not by the state legislatures.

The decision of the Constitutional Convention to ignore or defy the Articles of Confederation – which were, after all, the then-prevailing "law" – is at least interesting in its own right and probably possesses enduring significance for American constitutional law.[4] Were the Constitution's authors (or "framers" as they are more commonly called) and ratifiers (those who voted to approve it in separate state conventions) "outlaws" in their own time? Why were they not obliged to follow the Articles of Confederation in all of their written detail? How could valid law, in the form of a Constitution, emerge from actions not authorized by prior written law? It is not enough to say that the framers decided to start over; surely not every group is entitled to "start over" whenever it feels like doing so – for example, by staging a coup or pronouncing itself not bound by current constitutional law. In concluding that they were entitled to ignore the written law of their time, whereas others living under the new Constitution would be bound by it, the framers and ratifiers – followed by subsequent generations who have lionized them – appear to have assumed that unwritten principles of moral and political right preexist, and in some sense are more fundamental than, any written law.

4 See Bruce Ackerman, *We The People: Foundations* (Cambridge, MA: Belknap Press of Harvard University Press, 1991), vol. 1 (considering the relationship between legality and illegality and the theory of political legitimacy reflected in the framing and ratification of the Constitution). Compare Akhil Reed Amar, "Philadelphia Revisited: Amending the Constitution Outside Article V," 55 *University of Chicago Law Review* 1043 (1988) (asserting the availability of legal justifications for the course of action followed at the Constitutional Convention and thereafter).

In light of the Constitution's origins, it should come as no surprise that debates about whether the Constitution presupposes background principles of moral and political right, even if it does not list them expressly, have echoed throughout American constitutional history.[5]

Original Constitutional Design

By any reasonable measure, the delegates to the Constitutional Convention were an extraordinarily able group. They pursued their work with a mixture of idealism, imagination, practicality, and self-interest. As in the Continental Congress, each state had one vote in the Convention's deliberations. Predictably, the delegations disputed whether each state should retain one vote in the new government's Legislative Branch or whether representation should instead reflect population. The delegates ultimately agreed to a compromise: representation in the House of Representatives depends on population, but each state, regardless of size, gets two Senators.[6]

From a modern perspective, the deliberations at the Convention were striking in several respects. Perhaps most notably, the delegates took it for granted that slavery must continue to exist under the new Constitution. Otherwise the slave states would not have participated. In at least three places the Constitution makes veiled reference to slavery but avoids the shameful term.[7] No women attended the Constitutional

5 See Thomas C. Grey, "The Origins of the Unwritten Constitution," 30 *Stanford Law Review* 843 (1978); Suzanna Sherry, "The Founders' Unwritten Constitution: Fundamental Law in American Revolutionary Thought," 54 *University of Chicago Law Review* 1127 (1987).

6 The best relatively recent work on the Convention is Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1997). For an older but still valuable account, see Max Farrand, *The Framing of the Constitution of the United States* (New Haven, CT: Yale University Press, 1913).

7 See Article I, Section 2 (basing a state's representation in the House of Representatives on its free population and three-fifths of "all other Persons" within its territory); Article I, Section 9 (barring Congress from abolishing the slave trade before 1808); and Article 4, Section 2 (providing for the return of runaway slaves).

Convention. Although the Constitution sought to preserve and promote individual liberty, not until after the Civil War could it even plausibly be viewed as a charter of *equal* human freedom.

It also bears note that there were no political parties at the Constitutional Convention. On the contrary, the framers disliked the very idea of parties, which they associated with "factions" hostile to the general or public interest. Nevertheless, a party system quickly developed. For the most part, the parties have worked within a constitutional structure not designed for them.[8]

Although much of the framers' specific thinking now seems embedded in a worldview that is difficult to retrieve, on other issues their aspirations were timeless. At the highest level of abstraction, they wanted to create a national government that was strong enough to deal effectively with genuinely national problems but would not threaten the liberties of a free people – as awkwardly defined to exclude slaves and Native Americans. In pursuing these aims, the basic structure created by the Constitution has impressed most Americans as adequate, and even admirable, for more than two hundred years.

Apart from its brief Preamble, the Constitution – which is reprinted as an appendix to this book for readers who may want to consult it – is not a rhetorical document. Working from the ground up, it literally constitutes the government of the United States. The main structural work occurs in the first three articles.

Article I provides that "[a]ll legislative powers . . . shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Following sections that deal with qualifications, apportionment, and election, Article I, Section 8, lists the powers of Congress in a series of seventeen clauses that include the "Power to lay and collect Taxes" and to "regulate Commerce." The list concludes with the so-called Necessary and Proper Clause, authorizing Congress

8 One element that was designed with political parties in mind is the Twelfth Amendment, which was ratified in 1804 to accommodate party-based presidential voting.

"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." The Supreme Court has construed the Necessary and Proper Clause as mandating a broad interpretation of Congress's other powers.

Article II confers the executive power on the President of the United States. It provides for the election of the President and Vice President, then specifies the President's powers and duties in a reasonably detailed list. Among other things, the President is made the Commander in Chief of the armed forces and is empowered to make treaties and to appoint ambassadors, judges, and other officers of the United States "by and with the Advice and Consent of the Senate." The President also possesses a power to veto or reject legislation enacted by Congress, subject to override by two-thirds majorities of both Houses.

Article III vests "the judicial Power of the United States" in "one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Both in the Constitutional Convention and in the ratification debates, it appears to have been taken for granted that the courts, and especially the Supreme Court, would determine whether legislation enacted by Congress and the states comports with the Constitution.[9] But the text of Article III leaves the power of "judicial review," as it is called, implicit rather than explicit.

Article IV contains miscellaneous provisions. One, the "Privileges and Immunities Clause," imposes an antidiscrimination rule: it limits the freedom of states to discriminate against citizens of other states who might travel or pursue business opportunities within their borders. Another clause of Article IV provides for the admission of new states. A third empowers Congress to legislate for the territories.

Article V establishes the process for amending the Constitution. Unlike ordinary laws, constitutional amendments require the affirmative

9 See Richard H. Fallon Jr., John F. Manning, Daniel J. Meltzer, and David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System*, 6th ed. (New York: Foundation Press, 2009), 11–13.

vote of two-thirds of both Houses of Congress and of three-fourths of the states. The requirement that three-quarters of the states must approve constitutional amendments makes the Constitution extraordinarily difficult to amend.

Article VI states explicitly that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." This "Supremacy Clause" establishes that whenever state law conflicts with either the Constitution or with federal laws passed by Congress, state law must yield. Article VI also forbids the use of any religious test "as a Qualification to any Office or public Trust under the United States." Article VII provides for the Constitution to be ratified by conventions in the several states, not by the state legislatures.

As originally written, the Constitution included only a few express guarantees of rights. To safeguard liberty, it relied on two strategies. First, it divided the powers of government among three separate branches. Second, the Constitution made the federal government one of limited or "enumerated" powers only. The framers saw no need to create an express right to freedom of speech, for example, because they thought that the delegated powers of Congress, properly construed, included no authority to enact legislation encroaching on speech rights. What is more, they trusted the various state constitutions to stop state governments from encroaching on the liberties of their citizens.

During the debates about whether the Constitution should be ratified, the absence of a bill of rights was widely criticized, and the Constitution's main champions – the so-called Federalists – promised to remedy the defect.[10] After the Constitution's ratification, the first Congress proposed twelve amendments, ten of which were quickly approved and took effect in 1791. Known collectively as the Bill of Rights, these ten amendments are today regarded as mainstays of constitutional freedom.

10 For a comprehensive and illuminating examination of the ratification debates, see Pauline Mayer, *Ratification: The People Debate the Constitution, 1787–1788* (2010).

The First Amendment guarantees freedoms of speech and religion. The Second provides that "[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." The Third Amendment forbids the quartering of troops in private homes without the owners' consent, except in time of war. The Fourth creates rights against "unreasonable" searches and seizures. The Fifth forbids deprivations of "life, liberty, or property, without due process of law." Along with the Sixth Amendment, it also provides a variety of rights to people accused of crimes. The Seventh Amendment protects rights to trial by jury. The Eighth bars "cruel and unusual punishments." The Ninth says that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Finally, the Tenth Amendment emphasizes the continuingly important role of the states (the powers of which come from their own constitutions and not, interestingly and importantly, from the Constitution of the United States): "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."

Surprisingly from a modern perspective, the Bill of Rights originally applied only to the federal government and imposed no restrictions on the states.[11] In other words, it left the states free to regulate speech and religion, for example. In the context of the times, national governmental power obviously aroused more distrust than state power. But trust of the states soon eroded, especially in the long struggle over slavery that increasingly dominated American politics in the first part of the nineteenth century.

That struggle ultimately produced the Civil War, which in turn led to adoption of the Thirteenth Amendment abolishing slavery, the Fourteenth Amendment requiring the states to accord to every person "the equal protection of the laws," and the Fifteenth Amendment forbidding race-based discrimination in voting. Beginning in the twentieth century,

11 See *Barron v. City of Baltimore*, 32 U.S. 243, 247–50 (1832).

the Supreme Court has also construed the Fourteenth Amendment as making nearly all guarantees of the Bill of Rights applicable against the states – a development specifically discussed in Chapter 4. This is a phenomenon of enormous importance, which marks a sharp divide in constitutional history. Since the "Civil War Amendments," twelve further amendments have been ratified, for a total of twenty-seven. Among the most important, the Sixteenth Amendment authorizes Congress to impose an income tax, the Nineteenth guarantees voting rights to women, and the Twenty-Second bars a President from serving more than two terms in office.

One further feature of the Constitution's design deserves emphasis. As is discussed in greater detail in Chapter 12, virtually without exception the Constitution applies only to the government, not to private citizens or companies. Accordingly, if a private company fires an employee for criticizing the boss, it does not violate the constitutional right to freedom of speech – which is only a right against the government. So it also is with other constitutional provisions, including the Equal Protection Clause of the Fourteenth Amendment, which generally prohibits race-based and certain other kinds of discrimination by the government. If private citizens discriminate on the basis of race, their actions be may wrong as a moral matter and may also violate laws enacted by Congress or state or local governments, but they do not violate the Constitution.

The Constitution as Higher Law: Foundations of Judicial Review

Although many changes have occurred subsequently, the Constitution drafted in 1787, as supplemented by the Bill of Rights, created the basic framework of federal law that persists today. On one level there is ordinary law, enacted by ordinary majorities in Congress, state legislatures, and local governments. On another level stands the Constitution, as higher law, which not only establishes and empowers the national government but also imposes limits on what ordinary law can do.