Introduction

What Is the Constitution?

Americans refer to "the Constitution" easily and often. What exactly they mean is not so clear much of the time.

The term is, of course, short for "The Constitution of the United States of America," which is the title of a document – really, a collection of documents, the original text and the amendments. In some sense, Americans always have the document in the back of their minds when they invoke its title. In ceremonial contexts, and when politicians want to belabor their opponents about the latter's supposed perfidy, "the Constitution" brings up the image of the parchment document housed in the National Archives, with "We the People" in large flowing script at the beginning and George Washington's signature leading the rest at the end; what the document actually *says* between heading and signatures is often immaterial. At the other end of the spectrum, "the Constitution" in a list of university classes might identify a course truly focused on the language drafted in Philadelphia in the summer of 1787, with some attention paid to the text's antecedents and to the intellectual arguments and political struggles over its subsequent ratification by the thirteen original states. Somewhere in between are those many occasions when "the Constitution" stands for the speaker's views on American ideals. Exactly *how* the words of the text express those ideals may be hazy, but *that* the words do so, and in the process safeguard those ideals, is crucially important, indeed, the very point of referring to the Constitution.

When American lawyers say the words "the Constitution," however, if they are speaking as lawyers, what they usually have in mind is not so much the document or its contents or the ideals for which it stands, although the lawyers' "Constitution" is related to those other meanings. A lawyer's statement about "the Constitution" – "the Constitution authorizes Congress to charter a national bank," for example, or "the Constitution prohibits interference with the right to travel interstate" – is the answer (or proposed answer) to a question about how the nation's fundamental law addresses some issue or problem. What lawyers have in mind, when speaking as lawyers, are the precedents, rules, principles, and doctrines that lawyers and judges

have developed since 1787, and that in fact generally provide the rules of decision for solving constitutional problems. It is these rules and doctrines, which I shall call the Constitution-in-practice, that function most of the time as the fundamental law of the Republic.

This is no betrayal or repudiation of the document, most of which was written in 1787. The written Constitution refers to itself as "the supreme Law of the Land," and as we shall see, the constitutional text plays a crucial role in the answers lawyers construct in addressing constitutional questions. But it is descriptively inaccurate, or at least misleading, to equate the fundamental law that lawyers argue over with the semantic contents of the 1787 document plus later amendments. Constitutional lawyers, including those who sit on the Supreme Court of the United States, do not answer a constitutional question, in fact they do not even define what counts as a constitutional question, simply by consulting the words of the document, along with (perhaps) Dr. Johnson's great eighteenth-century dictionary. And this is true even of those lawyers and Supreme Court justices who insist most vigorously that constitutional law questions can only be answered properly on the basis of arguments closely related to the text.

All of this is by way of saying that the lawyers' practice of constitutional law – the activity of framing and debating questions that make sense in court and in other settings of legal argument, and whose answers can be stated as what "the Constitution" authorizes/permits/prohibits/limits, and so on – is an activity distinct from the literary examination of the constitutional text, historical investigation into its origins, or the philosophical or political articulation of our society's highest ideals. These other activities overlap with constitutional law, but engaging in them is not engaging in constitutional law. This book is an introduction to the activity of constitutional law that lawyers writing briefs and judges deciding cases actually practice.

The reader may have detected in the previous paragraphs a preference for referring to constitutional law as an action rather than a subject: constitutional lawyers ask (or are asked) questions, they propose answers, they practice or engage in an activity. I have two reasons for doing so. The first is to suggest what the reader should not expect from the book's contents: This is not a summary of the *content* of the Constitution-in-practice, of the set of answers and predicted answers that competent constitutional lawyers believe the Supreme Court would give, or ought to give, to constitutional questions. Along the way we shall encounter many references to constitutional law in this subject matter sense, but supplying answers to such questions is not my goal. There are plenty of introductions to the principles, doctrines, and rules of constitutional law; this book's aim is to explain the intellectual activities by which lawyers and judges identify, analyze, criticize, and construct those principles, doctrines, and rules. I've already rejected the common sense assumption that the words of the written Constitution supply all the content of constitutional law in some straightforward manner; the rest of this book explains the

methods by which lawyers and judges determine that content since the text is not, and indeed cannot be, the exclusive basis of constitutional reasoning.

The second and more important reason for describing constitutional law as an activity or process is that thinking of it in those terms rather than as a body of knowledge is a better way to understand what gives constitutional law its coherence and, in principle, intellectual integrity. The methods of constitutional reasoning are also part of the Constitution-in-practice, and indeed the most enduring part. "Ultimately, the law is not something that we know, but something that we do,"[1] and competence in any area of law *always* requires experiential proficiency in how to practice in that area, not simply the possession of information. (To be sure, many areas of law also demand acquaintance with a great deal of technical detail.) This general truth about law is even more salient in constitutional law, which can seem so riven by political and ideological disagreement that one might wonder if it has any coherent or continuing substance. I think the extent of internal disarray and division in constitutional law is often exaggerated, but there is enough, particularly at the Supreme Court level that is all most nonlawyers know about, to raise a genuine concern that "it's all politics." The claim that constitutional law is a genuine form of law and not merely a species of political choice is crucial to the legitimacy of constitutional law in the American governmental system, and the claim, if it is to be vindicated, rests largely on the existence of a coherent, describable set of methods for making and critiquing constitutional arguments. Americans are sharply divided over any number of substantive constitutional issues, a fact that has always been true although the substance of the disagreements changes over time. What transcends these divisions are the tools American lawyers and judges use to raise and answer constitutional law questions. The purpose of this book is to explain those tools.

[1] Arthur A. Leff, Law And, 87 *Yale L. J.* 989, 1011 (1978). No, no words are missing from Professor Leff's title.

1

Constitutional Lawyers as Problem Solvers

Lawyers are problem solvers. The problem may already have occurred (the promised delivery of widgets never arrived) or lie in a future that someone wants to address (what shall we do if the widgets get lost in transit?). The goal in mind as the lawyer looks for a solution to the problem varies across areas of law and the differing roles lawyers play. Contract law facilitates social and economic cooperation and addresses breakdowns in agreements (someone is going to be out of pocket if those widgets never show up). In contrast, the systemic purposes of criminal law are punishment and deterrence (it's socially useful to dissuade a would-be thief from stealing the widgets). Within limits the law creates, the criminal defendant's attorney and the prosecutor have diametrically opposed goals, while the judge's purpose is to ensure the lawfulness and, again within limits dictated by the law, the justice of the proceedings.

Constitutional lawyers address problems that arise out of the fundamental governmental structures and political commitments of the United States as a political community. Any human society has a "constitution" in the sense that one can describe its basic organizational arrangements, even if they are nowhere formally defined. Furthermore, all societies tend to adhere to the arrangements that have characterized their activities in the past – a society in which everything is up for grabs is in the process of dissolution. But in any society, disputes arise not only within the accepted modes of conflict resolution but also at times over the fundamental rules themselves. Every society must have some at least tacit means for resolving the problem of disagreement over its basic arrangements or, once again, it is headed for change or collapse.

In the United States, the fundamental arrangements of political society and the mode of resolving conflict about those arrangements are formalized rather than tacit. The written Constitution both symbolizes this fact and provides an incomplete specification of the arrangements that in fact structure and limit American government. By long-standing agreement, those arrangements, whatever their relation to

the written text, are generally treated as legal rules and principles that courts can interpret and apply in the course of judicial proceedings that are, speaking broadly, of the same sort as those used to resolve contractual disputes and criminal prosecutions. This practice in turn means that many problems that arise over American governmental structures and activities – problems that in some other society might be thought the province of politicians or philosophers – are treated in this society as legal problems that lawyers must solve using legal tools.

That constitutional disputes are disagreements over law is an almost universal American assumption; it is also a most peculiar one. The "constitution" of a political community is, by definition, political in nature and content. Controversy arising over, or out of, some aspect of the community's basic governmental arrangements will stem from political, moral, economic, religious, and social causes; draw on the passions and ambitions of political persons and groups; and demand a resolution with intensely political consequences. The processes of legal argument and judicial decision are, on the face of it, ill-suited to handle such conflicts: For quite a long time, indeed, English-speaking law's procedures and professional traditions have been shaped with an eye toward *de*-politicizing the judiciary, excluding nonlegal factors from consideration, and eliminating any formal role for passion or ambition in decision. Either the law's limitations will fail to encompass the moral ideals and commitments of the community, it might seem, or the political nature of constitutional disagreements will corrupt the law and the institutions of law.

Despite these potential drawbacks, which did not escape the notice of founding-era Americans, essentially from the beginning, Americans have generally agreed that the written Constitution is law in much the same way that an enactment by the legislature is law, and that "the Constitution" announced by lawyers, the Constitution-in-practice, governs American government. The details of how and why this happened are disputed, but that it did so very quickly is beyond debate, and that fact provides an essential baseline for this book's goal of introducing the reader to the tools twenty-first-century constitutional lawyers and judges employ.

Begin with the concept of law itself. Many of the leading founders had a surprisingly sophisticated understanding of the history of Western political thought, and the Declaration of Independence reflects the widespread acceptance, for some purposes, of certain very general ideas about law. American political freedom, the second Continental Congress informed the world, is an entitlement based on "the Laws of Nature and of Nature's God." The Declaration's famous second paragraph grandly announced the individual's possession of "certain unalienable Rights" as well as the collective "Right of the People to alter or to abolish" government when in the People's judgment the existing government has become destructive of its purpose "to secure these rights" to "Life, Liberty and the pursuit of Happiness." Since the

signatories and supporters of those familiar words were at the same time busily committing treason against the sovereign and the governmental system they had acknowledged up until a few months before, clearly they thought it meaningful to use the language of law in ways that do not refer to any mundane and regularly organized legal system. But for other, less revolutionary purposes, when the founders invoked "law," what they often had in mind was the English common law, the very mundane and indeed parochial set of legal institutions, procedures, and ways of thinking the American colonists had imported from Britain.[1]

Once again, there are fascinating historical arguments about hows and whys and wherefores that we cannot discuss here, although it is important to acknowledge that independence brought along with it a deliberate effort on the part of some Americans to escape the gravitational pull of the familiar English legal forms. In the end, the effort was almost wholly unsuccessful, in part because Americans associated the unalienable and natural right of Liberty with such quintessentially English institutions and practices as the jury, the writ of habeas corpus, and the amenability of executive officials to judicial process, and for that reason maintained those institutions and practices. Equally important was the simple fact that few people who played a significant role in founding-era politics knew much detail about any modern legal system other than the common law. They simply assumed that one must think about a legal issue in the ways common lawyers went about answering legal questions. As a result, when Americans assimilated constitutional dispute resolution to legal problem solving in the wake of the adoption of the written Constitution, they immediately and unreflectively adopted the mindset of the common lawyers as the intellectual starting point for reasoning about the constitutional law of the United States. The consequences of that absent-minded nondecision in the Republic's first years continue to shape how contemporary constitutional lawyers solve twenty-first-century problems.

Consider the written Constitution. The text itself creates questions that cannot plausibly be answered by the text alone, and yet if the text is to function as law, it must be possible to find legal answers to those questions. An example will illustrate the point. Article II section 4 expressly makes the vice president subject to removal from office upon impeachment and conviction for "high Crimes and Misdemeanors." From other provisions, we know that the House of Representatives has the power of impeachment and that the Senate tries any impeachment case that the House presents. In addition, Article I section 3 mandates that "when the President of the United States is tried, the Chief Justice shall preside" over the Senate. Who presides when the vice president is on trial? Section 3 also makes the vice president "President of the Senate" and empowers the senator who is president pro tem to take the vice

[1] For additional discussion of the common law, see the Appendix.

president's place only "in the Absence of the Vice President," or when latter is serving as president. Does that mean the vice president presides at his own trial? There must be an answer, and it must be an answer of constitutional law since the Constitution, which is law, gives rise to the question. But the text, by itself, provides no clear answer.[2]

[2] There is in fact a straightforward textual answer to the question of who presides over the Senate if one treats the written Constitution as a hermetically sealed collection of answers to be derived by semantics and abstract logic: when the vice president is tried, the vice president presides. The vice president is subject to trial on being impeached (Article II section 4), the Senate has "the sole Power to try all Impeachments" (Article I section 3), and the vice president is the president of the Senate (Article I section 3). This answer is patently absurd. (Lawyers who accept the answer as correct in some linguistic sense generally treat it as proof that the text contains "a few glaring errors." *See, e.g.*, Stephen L. Carter, The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision, 131 *U. Pa. L. Rev.* 1341, 1357 & n. 72 (1983).)

The lawyerly way to make fun of this answer is to point to the background principle of Anglo-American law that no one should be a judge in his own case and to the incontrovertible historical fact that the framers and ratifiers of the written Constitution meant to create a government that made sense, and made sense in part because it respected universally accepted background principles of law. The fact that no adult, lawyer or not, would think that the vice president presides ought to be the right answer is itself a powerful illustration of the fact that the constitutional text does not, on its own, address all constitutional questions, or at least not satisfactorily.

Article I section 3's designation of the chief justice as the presiding officer when the Senate tries the president is obviously intended to avoid the potential conflict of interest a vice president would face in presiding over a trial that might make him president. Since the conflict of interest would be even more severe if the defendant on trial were the vice president himself, the chief justice seems an excellent choice for vice presidential trials as well. But there are serious textual difficulties with that answer. First, on its face, section 3 authorizes the chief justice to preside over a Senate trial in only one circumstance, and a common law canon of construction respected by founding-era American lawyers counsels against expanding the authorization. (*Expressio unius est exclusio alterius*: the statement of one thing forbids the inclusion of others. *See, e.g.*, *In re Bliss*, 9 Johns. 347, 348–49 (N.Y. Sup. Ct. 1812). *Bliss* quoted the *expressio* canon and held that the mention of specific officers of the court in a statute creating exemptions from militia duty implied, "by irresistible inference," that other officers were not exempt.) Second, section 3's involvement of an officer of the Article III branch of the federal government in the work of a part of the Article I branch creates an exception to the general principle of separation of powers established by Articles I, II, and III. Since the text expressly creates the exception for presidential trials, the chief justice's intrusion raises no constitutional problems, but extending the exception to trials of the vice president has no such textual justification for impinging on one of the most important structural features of the constitutional system.

Since the office of president pro tem exists by constitutional authorization, and allowing that senator to preside does not raise "separation of powers" concerns, perhaps that is the best answer. But this answer has textual difficulties as well. It requires us to ignore the fact that Article I section 3 expressly states when the president pro tem can preside – "in the Absence of the Vice President or when he shall exercise the Office of President" – and thus, by the same canon of construction just mentioned, section 3 implicitly prohibits the president pro tem from presiding if the vice president insists on being present. (The legal fiction that the vice president should be deemed absent when on trial is a confession that section 3 has led us into a dead end.) Furthermore, allowing the president pro tem to preside over a trial that might make her president of the Senate all the time, until the vice presidential office can be filled, poses at least to some degree the conflict of interest concern that we confidently infer lies behind the chief justice's role in presidential trials. And finally, if the president pro tem presides, does she lose her vote for or against convicting the vice president, and does she count as a "Member present" for the purposes of determining if the vice president has been convicted by "the Concurrence of two thirds of the Members present" as Article I section 3 also requires?

Founding-era Americans did not have to decide who should preside at a vice president's trial, but they encountered constitutional questions with no clear textual answer from the beginning, and their response was to use the familiar methods of common law argument to construct answers. After the constitutional text went into effect, this turn to common law reasoning to address questions with textually indeterminate answers began no later than 1790, when President George Washington asked Secretary of State Thomas Jefferson, who had been a practicing lawyer before the Revolution, whether the Senate had the power to reject the rank to which Washington proposed to appoint an American diplomat. Article II section 2 of the Constitution vests the president with the power to "nominate, and by and with the Advice and Consent of the Senate, . . . appoint Ambassadors, other public Ministers and Consuls," but it does not explain whether the Senate can properly address any issue beyond the suitability of the president's nominee for the position and rank that the president proposes. Jefferson gave the answer Washington hoped for (the Senate is limited to an up or down vote on the nominee) and justified his answer with a written legal opinion using traditional common law arguments to conclude that the Senate's advice and consent role is a narrow exception to an otherwise exclusive executive power.

Jefferson's turn to common law-like arguments to make workable sense of the written Constitution was not arbitrary. The constitutional text itself clearly invites its readers to assume that English common law provides the legal backdrop for its provisions. Article VI announces that "This Constitution," along with acts of Congress "in Pursuance thereof" and federal treaties, is "the supreme Law of the Land." The immediate point of the provision is to ensure national law's superiority to state law, but its language is a clear invocation of English legal tradition: The most famous clause in Magna Carta was a royal promise to do no harm to any freeman "but by lawful judgment of his peers, or by the law of the land." The text of the original 1787 document and of the Bill of Rights (the first ten amendments, proposed to the states by the First Congress in 1789[3]) repeatedly presupposes that the reader has some knowledge of the common law system simply to understand its terminology; indeed, the seventh amendment directs that no fact "tried by a jury" (an institution defined by the common law!) is to be re-examined in a federal court other "than according to the rules of the common law." And on a different and, for our

I think the best answer is that the president pro tem should preside. The perks of being president of the Senate and thus the conflict of interest issue seem fairly minimal, especially since the adoption of the twenty-fifth amendment in 1967, which creates a procedure for replacing the vice president between presidential elections. The constitutional difficulties pointed out at the end of the last paragraph can be addressed by the Senate's adoption of rules addressing them as part of its constitutional duty and power to determine how to conduct impeachment trials. And deciding not to ask the chief justice to preside avoids any separation of powers problems as well as the possibility that the chief justice would refuse on the ground that, whatever the Senate's view, in his opinion he was not authorized to act.

[3] In constitutional law as in political history, "the First Congress" refers to the first Congress to convene under the authority of the written Constitution, which sat from 1789 to 1791. For the special significance of the First Congress in constitutional law, see Chapter 3.

purposes, more important level, the assumption that the constitutional text as written and authoritative law is to be read as common lawyers read such texts profoundly shaped the new practice of constitutional law.

In a strict sense, "common law" referred to law announced by the courts rather than ordained by parliamentary enactment. Founding-era Americans sometimes invoked an old notion that the common law's substance ultimately stemmed from popular customs and early "legislative" pronouncements now lost in the mists of time, a fig leaf attractive to those squeamish about the reality that the courts had made and continued to remake the common law, but otherwise of no significance whatever. Early-modern common law judges generally conceded, sometimes with undisguised reluctance, that an act of Parliament could override or supplant a contrary common law rule. That concession, however, did not extend to the modes of argument and decision the courts accepted in applying superior parliamentary law. Instead, the common law courts construed statutory language using (in general) the same techniques of interpretation they applied to other legal instruments (deeds, written contracts, and the like) and recognizing the same forms of argument they considered when applying purely judge-made legal rules. The result was to minimize the intellectual differences between a decision controlled by a statute and one determined by common law per se, and over time to make the statute in practice as much as product of the judicial decisions construing it as of the original statutory text itself.

The same process has occurred in American constitutional law, as already signaled in the distinction I drew in the introduction between the written Constitution and the Constitution-in-practice that lawyers discuss. Where it exists, it is the latter that is the controlling fundamental law of the United States, and on issues that have been much litigated – the scope of Congress's Article I power to regulate interstate commerce or of the first amendment right to freedom of speech, to take two clear examples – it is to the Supreme Court's decisions, not textual exegesis, that one must chiefly look to in order to answer any difficult question. To the great surprise of some first-year law students, therefore, most of the time debate over what "the Constitution" commands is a discussion of judicial precedents and judicially formulated principles and doctrines far more than an investigation into the semantics and history of the document. To be sure, the precedents and principles and doctrines refer, sometimes rather remotely or indirectly, to the written Constitution, but the courts derive them by methods of legal reasoning parallel to those at work in areas of law traditionally governed by the common law proper such as contracts and torts.[4]

[4] The same phenomenon occurs in American statutory law as well: Over time the practical meaning of a legislative provision that is frequently litigated increasingly depends on what the courts have made of it, although of course their decisions stem from the original legislative language. Building additional detail into that language limits but cannot eliminate the gradual incrustation of the legislature's handiwork by judicial glosses; indeed, one effect of statutory detail is to invite the courts to determine

None of this is to say that the written Constitution is inconsequential, or that power-mad judges have usurped the authority that properly belongs to the charter adopted by the sovereign People. The observation that in practice constitutional law is the product of common law-like legal reasoning describes *how* the written Constitution serves as law in reality, not a denial that the text is the supreme law. The constitutional text's authority is axiomatic in constitutional law: Questions about the source and propriety of its authority – for example, whether it makes sense in the twenty-first century to treat as authoritative a collection of documents the oldest and longest of which was drafted and approved by groups of eighteenth-century white men – are not questions within constitutional law.[5]

The constitutional text, in addition, limits the scope of the Constitution-in-practice in two important ways. First, the text addresses some basic aspects of American governmental structure so clearly, whether expressly or by obvious implication, that they seldom or never give rise to legal problems: Congress has two chambers, both of which must act in order for a bill to become law, every state regardless of population has two senators, Congress cannot convict someone of violating federal law by enacting a law stating that he or she is guilty of doing so, the president may not appoint members of Congress or a state legislature or fire a federal judge, no state may limit the right to vote to men (or women). Such unproblematic aspects of the written Constitution are extremely important, but they do not play an important role in constitutional law precisely because their clarity heads off the kind of problems constitutional lawyers solve.

Second, the constitutional text plays a vital, although not exclusive, role in identifying just what political and social questions are matters for constitutional lawyers and judges to debate. Taken on its own, the abstract concept of a constitution suggests that a problem or controversy rises to a "constitutional" level insofar as it involves the broadest or most fundamental political issues and societal commitments of the community. As a rough generality, that can be said of American constitutional law, but the existence of the written Constitution creates many exceptions. On the one hand, very important concerns can be outside the realm of constitutional debate because they have no foothold in the constitutional text. The wisdom and political morality of large-scale federal deficit spending is a legitimate and important question, and some deficit hawks argue that it violates fundamental norms of good government, but in the absence of a balanced-budget amendment, the question lies beyond the purview of constitutional law. And on the other hand, if

the statute's effect by resort to canons of statutory construction that are themselves the product of judicial decision and applied by judicial reasoning.

[5] "The authoritative status of the written constitution is a legitimate matter of debate for political theorists interested in the nature of political obligation. That status is, however, an incontestable first principle [in] American constitutional law. . . . For the purposes of legal reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration." Henry Paul Monaghan, Our Perfect Constitution (1981), in *American Constitutional Law: Selected Essays* 411–12 (Durham, NC: Carolina Academic Press, 2018).