

Chapter 1

THE CONSTITUTION AND CONSTITUTIONAL ARGUMENT

INTRODUCTION

Understanding constitutional law is an ambitious undertaking. The subject is complex and can be viewed from different angles. An effort to understand constitutional law may profitably consider the Constitution, the events leading to it, its operation in practice, the interaction of the various institutions it created, and the rules, principles and doctrines which are known as constitutional law.

This chapter introduces the notion of a Constitution and describes in broad terms the historical events leading up to the ratification of our Constitution. It then discusses structural arrangements used to control government. Section 1.04 addresses the need for constitutional interpretation and some theories regarding it. Section 1.05 explores different types of constitutional arguments commonly employed.

§ 1.01 CONSTITUTIONS

The word “constitution” is used in several different senses. At times it describes the basic rules, written and unwritten, which create and control government. Alternatively, “Constitution” may denote a document which contains those rules which provide the framework for government. Both senses of the word apply to the American system. Unlike the British constitution, our Constitution is a written document which delegates and defines governmental power.

The Constitution’s primary purpose is to create and limit national government.¹ As such, constitutional government signifies an arrangement in which institutions of state are subject to, not superior to, law. Under American constitutional assumptions, “We the People of the United States”² delegated power to the Constitution which allocated it among the governing institutions it created. A singular feature of our Constitution is that its text can be formally changed only with great difficulty. Formal amendment requires some super majority support and ratification by three-fourths of the states.³ Only 27 constitutional amendments have been ratified, and ten of those came in a package shortly after the Constitution itself

¹ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

² U.S. Const., pmbl.

³ U.S. Const. art. V.

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was adopted. In essence, the Constitution's terms are placed outside the reach of normal political action.

The English scholar, Sir Kenneth C. Wheare, observed that “[i]f we investigate the origins of modern Constitutions, we find that, practically without exception, they were drawn up and adopted because people wished to make a fresh start, so far as the statement of their system of government was concerned.”⁴ The experience in the United States was no exception.

§ 1.02 RATIFYING THE CONSTITUTION

The Constitution represented a “fresh start” after the initial period under the Articles of Confederation. The thirteen colonies had ratified the Articles after the Revolutionary War concluded in 1781. The Articles created a weak national government. States retained their sovereignty and all powers not “expressly delegated” to the United States.⁵ The national government consisted of Congress; there was no executive or judiciary. Congress had limited power. It could not tax or regulate interstate commerce.

With the benefits of hindsight, it is not difficult to understand the problems the new nation experienced. Without an executive and judiciary, the national government lacked any means to enforce federal law. “Congress simply could not make anyone, except soldiers, do anything,” wrote historian Leonard Levy. “It acted on the states, not on people.”⁶ Some States adopted protectionist laws which predictably spawned retaliatory measures. These measures eroded any semblance of national unity. Shays’ Rebellion in the fall-winter of 1786-87 raised the spectre of anarchy and persuaded many of the need for a stronger national government.⁷

The Constitutional Convention convened in Philadelphia on May 25, 1787, specifically to consider changes to the Articles of Confederation. Under the terms of the Articles, any change required unanimous consent. Five days later, the Convention voted to create a national government comprised of legislative, executive, and judicial branches. Thus, within a few days of gathering, the delegates decided to abandon, rather than salvage, the Articles.⁸ The vote was not unanimous; Connecticut opposed the motion and New York was divided.⁹ Under the terms of the Articles, the motion failed. But those who met in Philadelphia were no longer proceeding under the prior arrangement. Edwin M. Yoder, Jr., a keen constitutional historian, observed, “The fifty-five framers performed radical surgery with a clearer notion of need than mandate from the constituents

⁴ K. C. Wheare, *Modern Constitutions* 6 (1966).

⁵ Articles of Confederation, 1777 art. II, in U.S.C. at XLVII (2000).

⁶ Leonard W. Levy, *Introduction: American Constitutional History, 1776–1789* in *The Framing and Ratification of the Constitution* 6 (Leonard W. Levy and Dennis S. Mahoney eds., 1987).

⁷ Stanley Elkins and Eric McKittrick, *The Founding Fathers: Young Men of the Revolution*, 76 *Pol. Sci. Q.* 181 (1961).

⁸ Levy, *supra* note 6, at 11.

⁹ Clinton L. Rossiter, *1787: The Grand Convention* 172 (1987).

they represented, who in any case were not a mass electorate. They worked in the name of ‘the people of the United States,’ but could afford to deliberate in secret and in indifference to ‘public opinion’ in the modern sense.”¹⁰

Delegates approached the Convention with different visions of the shape government should take. Virginia offered a plan for a strong national government which could regulate individuals. New Jersey, however, proposed a plan more hospitable to smaller states. It asked for a unicameral Congress in which each state would have an equal voice and for a Supreme Court which would be the only national court. Small states typically wanted equal representation in the legislature, whereas large states thought seats should be allocated based on population.

During the next four months, the delegates reached compromises regarding their competing ideals and interests. A bicameral Congress was proposed with a House of Representatives based on population and a Senate based on equal representation. Under the Madisonian Compromise, named for James Madison, the delegates agreed to create a Supreme Court but to give Congress discretion to “ordain and establish” lower federal courts.¹¹ The method of selecting the executive proved controversial. Some thought the President should be elected by the people; others would have assigned Congress that task. One group doubted the people had sufficient information to make the choice; the other, feared legislative selection would make the President too weak and dependent. Repeated votes failed to resolve the issue. Ultimately, the delegates compromised. Electors chosen in each state would meet solely to choose a President and Vice President. Each state would have the number of electors equal to its representatives in Congress.

The Convention adjourned on September 17, 1787 after nearly four months of deliberation. Attention then turned towards securing ratification by at least nine states as Article VII of the Constitution required. In some states the issue was hotly contested.

A collection of 85 essays advocating ratification of the Constitution were initially published separately from October 27, 1787 to August 16, 1788 in New York City newspapers under the pseudonym, Publius. Anti-federalist sentiment was strong in New York. In fact, the essays were written by Alexander Hamilton, James Madison, and John Jay, the first two of whom had served as delegates to the Convention. Subsequently assembled and published as *The Federalist Papers*, the collection has a threefold significance. It provides insight into the subjective understanding of at least two delegates to the Convention, Madison and Hamilton, regarding constitutional meaning and content. It provides some inkling of how the Constitution was understood by at least some people in New York who may have

¹⁰ Edwin M. Yoder, Jr., *The Historical Present: Uses and Abuses of the Past* 60 (1997).

¹¹ U.S. Const., art. III, § 1.

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read the essays before ratifying the Constitution. Finally, it is a classic American work in political theory.¹²

Ratification came easily in some small states — Delaware, New Jersey, Georgia, Connecticut, Maryland — and by a 2 to 1 margin in Pennsylvania after some sharp tactics by James Wilson and others. But Massachusetts agreed by only a 187 to 168 vote after some who initially opposed the Constitution were persuaded. Massachusetts also expressed its opinion that certain amendments, one of which was an early draft of the Tenth Amendment, would comfort concerns. South Carolina agreed by a 2 to 1 margin but with four recommendations, including an early version of the Tenth Amendment. New Hampshire became the ninth state to ratify on June 21, 1788 by a 57 to 47 vote with twelve proposed amendments. The debates in Virginia and New York, both critical states, were contentious, and ratification prevailed by narrow margins, 89-79 and 30-27 respectively.¹³ North Carolina did not approve the Constitution until late 1789; Rhode Island waited until May, 1790.

The founders appreciated the fact that they had undertaken a momentous task. Alexander Hamilton wrote in the *Federalist* #1:¹⁴

It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind.

§ 1.03 THE STRUCTURAL CONSTITUTION

The Constitution sought both to protect individual liberty from governmental tyranny and to provide a government able to respond well to public

¹² See *The Federalist* (Clinton Rossiter ed., 1961). In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418–19 (1821), Chief Justice John Marshall wrote: “The opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed. These essays having been published while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of State sovereignty, are entitled to the more consideration where they frankly avow that the power objects to is given, and defend it.”

¹³ See generally, Rossiter, *supra* note 9, at 285–98.

¹⁴ *The Federalist* No. 1 at 33. (Alexander Hamilton) (Clinton Rossiter ed., 1961).

needs. The framers were well aware of the delicacy of their task. Wrote James Madison:¹⁵

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself.

But how to oblige government to control itself?

Constitutions typically employ two different strategies to restrain government from invading individual freedom. At times constitutions design their architecture to restrain government. They arrange institutions in such a manner as to divide power and introduce obstacles to governmental action. Alternatively, constitutions often contain a Bill of Rights which place certain rights beyond the reach of government.

The American Constitution initially relied on the first strategy. “Ambition must be made to counteract ambition,”¹⁶ prescribed Madison. Government must be designed in a way which would allow it to respond to the people’s needs yet divide power to prevent tyranny. Although the original Constitution contained some specific safeguards of individual liberties,¹⁷ the Bill of Rights was not added until 1791. In fact, at Philadelphia a proposal to add a Bill of Rights was unanimously defeated.¹⁸

Some Anti-Federalists insisted that a Bill of Rights would assuage their concern about the Constitution. Hamilton argued that a Bill of Rights was “unnecessary,” given limitations already included in Article I, and even “dangerous.” He feared that inclusion of a Bill of Rights would expand governmental powers in unanticipated directions by encouraging the argument that any powers not explicitly limited were implicitly conferred. “They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?”¹⁹ Madison thought a Bill of Rights could not effectively control a majority intent on acting.²⁰ Others, including Madison, thought adding a Bill of Rights might induce states like North Carolina and Rhode Island to join the Union.²¹ The first Congress proposed 12 amendments; ten were ratified by three-fourths of the state legislatures in

¹⁵ The Federalist No. 51, at 322 (James Madison) (Rossiter ed. 1961).

¹⁶ *Id.*

¹⁷ See, e.g., U.S. Const. art. I, § 9, 10.

¹⁸ Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, 288 (1996).

¹⁹ The Federalist No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁰ Rakove *supra* note 18, at 332.

²¹ See David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801*, 110 (1997).

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1791.²² To be sure, many of those amendments, as well as others adopted later, have proved the source of important rights of individuals against national or state government. Chapters 8 and on explore those issues.

Yet the Constitution relied primarily on various structural devices to limit governmental power.²³ “In the compound republic of America,” wrote Madison, “the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.”²⁴ Power was divided between Nation and State, the concept of Federalism. Congress’ power was limited to that “herein granted,”²⁵ with the remainder residing with the States or the People.²⁶ On the other hand, the Supremacy Clause declared federal law supreme over state law and bound state officials to respect and enforce federal law.²⁷ The States were given influence in constituting the national government. State legislatures chose each State’s senators and electors chosen in each State chose the President and Vice President.

The Constitution also divided power between the three branches of the federal government, the concept known as Separation of Powers. Indeed, the vesting clause of each of the first three articles suggested this division. Article I vested legislative power in a Congress, Article II vested executive power in the President, and Article III vested judicial power in a Supreme Court and such other courts Congress might choose to create. Moreover, the Constitution created various checks and balances between governmental institutions. The President could propose legislation,²⁸ but a bill could not become law unless both the House and the Senate passed it and the President signed it.²⁹ If the President chose to veto legislation, a two-thirds majority of each house was required to pass it.³⁰ Ultimately, the Court’s power to review legislation to ascertain its constitutionality, which was implicit in the structure of the Constitution,³¹ was recognized.³²

§ 1.04 CONSTITUTIONAL INTERPRETATION

The Constitution is the basic source from which government derives its authority, but it provides only an outline of the governmental system. A Constitution is a unique document, a truth implicit in Chief Justice John Marshall’s admonition that “we must never forget that it is a *Constitution*

²² Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 8 (1998).

²³ See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 92–93 (1980).

²⁴ *The Federalist* No. 51, at 323.

²⁵ U.S. Const. art. I, § 1.

²⁶ U.S. Const. amend. X.

²⁷ U.S. Const. art. VI.

²⁸ U.S. Const., art. II, § 3.

²⁹ U.S. Const., art. I, § 7.

³⁰ U.S. Const., art. I, § 7.

³¹ *The Federalist* No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

we are expounding.”³³ “A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind,”³⁴ wrote Chief Justice John Marshall. A Constitution which attempted to anticipate all contingencies would “never be understood by the public”³⁵ and would prove insufficiently flexible to adapt to changing circumstances. Instead, the Constitution provided a framework many details of which were left unsaid. “We do not expect to find in a constitution minute details,” wrote Justice Strong in 1870. “It is necessarily brief and comprehensive.”³⁶ The “nature” of a Constitution “requires that only its great outlines should be marked, its important objects designated”³⁷ and the rest left to be deduced.

Thus, the Constitution requires interpretation. To be sure, some clauses direct clear outcomes. For instance, the Constitution provides that no one is eligible to be President until they have reached age 35,³⁸ that each state gets two senators³⁹ and that conviction for treason must be based “on the testimony of two witnesses to the same overt act, or on confession in open court.”⁴⁰ These provisions give relatively clear direction regarding the subjects they address. But the meaning of other constitutional provisions is less clear. The Fifth and Fourteenth Amendments protect against deprivations of “life, liberty or property without due process of law.” Concepts like life, liberty and property are contestable and mean different things to different people. And what is due process of law? The Eighth Amendment proscribes “cruel and unusual punishments”; does capital punishment come within that prohibition? Does the guarantee of the Equal Protection Clause in the Fourteenth Amendment pertain to equal opportunity, equal outcome, or something else? And what is an “establishment of religion” about which Congress cannot legislate?⁴¹

Much of the Bill of Rights is notoriously “open textured,” but the ambiguous areas do not reside simply in the Bill of Rights. The Constitution’s structural clauses raise numerous question, too. What does it mean to empower Congress “[t]o regulate commerce . . . among the several states?”⁴² A substantial amount of litigation has addressed that question during the twentieth century. The President can appoint officers of the United States with the advice and consent of the Senate⁴³ ; but suppose

³³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

³⁴ *Id.* at 407.

³⁵ *Id.*

³⁶ *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 532 (1870).

³⁷ *McCulloch*, 17 U.S. at 407. *See also* *Legal Tender Cases*, 79 U.S. at 532. (“It prescribes outlines, leaving the filling up to be deduced from the outlines.”).

³⁸ U.S. Const., art. II, § 1, cl. 5.

³⁹ U.S. Const., art. I § 3, cl. 1.

⁴⁰ U.S. Const., art. III, § 3, cl. 1.

⁴¹ U.S. Const., amend. I.

⁴² U.S. Const., art. I, § 8, cl. 3.

⁴³ U.S. Const., art. II, § 2, cl. 2.

the President wants to remove an officer? The Constitution does not speak specifically to that contingency. The Constitution provides that the Chief Justice presides when the President is tried on impeachment.⁴⁴ Who presides if the Vice President is impeached? Can the Vice President, as President of the Senate,⁴⁵ preside?⁴⁶ Suppose there is no Chief Justice; can someone else preside over the President's impeachment trial? If so, who? Congress can support an army⁴⁷ and provide for a navy⁴⁸ but the Constitution says nothing about an air force. Is it unconstitutional?

These examples are illustrative, not exhaustive. One can easily multiply questions to which the Constitution does not speak directly or clearly. The U.S. Reports, and constitutional law casebooks, are filled with cases addressing contested language in the Constitution. Constitutional interpretation thus becomes a necessary task of those charged with acting in accordance with the Constitution.

This raises the question regarding how one interprets and argues about the Constitution. The appropriate method of constitutional analysis is controversial. Various judges and scholars adopt different orientations concerning constitutional interpretation.⁴⁹ Some believe constitutional interpretation should focus on the text. Many text based theories call for constitutional language to be construed consistently with the original understanding.⁵⁰ Alternatively, others advocate a "living constitution." They take their inspiration in part from John Marshall's observation that the "Constitution [is] intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."⁵¹ They advocate reading the text in accordance with contemporary, rather than original, understandings.⁵² Some advocates of a "living constitution" believe legal precedent and/or ongoing practice are more important in constitutional interpretation.⁵³ Thus, Professor David Strauss endorses a common law approach to constitutional interpretation. He argues:⁵⁴

⁴⁴ U.S. Const., art. I, § 3, cl. 6.

⁴⁵ U.S. Const., art. I, § 3, cl. 4.

⁴⁶ For different views, see Joel K. Goldstein, *Can the Vice President Preside at His Own Impeachment Trial? A Critique of Bare Textualism*, 44 St. Louis U. L. J. 849 (2000) (no); Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 Const. Comment 245 (1997) (yes).

⁴⁷ U.S. Const., art. I, § 8, cl. 12.

⁴⁸ U.S. Const., art. I, § 8, cl. 13.

⁴⁹ See Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 Cal. L. Rev. 535, 541–45 (1999).

⁵⁰ See, e.g., Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990).

⁵¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819). See also *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 387 (1821) ("But a constitution is framed for ages to come, and designed to approach immortality as nearly as human institutions can approach it.").

⁵² See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 209–17 (1980).

⁵³ See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996).

⁵⁴ *Id.* at 879.

The common law tradition rejects the notion that law must be derived from some authoritative source and finds it instead in understandings that evolve over time. And it is the common law approach, not the approach that connects law to an authoritative text, or an authoritative decision by the Framers or by ‘we the people,’ that best explains, and best justifies, American constitutional law today.

Some theories are process-oriented. For instance, Professor John Hart Ely argued that the Constitution was primarily focused on assuring fair processes, not certain outcomes. Taking his cues from Justice Stone’s famous footnote four in *United States v. Carolene Products Co.*,⁵⁵ he argued that other than the Constitution’s clear commands, constitutional interpretation should properly focus on making sure that political processes are open to participation by all on a fair basis. Protecting decision-making processes, not producing certain substantive outcomes, was the “paramount mission of constitutional interpretation,” he argued.⁵⁶ Others characterize a commitment to process-based theories as “puzzling.”⁵⁷ Professor Laurence Tribe argued, for instance, that such theories elevate one substantive value, democratic participation, beyond others, and ignore the many constitutional provisions which reflect commitments to other values. Professor Christopher Eisgruber argued that constitutional interpretation involves “principled argument about moral and political issues,” particularly as it focuses on certain clauses.⁵⁸

This synopsis of these theories neither provides an exhaustive catalogue of constitutional theories nor does it do more than provide a few sound bites from those few it includes. The literature includes numerous possible approaches and those mentioned here lend themselves to discussion (and scrutiny) in book length treatments.

§ 1.05 CONSTITUTIONAL ARGUMENT

If it is difficult to agree on a prescriptive theory, it is easier to describe the types of constitutional arguments which governmental officials and lawyers typically make. These modes of constitutional arguments can be divided into several categories.

[1] Textual Argument

The text of the Constitution is a starting point for constitutional interpretation. Virtually all students of constitutional law agree that clear textual commands merit substantial deference and that even contestable provisions

⁵⁵ 304 U.S. 144, 152–53 n.4 (1938).

⁵⁶ Ely, *Democracy and Distrust*, *supra* note 23.

⁵⁷ Laurence W. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 59 *Yale L. J.* 1063 (1980).

⁵⁸ Christopher L. Eisgruber, *Constitutional Self-Government* 6 (2001).

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must be engaged rather than ignored. “Liberty” may be subject to different meanings but we must at least acknowledge that concept is under discussion. Textualism comports with a sense of law as a positive system of rules.⁵⁹ Moreover, textualism has a democratic character to it. The text is available to all. Citizens can interpret it in some fashion without recourse to the original records or philosopher’s tomes more accessible to law professors and academics. Although some see the text in originalist terms, meaning forever what it meant at ratification,⁶⁰ others believe textualism allows constitutional meaning to evolve to comport with the way in which language is understood today.⁶¹ As Professor Philip Bobbitt put it, “one power of textual argument is that it provides a valve through which contemporary values can be intermingled with the Constitution.”⁶² Finally, some defend textualism as a way to restrain judicial choice, to keep judges from introducing their own political and moral sensibilities into constitutional argument.

Textualism has limits, too. The Constitution often fails to resolve difficult questions, either because it does not speak directly or clearly to a problem that arises. The examples mentioned earlier are illustrative. Can the President abrogate a treaty by his own action?⁶³ The Constitution does not contain an explicit answer. Under the Commerce Clause Congress can regulate commerce among the States. Suppose Congress had not regulated a particular area of commercial life. Can the States regulate that matter or is the constitutional grant of power to Congress exclusive? The Constitution’s text does not contain specific language to answer those questions either. Yet as Professor Bobbitt points out, “in a Constitution of limited powers what is *not* expressed must also be interpreted.”⁶⁴ Constitutional interpretation must interpret textual silence, yet the silent text often leaves us scratching our heads and wondering.

At times, the Constitution uses language which is in John Hart Ely’s phrase, “open-textured”⁶⁵; formulations so general and abstract that they invite interpretation. Does the Eighth Amendment’s ban on “cruel and unusual punishments” preclude the death penalty? What is the meaning of “liberty” in the Due Process Clause of the Fifth and Fourteenth Amendments? Even if we engage the text, its open-textured language may not point in only one direction.

Finally, if we examine constitutional practice we find that the text often does not play a crucial role. On some occasions, courts decide cases based

⁵⁹ See, e.g., Ely, *supra* note 23, at 3 (explaining basis behind textualism).

⁶⁰ See, e.g., *South Carolina v. United States*, 199 U.S. 437, 448 (1905) (“The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.”).

⁶¹ Philip Bobbitt, *Constitutional Fate* 33 (1982).

⁶² *Id.* at 36.

⁶³ See *Goldwater v. Carter*, 444 U.S. 996 (1979).

⁶⁴ Bobbitt, *supra* note 61, at 38.

⁶⁵ See generally Ely, *supra* note 23, at 13–14.

on concepts not stated in the Constitution. The Constitution's text does not explicitly confer a general right of privacy, yet decisions prohibiting states from outlawing use of contraceptives or acknowledging a woman's right to terminate a pregnancy rest on that concept. Even if the Equal Protection Clause provided a basis to outlaw State sponsored school segregation, as the Court held in *Brown v. Board of Education*⁶⁶ in 1954, that clause only limits action of the States. There is no such clause in the text vis a vis the Federal Government. Does that mean that the Federal Government could operate segregated schools even though the States could not? Such an outcome would seem inconceivable. The Court avoided that result by finding an equal protection component in the Due Process Clause of the Fifth Amendment.⁶⁷ But that approach created other textual anomalies. "In the important cases, reference to and analysis of the constitutional text plays a minor role,"⁶⁸ wrote Professor Thomas C. Grey in 1976.

These criticisms do not sideline textual analysis from constitutional interpretation. The text certainly does decide some issues, e.g. the age of eligibility to be President, Senator or Representative. Even when it may not be decisive, it may at least limit the terms of discussion; the Eighth Amendment applies to "punishments," the Commerce Clause allows Congress to regulate "commerce," and so forth.⁶⁹ If the text restrains judges by focusing their attention on the Constitution's language, it also empowers them by suggesting they are free to reject decades of doctrine if it is inconsistent with the text.

Because the text is often not conclusive, the judiciary has developed other modes of analysis to help give meaning to general constitutional language in specific cases. In addition to the text, several other modes of argument command widespread support.⁷⁰

[2] Intent of the Framers

At least three types of historical arguments find their way into legal and judicial utterances. First, some view constitutional interpretation as a quest to capture and apply the intent of the framers. These originalist arguments generally seek to discover and enforce either the intent of the drafters or ratifiers of the original Constitution. Proponents of originalism often advance one or more of four justifications for giving it strong weight. First, ratification of the Constitution was the positive act which elevated it from paper to law. It was ratified by a democratic act which required super-majoritarian support. Those who ratified it presumably understood its

⁶⁶ 347 U.S. 483 (1954).

⁶⁷ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁶⁸ Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *Stan. L. Rev.* 703, 707–08 (1975).

⁶⁹ See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *Harv. L. Rev.* 1189, 1196 (1987).

⁷⁰ See generally Bobbitt, *supra* note 61; Charles A. Miller, *The Supreme Court and the Uses of History* 14-38 (1969); Fallon, *Constructivist Coherence*, *supra* note 69.

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language to achieve certain purposes. Accordingly, those understandings are what became law.⁷¹ Second, the founding generation was a unique collection of individuals acting in a time of heightened political consciousness. Their intent deserves deference because of their heroic and enlightened character. Further, originalism represents a strategy to confine the discretion allowed unelected judges. A jurist bound to apply original meaning is limited in a way that one licensed to interpret an ever-evolving Constitution is not. Finally, originalism gives the Constitution some rigor. If the Constitution is viewed as being elastic enough to accommodate changing conditions it will stretch until it loses all ability to restrain.⁷²

Originalism, too, poses some problems. First, can the intent of the framers or ratifiers really be fathomed? No official minutes were kept. Records of the Constitutional Convention and ratifying conventions are fragmentary. Only a fraction of what was said was preserved and some portions are cryptic.⁷³ The comments of a speaker may, or may not, have reflected the views or rationales of the greater number who were silent or whose thoughts were not preserved. Sources like *The Federalist Papers* may tell us how Hamilton, Madison, and Jay defended constitutional provisions, but their explanations may not have reflected the sentiments of other framers or those of ratifiers, most of whom were not familiar with these essays. The framers and ratifiers may not have anticipated or addressed some issues in a form that is preserved. Even when they did, it may be treacherous to ascribe to a group the articulated views of the few who may have spoken.⁷⁴ In *Brown v. Board of Education*, the Court rescheduled arguments ostensibly so the parties could brief what the original understanding of the Fourteenth Amendment was regarding school desegregation. But after many of the nation's ablest lawyers and historians labored for months to elucidate the subject, the Court concluded that the historical argument was "at best . . . inconclusive."⁷⁵

Capturing original intent may be particularly problematic when those doing the recovery are lawyers and judges rather than historians. As Professor Charles A. Miller wrote, "historians as scholars can generally state the matter more objectively than can advocates as historians."⁷⁶ The work of a historian rests on certain assumptions which may prove controversial. Yet they are likely to be more trained in the historical craft than are lawyers and judges, and better able to transport themselves back into the world view of the eighteenth century agrarian society, in which the framers and ratifiers lived to recreate what they thought. Moreover, they

⁷¹ See generally Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997); See also Ely, *supra* note 23, at 15–18 (discussing originalism).

⁷² See, e.g., Scalia, *supra* note 71, at 47.

⁷³ See, e.g., Yoder, *supra* note 10, at 79–80.

⁷⁴ See, e.g., Brest, *supra* note 52, at 229.; Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 Ohio St. L. J. 1085 (1989).

⁷⁵ *Brown v. Board of Education*, 347 U.S. 483, 489 (1954).

⁷⁶ Miller, *supra* note 70, at 157.

presumably do not approach an historical issue as advocates in the same way lawyers do.

Even if we can recapture original intent, we may ask how relevant it should be. The framers lived in different times with different problems. Moreover, as a group of white men, many of whom owned slaves, they hardly reflect the demographic reality of our times. Transformative events — westward expansion, the Civil War, immigration, two World Wars, the Great Depression, the change from an agrarian to industrial society, the civil rights movement, and many more — left us living in quite a different world from Madison, Hamilton, and Jay. Should the Constitution bind contemporary people to the specific choices of those who lived two centuries ago?⁷⁷

Finally, originalism cannot account for numerous decisions of the Supreme Court. The First Amendment has been interpreted to protect a broad “market place of ideas” which seems to extend far beyond the view of the founders. The Equal Protection Clause outlaws racial segregation of schools and much gender discrimination which was not within the aim of those who ratified it. And it has been made applicable against the federal government, an interpretive move hard to defend on originalist grounds.⁷⁸

[3] Ongoing Practice

A second type of historical argument involves ongoing history, or what might be termed an adverse possession theory of constitutional interpretation. These arguments rest on the premise that constitutional meaning evolves to embrace changing reality. In part, the Constitution changes in response to the accepted interpretations of government officials — Presidents, legislators, etc. — over a period of time.⁷⁹ It also responds to accommodate changes in social practice, technology and morality. Whereas original intent history seeks to confine judges to constitutional meaning at the founding, ongoing history “allows the Constitution to move with the prevailing temper of the country and may therefore be considered forward-looking.”⁸⁰

Ongoing history may allow the Constitution to change to accommodate new circumstances or to recognize traditional practice. But how does one decide which practices are significant in changing constitutional meaning and which are not? American society oppressed African-Americans and excluded women from certain preferred roles for centuries. The longevity of these practices would not seem a basis to accord them constitutional sanction. Indeed, it has not. One escape from this quandary is to admit

⁷⁷ See generally Richard H. Fallon, Jr., *Implementing the Constitution*, 13–14 (2001). William S. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. J. 433, 438 (1986).

⁷⁸ See Fallon, *supra* note 77, at 15–16.

⁷⁹ See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 01–02 (1819).

⁸⁰ See Miller, *supra* note 70, at 25.

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ongoing practice to shape the meaning of provisions respecting institutional practice and behavior, but not regarding those directly impacting individual liberty. Chief Justice Marshall relied on this resolution in *McCulloch v. Maryland*.⁸¹ There he suggested that past practice might be appropriate in certain cases in which “the great principles of liberty are not concerned.”⁸² Yet, at times, justices do look to tradition to determine whether practices like homosexuality,⁸³ abortion⁸⁴ and assisted suicide⁸⁵ are constitutionally protected. Moreover, accepting Chief Justice Marshall’s formulation does not eliminate the difficulty but simply limits it to cases dealing with institutions. At times the Court has found past practice suggestive of constitutional meaning; at other times, not. In *Stuart v. Laird*, Justice William Patterson used ongoing practice to silence the argument that the Constitution precluded Supreme Court justices from sitting on circuit courts. He wrote:⁸⁶

To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.

Less than two decades later, Chief Justice Marshall thought the earlier decisions of the executive and legislative branches, in favor of a national bank, suggestive of its constitutionality.⁸⁷ But 164 years later, in *Immigration and Naturalization Service v. Chadha*,⁸⁸ Chief Justice Burger suggested that the increased frequency of legislative veto provisions in federal statutes “sharpened rather than blunted”⁸⁹ the judicial scrutiny.

[4] Judicial Doctrine; Precedent

A third type of historical argument relates to judicial doctrine or precedent. These distinct, yet closely related, types of constitutional arguments use judicial formulations of the past to decide new constitutional cases. According to Professor Charles A. Miller, “[c]onstitutional doctrines are formulas extracted from a combination of the constitutional text and a series of related cases. Typically stated in shorthand fashion, they may be used almost as an emendation on the constitutional text.”⁹⁰ Or as Professor Charles Fried put it, “[d]octrine is the work of judges and of those who

⁸¹ *McCulloch*, 17 U.S. at 401–02.

⁸² *Id.* at 401.

⁸³ *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁸⁴ *See, e.g.* *Roe v. Wade*, 410 U.S. 113 (1973).

⁸⁵ *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁸⁶ *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

⁸⁷ *McCulloch*, 17 U.S. at 401.

⁸⁸ 462 U.S. 919 (1983).

⁸⁹ *Id.* at 944.

⁹⁰ Miller, *supra* note 70, at 15.

comment on and rationalize their decisions.”⁹¹ Doctrine would include the early twentieth century ideas that government could not interfere with liberty of contract,⁹² that equal protection was satisfied by separate but equal facilities,⁹³ that government could regulate commerce directly but not indirectly,⁹⁴ as well as contemporary pronouncements in favor of applying strict scrutiny to classifications based on race⁹⁵ or against commandeering state government.⁹⁶ Precedent involves the use of previously decided cases to resolve later cases, and may be used by way of analogy or as binding authority. Most doctrine is identified with some precedent as the doctrine citations in the last sentence of the prior paragraph suggest.

Judicial decisions add gloss to the Constitution’s text. The holdings and concepts embodied in judicial opinions often assume a life of their own and become the stuff of constitutional law.⁹⁷ Constitutional law includes judge-made rules which are developed in caselaw, especially the decisions of the Supreme Court that affect the distribution or the exercise of governmental authority.

Doctrine and precedent both recall a common law approach to constitutional law. They assign high status to judicial decisions and the principles they articulate. To be sure, as Justice Oliver Wendell Holmes observed, “[g]eneral propositions do not decide concrete cases”;⁹⁸ although this admonition most clearly states a limitation on doctrine, precedent, too, does not always cover precisely the situations presented by new cases.

Use of precedent has some clear advantages. It preserves judicial resources, adds some certainty and stability to constitutional law, links current decisions to those of the past, and limits judicial discretion.⁹⁹

Some question why doctrine and precedent should receive such deference. As Professor Fried posed the problem, “our allegiance and that of the judges is ultimately owed to the Constitution itself. Because only the Constitution has the authority of a founding document, the question arises: is it not wrong to substitute the course of judgments in the Supreme Court for that authority authentically discerned?”¹⁰⁰ The legal realists pointed out that judges have policy preferences and accordingly their decisions may mask as law their political predispositions. Why should later generations honor and perpetuate the work of earlier jurists? Critics complain that

⁹¹ Charles Fried, *Constitutional Doctrine*, 107 Harv. L. Rev. 1140 (1994).

⁹² *Lochner v. New York*, 198 U.S. 45 (1905).

⁹³ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁹⁴ *United States v. E. C. Knight*, 156 U.S. 1 (1895).

⁹⁵ *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325 (2003).

⁹⁶ *New York v. United States*, 505 U.S. 144 (1992).

⁹⁷ See, e.g., Strauss, *supra* note 53, at 899–900.

⁹⁸ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J. dissenting).

⁹⁹ See generally Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 Harv. J. L. & Pub. Pol’y 67, 70 (1988).

¹⁰⁰ Fried, *supra* note 91, at 1140.

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constitutional meaning turns on the text and original intent, not on subsequent interpretations.¹⁰¹ As Justice William O. Douglas put it,

A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it. So he comes to formulate his own views, rejecting some earlier ones as false and embracing others. He cannot do otherwise unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him.¹⁰²

Moreover, doctrine often takes on a life of its own quite independent of text and original intent. Terms like “separate but equal,” “clear and present danger,” “direct or indirect effects”, and “strict scrutiny” become vehicles to resolve cases even though they do not appear in the text itself.

Stare decisis, the practice of following precedent, is practiced in constitutional adjudication although not with the same rigor as in statutory cases. Justice Louis Brandeis explained:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . But in cases involving the Federal Constitution, where corrections through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.¹⁰³

Thus, at times the Court abandons or overrules pernicious or anachronistic precedents or doctrine, as it did in *Brown* when it rejected the notion from *Plessy v. Ferguson*¹⁰⁴ that “separate but equal” was consistent with the Fourteenth Amendment; or as it did when it stopped using “freedom of contract” from *Lochner* to proscribe governmental regulations.

Yet the Court has also applied doctrine or precedent even though some justices with votes critical to establishing a majority indicated that they thought the earlier decision may have been wrong. Thus, in *Planned Parenthood v. Casey*¹⁰⁵ the Court affirmed the central holding of *Roe v. Wade*,¹⁰⁶ which recognized a woman’s constitutional right to terminate a pregnancy, even though three justices repeatedly suggested that they may have had

¹⁰¹ See, e.g., Gary Lawson, *An Interpretivist Agenda*, 15 Harv. J. L. & Pub. Pol’y 157, 161 (1992).

¹⁰² William O. Douglas, *Stare Decisis* in 1 Benjamin N. Cardozo Memorial Lectures 285.

¹⁰³ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–08 (1932) (Brandeis, J., dissenting).

¹⁰⁴ 163 U.S. 537 (1896).

¹⁰⁵ 505 U.S. 833 (1992).

¹⁰⁶ 410 U.S. 113 (1973).

misgivings about *Roe* as an original matter. In *Casey*, Justices O'Connor, Kennedy and Souter suggested whether *stare decisis* should apply should turn upon several criteria: Was the earlier rule workable? Had it engendered substantial reliance? Had “related principles of law. . .so far developed as to have left the old rule no more than a remnant of abandoned doctrine?” Had facts changed so much “to have robbed the old rule of significant application or justification?”¹⁰⁷ Similarly, the Court applied judicial doctrine in an interesting manner in deciding that the warnings to criminal suspects it required in *Miranda v. Arizona*¹⁰⁸ were constitutionally required. In *Dickerson v. United States*,¹⁰⁹ the Court considered the constitutionality of 18 U.S.C. § 3501 which conflicted with *Miranda*. Although several members of the Court’s majority apparently had misgivings about “*Miranda*’s reasoning and its resulting rule”¹¹⁰ that the warnings *Miranda* prescribed were constitutionally compelled, it declined, on *stare decisis* grounds, to overrule *Miranda*. The Court that decided *Miranda* and subsequent Courts had treated *Miranda* as stating a constitutional rule. Its “doctrinal underpinnings” had not suffered sufficient deterioration to overrule the decision even though several members of the Court’s seven-justice majority would have interpreted the Constitution differently as an original matter.

In dissent, Justice Scalia, joined by Justice Thomas, pointed out that Chief Justice Rehnquist and Justices O'Connor and Kennedy were “on record as believing that a violation of *Miranda* is *not* a violation of the Constitution.”¹¹¹ He accused the majority of adopting “a significant *new*, if not entirely comprehensible, principle of constitutional law” that the Court could strike down a congressional statute “not only when what they prescribe violates the Constitution, but when what they prescribe contradicts a decision of [the] Court that ‘announced a constitutional rule?’”¹¹²

Yet the Court has not always applied these tests since *Casey* in determining whether to apply or abandon an earlier doctrine. Thus, in *Lawrence v. Texas*,¹¹³ for instance, the Court overruled *Bowers v. Hardwick*¹¹⁴ without assessing the earlier case against all of the *Casey* principles.

[5] Structural Arguments

In addition to historical arguments, constitutional interpretation often relies on structural argument, inferences from the structures and relationships of the Constitution.¹¹⁵ Such arguments identify concepts implicit in

¹⁰⁷ *Casey*, 505 U.S. at 855.

¹⁰⁸ 384 U.S. 436 (1966).

¹⁰⁹ 530 U.S. 428 (2000).

¹¹⁰ *Id.* at 443.

¹¹¹ *Id.* at 445.

¹¹² *Id.*

¹¹³ 539 U.S. 558 (2003).

¹¹⁴ 475 U.S. 186 (1986).

¹¹⁵ See generally Charles L. Black, Jr. *Structure and Relationship in Constitutional Law* (1969).

the Constitution's architecture to interpret the document. Thus, notions of federalism, separation of powers, checks and balances, rule of law, and so forth emerge from constitutional structures although those terms do not themselves appear in the Constitution. Structural reasoning is linked to the text because it involves drawing general conclusions based upon the document. It differs from textual argument because its focus is not on one particular clause but on the relationship between, and the principles that emerge from, various clauses. Structural reasoning features prominently in some of Chief Justice John Marshall's seminal opinions, such as *Marbury v. Madison*¹¹⁶ and *McCulloch v. Maryland*.¹¹⁷ Thus, in *Marbury* he concluded that the Constitution is paramount law, that Congress' powers are limited, and that citizens with rights must have remedies from basic concepts relating to constitutionalism and rule of law. In *McCulloch*, he cited the structural idea that constitutions are created to succeed and accordingly Congress can exercise means necessary to accomplish its enumerated ends. Moreover, he used the structural independence of the federal government and its democratic character as a basis to preclude a state from taxing its agencies. Structural reasoning is by no means a relic of earlier times. Professors Brannon P. Denning and Glenn Reynolds point out its prevalence in many recent decisions of the Rehnquist Court.¹¹⁸ Proponents, like Charles Black, Jr., argued that "the method of reasoning from structure and relation" is more likely "to make sense — current, practical sense" than some other forms of legal reasoning.¹¹⁹

Critics find structural argument elusive and malleable. Thus, structural reasoning may not restrain judges but rather give them license to reach results they wish to reach. Moreover, structural argument seems better suited for questions involving the relationship of different institutions of government; they are less useful "to the task of protecting human rights."¹²⁰

[6] Consequential Arguments

Prudential or consequentialist arguments proceed from the assumption that constitutional interpretation should take account of outcomes. This approach seeks to lend rationality to constitutional interpretation. It often balances competing constitutional principles. Thus, in *McCulloch v. Maryland*, Chief Justice Marshall justified the Court's conclusion that Congress had power to create a national bank by considering the difficulties that would exist if Congress lacked such a power. The Constitution was to succeed, not fail, and accordingly it needed to be interpreted in a fashion which

¹¹⁶ 5 U.S. (1 Cranch) 137 (1803).

¹¹⁷ 17 U.S. (4 Wheat.) 316 (1819).

¹¹⁸ See Brannon P. Denning and Glenn Harlan Reynolds, *Comfortably Penumbra*, 77 B. U. L. Rev. 1089 (1997).

¹¹⁹ Black, *supra* note 115, at 22.

¹²⁰ Bobbitt, *supra* note 61, at 89.

“the exigencies of the nation may require.”¹²¹ Prudential arguments may, at times, lead the Court to duck deciding a case to avoid institutional harm.¹²² It may lead a Court to hold that the federal government cannot operate segregated schools, as the Court held in *Bolling v. Sharpe*,¹²³ the companion case to *Brown v. Board of Education*. In *Bolling*, Chief Justice Warren wrote that “[i]n view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”¹²⁴ Consequential arguments may lead the Court to uphold a presidential foreign policy initiative to avoid adverse international impact.¹²⁵

Consequential arguments, however, may involve the Court in speculation regarding political reactions. Considering outcomes strikes some as policy-oriented, not law-oriented, and involving courts in legislating, not adjudicating. Is this an appropriate role for judges? Such judicial activity might also lead to “intellectual laziness” if it becomes a substitute for engaging other legal materials.¹²⁶

[7] Ethical Argument

At times, courts and lawyers invoke ethical or value arguments. These assertions seek to vindicate what is deemed moral, just, or desirable. Sometimes those arguments seem invited by the open-ended language of the Constitution i.e., due process, equal protection, and so forth. On other occasions, they are invoked when other arguments seem inconclusive. As Professor Ronald Dworkin writes, “[t]he moral reading proposes that we all — judges, lawyers, citizens — interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice.”¹²⁷ Moral argument has its critics, however.

It is sometimes criticized as contestable. Moral argument is unlikely to be conclusive since different people will reach different results. As such, some view moral argument as representing an effort to incorporate personal sentiments into constitutional law. Moreover, introducing moral argument into constitutional interpretation may diminish the role of elected decision-makers. Some argue that elected officials, not unelected judges, can best reflect the people’s moral convictions.¹²⁸

¹²¹ *McCulloch*, 17 U.S. at 408–09.

¹²² See, e.g., Alexander Bickel, *The Least Dangerous Branch* (1962).

¹²³ 347 U.S. 497 (1954).

¹²⁴ *Id.* at 500.

¹²⁵ See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

¹²⁶ Richard Posner, *Pragmatic Adjudication*, 18 *Cardozo L. Rev.* 1, 16 (1996).

¹²⁷ Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 2 (1996).

¹²⁸ See generally Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Readings” of the Constitution*, 65 *Ford. L. Rev.* 1269 (1997).

[8] Sociological Evidence

Two other forms of constitutional argument also merit mention. Courts sometimes use social facts as a basis for deciding constitutional cases.¹²⁹ The Brandeis brief, offered in *Muller v. Oregon*,¹³⁰ pioneered this approach.¹³¹ Attorneys challenging school desegregation in the 1950s employed extensive psychological and sociological evidence to support their ultimately successful claim that separate but equal violated equal protection because of its impact on African-American children.¹³² More recently, in a Michigan affirmative action case, the Court relied on evidence regarding the beneficial effects of affirmative action programs in college admissions.¹³³

Such argument is subject to some qualifications. When presented in briefs, rather than offered in evidence, there may not be effective opportunity to impeach the evidence and offer rebuttal.¹³⁴ Moreover, it may make legal principles turn on sociological data and accordingly vulnerable to a change in circumstance. Would racial segregation be constitutional if findings showed it to be beneficial?¹³⁵

[9] Comparative Constitutional Argument

Finally, some justices have recently argued that the practices and experiences of other countries furnish a basis for reaching decisions in American constitutional law. In cases dealing with assisted suicide,¹³⁶ homosexuality,¹³⁷ and affirmative action,¹³⁸ some justices have cited the way other countries handle these issues in resolving American constitutional principles. Although this cosmopolitan type of argument appears most often in cases involving constitutional rights, it has also appeared in structure cases, too.¹³⁹ Not all embrace the use of comparative constitutional law in interpreting our Constitution. Thus, Justice Scalia has suggested that the American Constitution should be interpreted without reference to the experience abroad.

¹²⁹ See generally Miller, *supra* note 70, at 17–20.

¹³⁰ 208 U.S. 412 (1908).

¹³¹ Alpheus T. Mason, Brandeis: A Free Man's Life (1946).

¹³² See generally Richard Kluger, Simple Justice (1977).

¹³³ See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹³⁴ Paul A. Freund, The Supreme Court of the United States 151 (1961).

¹³⁵ See Miller, *supra* note 70, at 19.

¹³⁶ See *Washington v. Guicksberg*, 521 U.S. 702, 718 n.16 (1997).

¹³⁷ See *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003).

¹³⁸ See *Grutter*, 539 U.S. at 344. (Ginsburg, J., concurring).

¹³⁹ See, e.g., *Printz v. United States*, 521 U.S. 898, 976–78 (1997) (Breyer, J. dissenting).

§ 1.06 CONCLUSION

Some of the previous discussion has implicitly assumed that courts and lawyers have a special role in constitutional argument. Indeed, much constitutional argument is addressed to, or used by, the judiciary. The following chapter will introduce and explore the institution of judicial review, which recognizes the important judicial role in interpreting the Constitution. The judiciary is the primary source of constitutional law, but it is by no means the only institution that shapes constitutional meaning. The President¹⁴⁰ and members of the executive and legislative branches¹⁴¹ also take oaths to enforce the Constitution, an obligation which arguably allows them to interpret it. Indeed, Presidents Thomas Jefferson,¹⁴² Andrew Jackson,¹⁴³ Abraham Lincoln¹⁴⁴ and Franklin D. Roosevelt¹⁴⁵ among others at times suggested that they had some independent authority to interpret the Constitution. Officials in the executive and legislative branches interpret the Constitution in the regular course of their duties.¹⁴⁶ When, for instance, the House of Representatives considered impeaching Presidents Richard M. Nixon and William Jefferson Clinton it had to interpret the Impeachment Clause to determine whether the acts alleged constituted “other high crimes and misdemeanor.”¹⁴⁷ Congress sometimes considers constitutional arguments in legislating. For instance, Senator Thomas F. Eagleton argued and voted against the War Powers Resolution in 1973 because he concluded that the measure unconstitutionally gave the President some of Congress’ power to declare war.¹⁴⁸ When the bill passed nonetheless, President Nixon vetoed it because he thought it unconstitutionally encroached on the President’s power.¹⁴⁹ In each case, their interpretation was based on their reading of the Constitution and their assessment of other constitutional materials. Neither Senator Eagleton’s nor President Nixon’s actions were unprecedented. On the contrary, members of the executive and legislative branches often consider constitutional arguments for or against proposed actions. At times the judiciary recognizes that one of the political branches has a superior right or competence to interpret a particular part of the Constitution. On other occasions, the

¹⁴⁰ U.S. Const., art. II, § 1, cl. 8.

¹⁴¹ U.S. Const., art VI, cl. 3.

¹⁴² The Writings of Thomas Jefferson 311 (Paul L. Ford ed., 1898) (Letter to John B. Colvin, Sept. 20, 1810).

¹⁴³ 3 Messages and Papers of the Presidents 1145 (James Richardson, ed., 1897).

¹⁴⁴ Abraham Lincoln, Special Session Message, *in* 7 Messages and Papers of the Presidents 3210 (James Richardson, ed., 1897).

¹⁴⁵ Gerald Gunther, Cases and Materials on Constitutional Law 24 (12th ed. 1991).

¹⁴⁶ *See generally* Louis Fisher, Constitutional Dialogues: Interpretation as Political Process (1988).

¹⁴⁷ U.S. Const. art. II, § 4.

¹⁴⁸ Thomas F. Eagleton, War and Presidential Power 163 (1974).

¹⁴⁹ Richard M. Nixon, Veto of the War Powers Resolution (Oct. 24, 1973) *in* Public Papers of the Presidents: Richard Nixon 1973, at 311 (1975).

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Court adopts, or is influenced by, the constitutional views of the executive or legislative branches.