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History, Structure, and Content of the United States Constitution 1

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Preamble to the United States Constitution

Chapter Outline

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KEY TERMS AND CONCEPTS

Bill of Rights	Fundamental rights
Commerce clause	Habeas corpus
Due process clause	Police powers
Equal protection clause	Preemption
Ex Post Facto	Selective incorporation
Federalism	

§ 1.1 History of the United States Constitution

The men who met in Philadelphia in 1787 had ample precedent for the notion of a written constitution. Americans had been living under colonial charters for more than 100 years. After declaring their independence, the 13 former colonies immediately began working on constitutions to prepare for statehood. New Hampshire was the first to complete this process.¹ By 1779, all 13 former colonies had constitutions in place. The governments established by the early state constitutions were patterned after the English parliamentary system. Nearly all provided for a bicameral legislature that was responsible for selecting the governor.

§ 1.2 —Early Steps Toward National Unity

The federal union established by the Constitution of 1789 was not the first attempt at alliance. In 1643, the colonies of Massachusetts, New Plymouth, Connecticut, and New Haven formed a coalition, known as the New England Confederacy, for mutual defense against the Dutch and Indians. The New England Confederacy was a loose association whose chief function was to provide protection against external threats. The member colonies maintained exclusive control over their internal affairs.

The Revolutionary War provided the first major impetus for unification. Coordinating the war effort required something more than 13 independent nations fighting separately toward a common goal. All colonies except Georgia sent delegates to the First Continental Congress, which assembled in Philadelphia in 1774.² Our colonial forefathers were apprehensive about establishing a strong central government with sovereign authority over them. Preparing to wrest power from one sovereign, they were in no hurry to turn it over to another. Consequently, they gave the Continental Congress only powers that were strictly necessary for carrying on the war. The Continental Congress functioned as an agent of the states, with the states retaining sovereignty.

§ 1.3 —Articles of Confederation

It soon became apparent that greater centralization was needed. In 1776, a committee was appointed to study this problem. This committee wrote the Articles of Confederation, which went into effect in March of 1781. While the Articles of Confederation set up a national government, the government's powers over domestic affairs were so limited that the government was doomed to fail before it began. Distrustful of a strong central government, the states refused to delegate the vital power to levy taxes, regulate commerce, or pass laws affecting domestic affairs.³ The Union established under the Articles of Confederation was little more than a loosely joined league of sovereign and independent states. The chief function of the national government was to represent the league of states in foreign affairs.

After the War of Independence was won, the American people were confronted with the realization that the government they had hastily thrown together for the purpose of carrying on the war was too weak to protect their common interests in peacetime. Fortunately, the leaders of this period were reasonable people and were able to solve this problem without the power struggles and bloodshed that so often follow a revolution.

§ 1.4 —Drafting the United States Constitution

In February of 1787, the Congress established under the Articles of Confederation adopted a resolution calling for a convention to consider revision. Three months later, 55 delegates, representing every state except Rhode Island, assembled in Philadelphia and selected George Washington as their unanimous choice to preside over the Convention. The session lasted nearly four months.

The most immediate question facing the Convention was whether the Articles of Confederation could be salvaged or whether it was necessary to begin anew. James Madison recommended salvaging the best feature of the Articles of Confederation—the idea of separating the powers of the national government into three branches—and building a new constitution around it. After heated debate and compromise on such issues as the amount and kinds of powers to delegate to the national government, the basis for representation in the national legislature, and the relation between the nation and the states, the Convention ended with a constitution that bore little resemblance to the document the delegates had assembled to revise. The proposed Constitution conferred broad powers on the federal government.

§ 1.5 —Ratification by the States

Although drafting the Constitution was a monumental task, an even greater one remained. Public sentiment was divided about the wisdom of conferring broad powers

on the national government. James Madison, Alexander Hamilton, and John Jay undertook the task of selling the Constitution to the people. In their historic Federalist Papers, they argued that a strong central government was necessary to ensure political stability and national security. Their opponents countered that:

1. granting the federal government the power to tax was dangerous
2. the Constitution lacked a Bill of Rights and the assurance of a fair trial
3. concentrating so much power in the federal government threatened the sovereignty of the states.

The ratification process moved forward in the face of heated debate. On June 21, 1788, New Hampshire became the ninth state to ratify the Constitution. Although ratification by nine states was sufficient to make the Constitution operative in the states that had ratified it, New York and Virginia had to be won over in order to ensure the political future of the new government. On June 25, 1788, Virginia ratified the Constitution by a narrow margin. On July 2, 1788, the Constitution was declared to have been duly ratified. New York ratified the Constitution less than a month later. North Carolina and Rhode Island remained outside the Union, watching from the sidelines for many months. The passage by Congress of a tariff on foreign imports, including goods imported from North Carolina and Rhode Island, drove them into the union. North Carolina and Rhode Island ratified the Constitution on November 21, 1789, and May 29, 1790, respectively.⁴

On September 13, 1788, the Continental Congress passed a resolution putting the new Constitution into effect. On April 30, 1789, George Washington was inaugurated as the first president of the United States. Within a span of 25 years, the 13 former colonies accomplished two major victories: they won the War of Independence and established a firm and stable government that has endured for more than 200 years.

§ 1.6 Structure and Content of the Constitution

The United States Constitution is divided into seven parts, called articles. The content of each article is summarized below.⁵

ARTICLE I. Article I establishes the legislative branch of government. It provides that the legislative powers of the United States shall be vested in Congress, which shall consist of two chambers—the Senate and the House of Representatives. Sections 2 through 7 provide for the number and qualifications of the representatives in each chamber, the method of selecting them, the procedures to be followed in enacting legislation, and the manner of impeachment. Section 8 outlines the powers of Congress in domestic and foreign affairs; sections 9 and

10 impose various limitations on the powers of Congress and of the states.

ARTICLE II. Article II establishes the executive branch of government. It provides that the executive powers of the United States shall be vested in the President and outlines the President's powers and duties. The remainder of this article deals with the qualifications of the President and Vice President, the manner of election, oath of office, and the method and grounds for removal.

ARTICLE III. Article III establishes the judicial branch of government. The Supreme Court is the only court expressly created by the Constitution. Article III vests the judicial power of the United States in the Supreme Court and in such inferior courts as Congress should see fit to establish. It goes on to outline the jurisdiction of the Supreme Court and the lower federal courts. Article III also defines the crime of treason and the proof necessary for a conviction.

ARTICLE IV. Article IV establishes the duties states owe one another. These duties include the duty to extend full faith and credit to the laws of sister states, to grant the citizens of sister states equal privileges and immunities, and to surrender fleeing felons for interstate extradition. Article IV also provides for the admission of new states, grants Congress plenary power to govern territorial possessions of the United States, and assures each state a republican form of government. Finally, it guarantees the states federal protection against external invasions and internal insurrections.

ARTICLE V. Article V establishes procedures for amending the Constitution. Constitutional amendments can be proposed in one of two ways: either by a two-thirds vote in both houses of Congress or through a recommendation endorsed by two-thirds of the state legislatures. Once proposed, the amendment must be ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths of the states, in order to become part of the Constitution.

ARTICLE VI. Article VI contains the "supremacy" clause. The supremacy clause provides that the Constitution, laws, and treaties of the United States shall be the supreme law of the land and shall bind state judges, displacing contrary provisions in state constitutions and statutes. Federal and state officials are required to take an oath of office to support the Constitution.

ARTICLE VII. Article VII has historic importance only. It provides that the Constitution shall go into effect once it is ratified by nine states and shall be operative in the states that ratified it.

§ 1.7 —Separation of the Powers of the National Government

The Framers were apprehensive of concentrated power. They believed that liberty would be more secure if the national government's powers were divided into three branches—a bicameral legislature with the power to make laws, an executive with the power to enforce them, and a judiciary with the power to interpret the laws and apply them in individual cases.⁶ They accomplished this in the first three articles. These articles distribute the powers of the national government among three branches—Congress, the Presidency, and the Judiciary—and describe the powers allocated to each. This allocation is fixed. The Constitution prohibits one branch from encroaching on the powers delegated to another branch and from turning its powers over to another branch.

Figure 1.1

Separation of Powers

Our Constitution divides the powers of the national government among three branches—a bicameral legislature with the power to make laws, an executive with the power to enforce them, and a judiciary with the power to interpret and apply them in individual cases.

A. Encroachment on Powers Delegated to a Coordinate Branch

While Congress has the power to enact laws, it may not exercise this power in ways that encroach upon the powers of the President or the judiciary. Congress, for example, cannot overturn the Supreme Court's constitutional rulings by statute. This is because the power to interpret the Constitution belongs to the courts. The Supreme Court is the ultimate expositor on what the Constitution means. When the Supreme Court hands down a ruling interpreting the Constitution, the decision becomes embedded in the Constitution the same as if it were written there. A constitutional amendment is the only action that can eradicate it.⁷ Amending the Constitution is a cumbersome process that has been undertaken successfully only 27 times in American history.

The Supreme Court's statutory interpretations stand on a different footing. Because Congress has the power to enact laws, Congress can change them if it does not like the way they are interpreted. The amended statute will govern the decisions of courts in future cases. However, Congress cannot change the outcome of cases that were previously decided under the statute because the judicial power includes the power to render binding decisions, subject to reversal solely by a higher court.

B. Delegation of Power to Coordinate Branch

The doctrine of separation of powers also prohibits one branch from turning its powers over to another branch. Congress, for example, cannot delegate responsibility for enacting laws to the executive or judicial branches. The nondelegation doctrine

stems from the language of Article I, Section 1, which declares that “[a]ll legislative powers herein granted shall be vested in a Congress of the United States.” However, the Constitution does not prohibit Congress from asking coordinate branches for assistance. The volume of regulations needed to run the nation is so mammoth that Congress could not function unless able to legislate in broad terms, leaving discretion to fill in the details to others. Under settled interpretation, Congress does not violate the constitutional separation of powers by delegating rule-making authority to agencies within the executive branch, provided it lays down clear standards to guide the agencies in exercising their delegated authority. When Congress enacted the Controlled Substances Act, for example, it delegated authority to the Attorney General to update the controlled substance schedules by adding new drugs found to meet certain statutory criteria. The addition of new drugs automatically made their manufacture, possession, and distribution a federal criminal offense. The Supreme Court, nevertheless, upheld the delegation because the Controlled Substances Act contained adequate criteria to guide the Attorney General’s exercise of the delegated authority.⁸

Regulations adopted by federal agencies to implement the statutes that Congress enacts are published in the Code of Federal Regulations, which is one of today’s most important bodies of law.

§ 1.8 —Division of Power between the National Government and the States

The Constitution also divides power between the national government and the states. Understanding the vertical division of power calls for a brief review of history. With the signing of the Declaration of Independence, the colonies renounced their allegiance to England and Parliament’s authority over them, and assumed the status of separate sovereign entities. Each state had its own constitution and functioned autonomously. The states retained their sovereignty and independence under the Articles of Confederation. However, they were forced to yield a portion of it to form a federal union. There was no historical precedent for the dual (federal–state) system of government established by the Framers. It remained for the subsequent course of history to define and redefine the precise nature of the federal union and the relationship between the nation and the states.

The division of power between the federal government and the states is accomplished through a combination of three sections. The Constitution begins by listing the powers delegated to the federal government. This is accomplished in Article I, Section 8. Article I, Section 10 then withdraws certain powers from the states by prohibiting the states from exercising them. The implication from this scheme is that all powers that have not been delegated to the federal government and that the states are not forbidden to exercise remain in the states, from whence the power originated. This implication was made explicit with the adoption of the Tenth Amendment in 1791, which reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

There are three things to keep in mind about the division of power between the federal government and the states. First, the federal government is a government of enumerated and limited powers. It can exercise only those powers that have been delegated. These powers are found primarily in Article I, Section 8, which is the focus of the next section.

Second, while the federal government is a government of enumerated and limited powers, it is supreme within its sphere of operation. When Congress enacts a law within the scope of its delegated powers, the federal law supersedes and annuls conflicting state laws. This results from the supremacy clause of Article VI, which declares that “[t]his Constitution, and Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land, . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” For example, should Congress decide to pass a law reducing the maximum speed on federal highways to 50 miles per hour, this law would supersede and annul state laws permitting a higher speed.

Third, all powers that have not been delegated to the federal government and that the states are not prohibited from exercising belong to the states. The powers reserved to the states are called **police powers**. They include the vital functions traditionally associated with local governments, such the power to operate public schools, control land use through zoning, regulate marriage, divorce, and child welfare, and protect the health, safety, and welfare of members of the community generally.⁹

The Civil War put to the test whether a state, having once joined the union and surrendered a portion of its sovereignty, could withdraw from the union by a unilateral act of secession. The indestructible nature of the federal union was decided on the battlefield. The union was permanent.

Figure 1.2

Division of Power between the Federal Government and the States

The Constitution divides power between the federal government and the states by: (1) enumerating the powers delegated to the federal government, (2) prohibiting states from exercising certain powers, and (3) providing that (t)he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States . . .” The federal government, though a government of enumerated and limited powers, is supreme in its sphere of operation. When Congress enacts legislation within the scope of its delegated powers, its laws prevail over contrary state laws.

§ 1.9 —Powers Granted to the Federal Government

Brevity is a striking feature of the Constitution. The Framers did not clutter the Constitution with unnecessary details that might have rendered it obsolete within a generation or two. Instead, they laid out a broad framework, having faith that courts

would interpret the language wisely and in accordance with the evolving needs of society.

Every law enacted by Congress must be based on one or more of its enumerated powers. The powers granted to the federal government are found primarily in Article I, Section 8. The following section provides an overview of the federal government's powers, emphasizing those that are most important.

A. *The Power to Levy Taxes and Make Expenditures for the National Defense and General Welfare*

The federal government has the power to tax. This power is essential because no government can survive without a source of revenue. The lack of taxing power was a major weakness of the government established by the Articles of Confederation.¹⁰

The power to tax can be used to encourage or discourage behaviours that are otherwise beyond the federal government's delegated powers. The Affordable Care Act (better known as Obamacare) is an example. This Act required individuals with a certain income to purchase health insurance or pay a penalty reportable on their federal tax return.¹¹ The Supreme Court upheld the law, not because Congress has the power to force people to purchase unwanted health insurance, but because it has the power to tax and this provision constituted a valid exercise of the taxing power. The Court noted that the power to tax gives the federal government "considerable influence even in areas where it cannot directly regulate." That Congress's primary purpose was to shape decisions on whether to buy health insurance, rather than to raise revenue, was of no moment. The Internal Revenue Code is replete with instances where taxes are used to shape decisions on matters that Congress cannot regulate directly. The cigarette tax is an example. Cigarettes are heavily taxed, not just to raise revenues, but to discourage individuals from smoking. By construing the Affordable Care Act as increasing taxes on those who have a certain amount of income, but choose to go without health insurance, the Court was able to uphold it as a valid exercise of taxing power.¹²

B. *The Power to Borrow Money on the Credit of the United States*

The federal government also has the power to borrow money. This power provides an auxiliary source of revenue when taxes are insufficient to cover the government's operating expenses.

C. *The Power to Regulate Interstate and Foreign Commerce*

Congress has the power to "regulate Commerce with foreign Nations, and among the several States." The **commerce clause** is one of the most important powers granted to the federal government. It gives Congress authority to regulate: (1) the channels and

instrumentalities used in interstate commerce, (2) persons and articles that move in interstate commerce, and (3) any commercial activity that substantially affects interstate commerce.¹³

Figure 1.3

Commerce Clause Powers

The commerce clause gives Congress regulatory authority over three areas: (1) instrumentalities and channels used in interstate commerce, (2) persons and articles that move in interstate commerce, and (3) commercial activities that substantially affect interstate commerce.

The first category—channels and instrumentalities used in interstate commerce—gives Congress authority to regulate highways, navigable waters, bridges, tunnels, canals, airlines, railroads, trucking concerns, telecommunications networks, and similar mediums. Congress has plenary power to regulate anything that has to do with them, including preventing criminal activity on, involving, or against them, and prohibiting their use for harmful or immoral purposes.

The second category—persons and articles that move in interstate commerce—permits Congress to regulate persons, products, transactions, activities, and services that extend across state lines. This category has provided the basis for a large body of federal criminal statutes, such as the Mann Act, which makes it a federal crime to take an individual across state lines for the purpose of engaging in illegal sexual activity; the National Motor Vehicle Theft Act, which makes it a crime to transport stolen vehicles in interstate commerce; and the Federal Kidnapping Act, which makes it a crime to kidnap persons and take them across state lines.¹⁴ It also provided the constitutional basis for the Public Accommodations Act of 1964 and the Fair Housing Law.¹⁵

The third category is the broadest. It empowers Congress to regulate any activity, national or local, that substantially affects interstate commerce. Congress has used this power to enact labor legislation, anti-trust laws, laws regulating safety standards in industry, minimum wage and hour laws, and other important provisions that form the backbone of our economy. The potential reach of the third power is so vast that the unchecked exercise could alter the federal-state balance of power. Recognizing this, the Supreme Court has imposed two limitations on its use. First, the third power can only be used to regulate commercial activity. Congress cannot use this power to regulate noncommercial activities traditionally regulated by the states like domestic relations, public school education, and street crimes.¹⁶ Second, Congress cannot force people to engage in unwanted commercial activity. This limitation was recognized in *National Federation of Independent Business v. Sebelius*,¹⁷ challenging the Affordable Care Act mandate that persons with a certain income level of income obtain health insurance or pay a penalty reportable on their federal income tax return.

The Supreme Court ruled that the mandate to purchase health insurance was not sustainable under the commerce clause:

The Constitution grants Congress the power to "regulate Commerce." The power to regulate commerce presupposes the existence of commercial activity to be regulated. . . . Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching "activity." . . .

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.

People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

That is not the country the Framers of our Constitution envisioned. . . .¹⁸

The Court, nevertheless, upheld the Act as a valid exercise of taxing power by construing the mandate as increasing taxes on persons with a certain level of income who decide to go without insurance.

D. The Power to Establish National Rules Regarding Immigration, Naturalization, and Bankruptcy

The federal government alone can regulate immigration and naturalization. The states are forbidden to legislate on this subject. The federal government also has exclusive legislative control over bankruptcy laws and the establishment of bankruptcy courts. States, nevertheless, remain free to enact laws dealing with the legal rights of debtors and creditors, so long as they do not conflict with federal bankruptcy laws.¹⁹

E. The Power to Coin Money, Regulate Currency, and Punish Counterfeiting

Congress has the exclusive power to regulate currency. This includes the power to coin money, designate the medium of exchange, forbid melting, defacing, and counterfeiting, and establish agencies to enforce the currency laws.

F. The Power to Establish Post Offices and Post Roads

Congress also has the power to establish post offices and post roads. This power enables Congress to regulate what can be placed in the mail, to make theft from the mails and use of the mails for illegal purposes federal crimes, and to establish federal agencies to enforce the postal laws.

G. The Power to Secure for Authors and Inventors the Exclusive Right to Writings and Discoveries for a Limited Period of Time

The Constitution grants Congress the power to secure for authors and inventors the exclusive rights to the fruits of their labors. This provision supplies the constitutional basis for federal patent and copyright laws.

H. The Power to Establish Judicial Tribunals Inferior to the Supreme Court

The Supreme Court is the only court expressly created by the Constitution; however, Congress was given the power to establish judicial tribunals inferior to the Supreme Court. In 1789, Congress exercised this power. The Judiciary Act of 1789 provided for the establishment of 13 district and three circuit courts. While the number of lower federal courts has grown, the basic pattern remains the same today. The federal court system has three tiers. Federal district courts are at the bottom: they function as federal trial courts. Federal criminal trials are held in federal district courts. Federal circuit courts are above them. Federal circuit courts are appellate courts rather than trial courts: they hear appeals from federal district courts. The Supreme Court is the highest court of the land. Very few appeals ever reach the Supreme Court.

I. The Power to Make and Enforce Laws Related to Piracies and Felonies Committed on the High Seas and Offenses against the Laws of Nations

Congress has the power to regulate criminal activity committed on the high seas on or against United States vessels.

J. The Power to Declare War

Congress alone has the power to declare war. The domestic powers of Congress are expanded during wartime, allowing Congress to impose some controls that would be unconstitutional in peacetime.²⁰ The Constitution, nevertheless, makes the President Commander-in-Chief of the armed forces. This division of authority has given rise to a peculiar state of affairs. In modern times, successive presidents have claimed authority, as Commander-in-Chief, to send American troops into combat abroad without waiting for Congress to declare war. Congress has declared war only five times; American troops have been deployed in combat operations abroad over a 100 times.²¹ Because Congress has never called the President to the task for initiating military operations without congressional approval, the Supreme Court has never had to decide whether the President as Commander-in-Chief has the inherent power to deploy American troops in military actions without consulting Congress.

K. *The Power to Raise and Support an Army and Navy and Provide for their Regulation*

Congress has the authority to enact draft laws, acquire land for military installations, establish military regulations, and set up military courts. The Uniform Code of Military Justice derives from this power.

L. *The Power to Organize a Militia and Call the Militia into the Service of the United States When Necessary to Execute Federal Law, Suppress Insurrections, and Repel Invasions*

"Militia" refers to the organization today known as the National Guard. The Constitution divides control of the militia between the federal government and the states. Congress is responsible for organizing and equipping the militia and has the authority to call the militia into federal service when needed to suppress insurrections, repel invasions, and execute the laws of the United States. The states are responsible for training the militia according to standards prescribed by Congress. Enlistment in the state National Guard simultaneously results in enlistment in the Army National Guard. Enlistees retain their status as state Guard members until ordered into active federal duty and again revert to state status when they are relieved from federal service.²²

M. *The Power to Govern the District of Columbia and All Federal Enclaves and Establishments*

Congress has exclusive legislative control and oversight of the District of Columbia and federal installations such as military posts, national parks, and federal buildings, even though they are located inside a state.

N. *The Power to Enact All Laws Necessary and Proper for Carrying into Execution the Specifically Enumerated Powers*

The final clause of Article I, Section 8 grants Congress the power to enact "all Laws which shall be necessary and proper for carrying into execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof . . ." This clause is known as the necessary and proper clause. It grants Congress broad discretion as to the choice of means for executing its constitutionally delegated powers.²³ In 1819, a controversy arose about whether Congress had the power to establish a national bank.²⁴ The Supreme Court ruled that Congress had this power, even though no specific language in the Constitution mentioned it; the power existed under the necessary and proper clause. Chief Justice Marshall, who wrote the Court's opinion, proclaimed:

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are

not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

The ends the federal government can pursue are circumscribed by its delegated powers. However, if the ends are constitutional, the federal government can select any means that are appropriate. Because Congress had the power to lay and collect taxes and to borrow money, Congress could establish means for safeguarding federal revenues pending their expenditure. Incorporating a bank was, therefore, appropriate. Marshall's interpretation of the necessary and proper clause forms the basis of the implied powers doctrine. The federal government has the implied power to adopt any measures, not prohibited by the Constitution, that are appropriate for carrying its delegated powers into effect.

§ 1.10 —Powers the States Are Forbidden to Exercise

Article I, Section 10 expressly forbids the states from doing five things.²⁵ States may not:

1. enter into treaties, alliances, or confederations
2. coin money, emit bills of credit, or make anything besides gold or silver coin legal tender in payment of debts
3. lay duties on imports or exports without the consent of Congress
4. keep troops or ships of war in times of peace
5. pass bills of attainder, ex post facto laws, or laws impairing the obligations of contract.

The Constitution grants the federal government authority to make treaties, establish a currency, regulate foreign commerce, and declare war. The first four restrictions on the Article I, Section 10 list make this authority exclusive by prohibiting the states from acting in these areas.

The fifth restriction outlaws three arbitrary practices. States are forbidden to enact bills of attainder, ex post facto laws, or to impair the obligations of contract. A bill of attainder is a legislative act that brands a person a criminal without a trial.²⁶ Legislatures cannot declare individuals criminals and impose sanctions on them. Only a court can do this.

States are also forbidden to enact *ex post facto* laws. *Ex post facto* means "after the fact." This clause protects an accused from being disadvantaged by changes made in the law after his/her crime was committed. Laws that (1) change the elements of a crime or make conduct, innocent when done, criminal,²⁷ (2) increase the punishment,²⁸ or (3) reduce the evidence needed to convict cannot be applied to crimes completed before they were enacted.²⁹ The same holds true for laws that change sentencing guidelines and credit for good behavior.³⁰ However, the accused enjoys no *ex post facto* protection against mere changes in procedural rules, even when they work to his/her disadvantage.

In *California Department of Corrections v. Morales*,³¹ the Supreme Court rejected an *ex post facto* challenge to a prison regulation decreasing the frequency of parole hearings because the change was procedural and presented little risk of prolonging the duration of a prisoner's confinement.

The restrictions discussed above are found in the text of the Constitution. Certain other restrictions are implicit from the nature of federalism. The principle that a state may not tax an agency of the federal government is an example. Permitting the states to tax an agency of the federal government runs counter to federalism because it permits the states to exert control over the operations of the federal government.

However, the most far-reaching restrictions on state power did not become part of the Constitution until after the Civil War. These restrictions are contained in the Fourteenth Amendment and are discussed in §§ 1.15 and 1.16 of this chapter.

§ 1.11 —Sovereign Powers Retained by the States

A. The Tenth Amendment and the Powers Reserved to the States

Believing that diffusion of power increases protection for liberty, the Framers of our Constitution delegated specific powers to the federal government and provided that all powers not so delegated would be reserved to the governments of the states and the American people. The powers retained by the states are called **police powers**. These powers are ascertained through constitutional mathematics. Before the adoption of the Constitution, sovereignty resided in the states. The states surrendered a portion of their sovereignty when they formed a federal union. The powers retained by the states are determined by subtracting from their original sovereignty, the powers they delegated to the federal government (Art. 1, § 8) and the powers the Constitution forbids them to exercise (Art. 1, § 10). This method of fixing the boundaries of federal and state power is set forth in the Tenth Amendment, which reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and to the people."

In making this division of power, the Framers assumed that the powers retained by the states would be greater than those delegated to the federal government. James Madison made this point in the Federalist Papers where he described the balance of power as follows:

The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.³²

This description, though accurate in 1798, is no longer true today. A shift occurred in the federal/state balance during the New Deal era. Article 1, Section 8 describes the

powers delegated to the federal government in broad, general language. The elasticity of the language allows it to be stretched. Since the states hold the residual of power (*i.e.*, all powers that have not been delegated to the federal government), the powers retained by the states pivot on the interpretation of the delegated powers. The Supreme Court's expansive interpretation of the commerce clause during the New Deal era caused a corresponding constriction of the powers retained by the states. However, the constitutional tide has now turned. Beginning in the mid-1990s, the Supreme Court issued a series of decisions reining in the powers of Congress under the **commerce clause**. The commerce clause, the Court warned, must be interpreted in light of our nation's dual system of government, which requires a distinction "between what is truly national and what is truly local." The power to regulate noneconomic matters that are local in nature belongs to the states and cannot be regulated by Congress under the commerce clause.³³

While the federal government has vast regulatory powers, its powers are mainly over the American people, not the states. Principles of federalism prevent the federal government from using its Article I powers to regulate actions of the states in ways that infringe on their sovereignty.³⁴ The federal government, for example, may not use its Article I powers to force state governments to enact particular laws,³⁵ administer federal programs,³⁶ or compensate private parties for violating their rights under federal statutes enacted under Article I.³⁷ In *Printz v. United States*,³⁸ the Supreme Court struck down a provision of the Brady Handgun Violence Prevention Act that required state law enforcement officers to conduct criminal background checks before issuing handgun permits. The Court stated that requiring state law enforcement officers to administer federal programs is "fundamentally incompatible with our constitutional system of dual sovereignty."

The reader should not infer that the federal government is powerless to regulate the actions of state governments. The Fourteenth Amendment, which was adopted immediately after the Civil War, placed certain restrictions on state governments and authorized the federal government to enforce the restrictions by appropriate legislation. The states were forbidden to discriminate on the basis of race, religion, or national origin or to deprive persons of their life, liberty, or property without due process of law. These restrictions are discussed later in this chapter.

B. The Supremacy Clause as a Limitation on State Power

Our Constitution adopts a system of dual sovereignty. The federal government and the states are each supreme within their own sphere of operation. Federal laws supersede and annul state laws when the two are not compatible. The annulling effect is called **preemption** and results from the Supremacy Clause, which provides that "(t)his Constitution, and the laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme law of the land, . . . any Thing in the Constitution or Laws of any state to the contrary notwithstanding."

Attempts by state governments to halt illegal immigration sparked the most recent preemption controversy. While the Constitution delegates power to regulate immigration and naturalization to the federal government, the economic and social burdens ensuing from illegal immigration have fallen largely on the states. Frustrated by the

federal government's inability to stop the deluge of illegal immigrants from across the border, a number of states responded by enacting harsh anti-immigrant laws designed to discourage illegal immigrants from taking up residence.

These efforts culminated in *Arizona v. United States*,³⁹ where the Court addressed the power of states to regulate illegal immigration within their borders. The Court found three provisions of the Arizona immigration law—(1) requiring aliens to carry their immigration papers with them at all times, (2) prohibiting undocumented workers from seeking or receiving employment in the state, and (3) allowing state police officers to arrest illegal aliens without a warrant based on probable cause that they are deportable—unconstitutional on grounds of preemption. Arizona's understandable frustration with the present state of affairs did not justify pursuing "policies that undermine federal law."

The Court left standing the provision requiring state police officers to determine the immigration status of persons stopped on other grounds if they had reasonable suspicion that the person was in the United States unlawfully. This section was not preempted by federal law because it gave state police officers no greater authority than they already had; they always had authority to contact federal immigration officials to check the immigration status of persons stopped on other grounds. The Court stated that it was premature to strike this provision down before the Arizona courts had an opportunity to interpret and apply it, but noted its potential for application in ways that would raise "serious constitutional concerns." Thus, while upholding this provision on its face, the Court did not rule out the possibility that it might later be found unconstitutional as applied.

§ 1.12 The Bill of Rights

During the ratification debates, there was a strong push for a bill of rights. Delegates to the state conventions wanted assurance that the liberty of the people would be secure.⁴⁰ The Federalists originally disputed the need for a bill of rights, but eventually capitulated and agreed to make the framing of a bill of rights the first order of business when the new Congress met. During the first session of Congress, James Madison introduced 20 amendments culled from the hundreds that had been proposed. Of these, 12 were approved by Congress and 10 were ratified by the states. The first 10 amendments went into effect in November of 1791.

The first 10 Amendments to the Constitution, or more appropriately, the first eight, are called the **Bill of Rights**. Before discussing the contents of the Bill of Rights, two observations are in order. First, the Bill of Rights is not a declaration of the rights that the American people have against each other. It is a declaration of their rights against the government. Second, the government against which these rights are held is the federal government. This is apparent from the wording. The First Amendment begins "Congress shall make no law respecting the establishment of religion . . ." In an early case, the Supreme Court ruled that the rights protected by the Bill of Rights could not be asserted against state governments.⁴¹

Figure 1.4 shows the rights protected by the first eight amendments. Review the text of the Bill of Rights in the Appendix and carefully study the material below.

Figure 1.4

Content of the Bill of Rights

Amendment	Rights Protected
First Amendment	Freedom of speech ⁴² Freedom of the press ⁴³ Right to assemble ⁴⁴ Right to petition Congress for a redress of grievances ⁴⁵
Second Amendment	Right to keep and bear arms ⁴⁶
Third Amendment	Protection against involuntary quartering of soldiers in private homes
Fourth Amendment	Protection against unreasonable searches and seizures ⁴⁷ Protection against the issuance of warrants without probable cause, supported by an oath or affirmation, particularly describing the place to be searched or the persons or things to be seized ⁴⁸
Fifth Amendment	Right to be indicted by a grand jury before being tried for a capital or otherwise infamous crime ⁴⁹ Protection against double jeopardy (i.e., against being tried more than once for the same offense) ⁵⁰ Protection against compulsory self-incrimination ⁵¹ Protection against deprivation of life, liberty, or property without due process of law ⁵² Right to just compensation when private property is taken for a public use ⁵³
Sixth Amendment	Right to a speedy criminal trial ⁵⁴ Right to a public criminal trial ⁵⁵ Right to a jury trial in criminal cases ⁵⁶ Right to be informed of the nature and grounds of a criminal accusation Right to confront and cross-examine prosecution witnesses ⁵⁷ Right to compulsory legal process to compel attendance of defense witness ⁵⁸ Right to the assistance of counsel in criminal cases ⁵⁹
Seventh Amendment	Right to a jury trial in civil cases when the amount in controversy exceeds \$20 ⁶⁰
Eighth Amendment	Protection against excessive bail ⁶¹ Protection against excessive fines ⁶² Protection against cruel and unusual punishment ⁶³

Italicized type means that this protection has been incorporated into the Fourteenth Amendment and applies to the states.
Regular type means that this protection does not apply to the states.

Italicized print means that the Supreme Court has not decided this question.

The most important safeguards are found in the First, Fourth, Fifth, Sixth, and Eighth Amendments. The First Amendment protects freedom of speech. The Fourth, Fifth, Sixth, and Eighth Amendments limit the government's authority to arrest, search, and interrogate persons suspected of crimes and establish procedural safeguards that apply during criminal trials. Because these Amendments are given in-depth treatment in later chapters, they will not be discussed here.

The Second Amendment reads that "[a] well-regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." This language establishes an individual right to possess firearms for lawful personal use, and not the right to own them to perform militia duties.⁴² However, the right to bear arms, like other constitutional rights, is not unlimited. State and local governments can impose reasonable restrictions on gun ownership and use, but they cannot make it a crime for law-abiding citizens to keep a loaded handgun in their home for self-defense.⁴³ This protection goes to the core of the Second Amendment and cannot be denied.

The Ninth and Tenth Amendments, technically speaking, are not part of the Bill of Rights because they do not establish individual rights. The Ninth Amendment states that

"[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." What this language means remains a constitutional mystery. The argument is occasionally made that the Ninth Amendment authorizes the Supreme Court to recognize constitutional rights beyond those mentioned in the Bill of Rights. The Supreme Court has been uncomfortable with this interpretation and has never accepted it. Authorizing courts to recognize constitutional rights that lack textual support would open up a Pandora's box. For this reason, the Supreme Court has never relied on the Ninth Amendment as the sole basis for any constitutional decision.

The Tenth Amendment deals with **federalism** and was discussed in § 1.11.

§ 1.13 —Applying the Bill of Rights to the States Through the Fourteenth Amendment

The Bill of Rights constituted a declaration of rights that the American people had against the federal government. Americans had no protection against arbitrary acts of state governments until almost a century later. The Fourteenth Amendment, ratified in 1868, contained a mechanism that was used to impose the Bill of Rights guarantees on the states. That mechanism was the **due process clause**.

The Fourteenth Amendment forbids the states to "deprive any person of life, liberty or property without *due process of law*." The phrase *without due process of law* means "without the process that is due under the law."⁶⁶ Restated, the Fourteenth Amendment forbids the states from depriving people of life, liberty, or property without affording them the process due them under the law. Where did the Supreme Court look to determine what process was due? You guessed it—the Bill of Rights.

The central guarantees contained in the Bill of Rights have gradually been absorbed into the Fourteenth Amendment due process clause and made binding on state governments through an approach known as **selective incorporation**. Under this approach, rights deemed fundamental to the American system of justice are regarded as components of the due process that states are forbidden to deny.⁶⁷ Most provisions found in the Bill of Rights have been incorporated. The standard used to decide whether to incorporate a particular right is whether the right is fundamental to the American justice system.⁶⁸ Figure 1.5 shows the current incorporation status of each of the rights guaranteed by the Bill of Rights. Notice that all but four rights have been incorporated.

Incorporation into the Fourteenth Amendment means that states must provide at least as much protection as the United States Constitution requires. Federal standards become the constitutionally minimum protection, but states remain free to impose a higher standard under their own constitutions.⁶⁹

Figure 1.5

Overview of the Fourteenth Amendment

The Fourteenth Amendment: (1) makes most of the Bill of Rights applicable to the states; (2) prevents the states from depriving people of life, liberty, or property without procedural and substantive due process; (3) prohibits the states from treating people differently because of race, gender, or national origin except under extraordinary circumstances; and (4) gives Congress power to pass legislation enforcing these restrictions.

§ 1.14 The Fourteenth Amendment as a Limitation on State Power

The Civil War altered the relationship between the national government, the states, and the American people. Before the Civil War, the American people viewed the states as the watchdogs of their liberty and feared the federal government. The fact that the Bill of Rights was directed at the federal government alone shows this. The Civil War changed things. After the Civil War, the states were viewed as the threat and the federal government the protector. Demand for federal protection against oppressive acts of state governments led to the passage of the Fourteenth Amendment.

The Fourteenth Amendment reads:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

We previously saw how the Fourteenth Amendment served as the vehicle for imposing the central guarantees of the Bill of Rights on the states. However, the

importance of the Fourteenth Amendment goes far beyond this. Before delving into its contents, there are two things you need to keep in mind. Both stem from the first three words. The Fourteenth Amendment begins “[n]o State shall . . .” First, the Fourteenth Amendment is addressed to the states. It regulates the conduct of states; it does not regulate the conduct of the federal government or private citizens. Second, the Fourteenth Amendment is phrased in the negative. It forbids the states to take arbitrary action; it does not require them to take helpful action. This point was made tragically clear in *DeShaney v. Winnebago County Department of Social Services*.⁷⁰ The plaintiff, Joshua DeShaney, was a four-year-old boy who suffered permanent brain damage due to his father’s beatings. The defendants were social workers, employed by the state, who allegedly knew that Joshua was being abused, but took no steps to remove him from his father’s home. Joshua claimed that their failure to protect him from his father’s violence deprived him of liberty without due process in violation of the Fourteenth Amendment. The Supreme Court disagreed, ruling that:

... (N)othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without “due process of law,” but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

DeShaney’s message, though disturbing, is a correct interpretation of the Fourteenth Amendment. The Fourteenth Amendment forbids the states from engaging in oppressive action; it does not require them to take helpful action.

§ 1.15 —Due Process of Law

The Fourteenth Amendment due process clause reads “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .”⁷¹ This clause provides two kinds of protection—one procedural and the other substantive. *Procedural due process* requires states to use fair procedures in reaching decisions that deprive a person of life, liberty, or property. *Substantive due process* requires them to have an adequate justification or, in other words, a good enough reason for the deprivation. Procedural and substantive due process work together to prevent arbitrary deprivations of life, liberty, and property. Suppose that a state child welfare agency wants to remove a child from a parent’s home. Since the right to the care and custody of one’s children is part of the liberty protected by the due process clause,⁷² the state cannot take this right away without establishing an adequate justification (substantive due process) and providing notice and a hearing (procedural due process). The strength of the justification required to satisfy the demands of substantive due process varies with the importance of the rights at stake. The state cannot interfere with rights that

qualify as “fundamental rights”, such as the right of parents to raise their children, without establishing a “compelling reason.”

Procedural due process requires states to use fair procedures in reaching decisions that deprive a person of life, liberty, or property. *Substantive due process* requires them to have an adequate justification or, in other words, a good enough reason for the deprivation. Procedural and substantive due process work together to prevent arbitrary deprivations of life, liberty, and property.

A. Procedural Due Process

Suppose when you go home tonight, you discover that your furniture and possessions are gone and you are informed that a judge awarded them to your landlord for nonpayment of rent. How would you feel? You would probably feel that this was unfair. You should have been notified that legal proceedings affecting your property were taking place and allowed to appear and present your side of the story. Your sense of injustice is due to a lack of procedural due process.

Procedural due process requires the government to give notice and a hearing before depriving a person of life, liberty, or property. This requirement is not limited to criminal proceedings. It applies whenever the government takes any action that deprives a person of life, liberty, or property. Procedural due process, for example, is required before the government can expel students from public school, revoke an offender’s probation,⁷³ or fire a tenured government employee⁷⁴ because each of these actions deprive the person affected of liberty or property.

The procedures necessary to satisfy due process vary with (1) the importance of the right at stake, (2) the extent to which the additional safeguards would reduce the risk of an erroneous decision, and (3) the increased fiscal or administrative burden on the government of providing them.⁷⁵ Maximum procedural protection is required at criminal trials because the stakes are at their highest. When the government accuses a person of a crime and threatens to take away his life or liberty, the Constitution insists on a broad array of procedural safeguards. These safeguards include the right to notice of the charges;⁷⁶ to be tried before an impartial tribunal;⁷⁷ to cross-examine prosecution witnesses;⁷⁸ to testify and compel attendance of defense witnesses;⁷⁹ to be represented by counsel of his choice⁸⁰ or an attorney furnished by the government if he cannot afford representation;⁸¹ to be assisted by experts, such as psychiatrists;⁸² and to be set free unless the government proves guilt beyond a reasonable doubt.⁸³

B. Substantive Due Process

The due process clause does more than guarantee fair procedures. It also has a substantive component.⁸⁴ The concept of substantive due process is rooted in the term “liberty” found in the due process clause. Although the Fourteenth Amendment confers

broad protection on individual liberty, the Constitution nowhere defined this term. This is the role of substantive due process. The two main areas where courts use the concept of substantive due process are (1) to protect “fundamental rights”⁸⁵ and (2) to hold government officials accountable for egregious misconduct that is not otherwise prohibited by the Constitution.⁸⁶

1. Protection of Fundamental Rights

Some rights are so fundamental to the liberty of free citizens that they cannot be denied without a compelling reason. These rights are called **fundamental rights**. Once a right is labeled as fundamental, it is placed largely beyond the government’s control. The label of a fundamental right has been reserved for important choices that are central to an individual’s self-concept, dignity, and autonomy. Rights that have been recognized as fundamental include the right to marry,⁸⁷ to have children,⁸⁸ to direct their upbringing and education,⁸⁹ to enjoy privacy,⁹⁰ to practice birth control,⁹¹ to terminate unwanted pregnancies,⁹² to make health-care decisions,⁹³ and to forego life-sustaining treatment.⁹⁴ The Supreme Court has explained that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”⁹⁵

Having said this, the Supreme Court, nevertheless, declined for many years to recognize the right to be a practicing homosexual as a fundamental right. In *Bowers v. Hardwick*,⁹⁶ the Court upheld a state statute making sodomy a crime. Four Justices dissented, arguing:

Only the most willful blindness could obscure the fact that sexual intimacy is “a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality”. The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many “right” ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.⁹⁷

Bowers v. Hardwick was later overruled in *Lawrence v. Texas*.⁹⁸ Police, responding to a hoax call that a weapons disturbance was taking place in John Lawrence’s apartment, burst into the apartment and found Lawrence having consensual sex with another adult male. They arrested him for engaging in “deviant sexual intercourse,” a crime defined under Texas law as having “anal or oral sex with a member of the same sex.”⁹⁹

The Supreme Court set the conviction aside, holding that there are certain spheres of life “where the government should not be a dominant presence.” Private sexual conduct behind closed doors is one of them. This case did not involve sex with a minor, public conduct, prostitution, or “whether the government must give formal recognition

to any relationship that homosexual persons seek to enter.” Rather, it involved private sexual conduct between two consenting adult homosexuals. “The State,” the Court declared, “cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”¹⁰⁰

Lawrence v. Texas is constitutionally important, not only because it invalidates sodomy laws, but also because it undercuts the most powerful argument justifying discrimination against gays and lesbians, namely that their behavior is immoral and illegal.¹⁰¹ Although the Court could have overturned the Texas statute on equal protection grounds because it made sodomy a crime only when both partners were of the same sex, the Court went further than expected and seized the occasion to deliver a strong statement that moral disapproval of homosexual conduct does not justify legal intolerance.¹⁰² *Lawrence v. Texas* has been hailed as the *Brown v. Board of Education* of the gay community. It has already had far-reaching effects and is likely to have ever greater effect in the future.

2. Egregious Misconduct by Public Officials

Substantive due process also provides a theory for holding government officials accountable for egregious misconduct that is not addressed elsewhere in the Constitution.¹⁰³ Courts, for example, have held that police have a substantive due process duty to obtain necessary medical treatment for prisoners taken into custody.¹⁰⁴ However, substantive due process only reaches conduct at the extreme end of the fault spectrum. In the language of the Supreme Court, the conduct must be so egregious that it “shocks the conscience.”¹⁰⁵ In the case of failure to obtain necessary medical treatment, this standard is satisfied only if the failure of the police reflects *deliberate indifference* to a prisoner’s known, serious medical needs.¹⁰⁶ Thus, while substantive due process expands the constitutional accountability of police officers, it does so only in situations when they are guilty of extreme misconduct.¹⁰⁷

§ 1.16 —Equal Protection of the Laws

The Fourteenth Amendment contains another equally important safeguard—the equal protection clause. This clause forbids a state to “deny any person within its jurisdiction the equal protection of the laws.”¹⁰⁸ The equal protection clause was included to protect former slaves against unfair treatment at the hands of state governments, a purpose that was not fully realized until almost a century later. In 1896, the Supreme Court handed down *Plessy v. Ferguson*,¹⁰⁹ in which it held that state-mandated racial segregation satisfied the equal protection clause, provided that equal facilities were available to members of both races. *Plessy* established the doctrine of “separate but

equal." After this, segregation codes flourished, infesting every avenue of American life, from restrooms, drinking fountains, telephone booths, hospitals, and prisons, to the books used by children in segregated public schools.¹¹⁰ Justice Harlan alone dissented in *Plessy*, sounding what would become the Supreme Court's position in 1954. Justice Harlan wrote:

... (I)n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man and takes no account of his surroundings or his color when his civil rights as guaranteed by the supreme law of the land are involved.

The national conscience was reawakened in 1954, when the Supreme Court handed down the landmark decision of *Brown v. Board of Education*,¹¹¹ in which it announced that the "separate but equal" doctrine no longer satisfied the Constitution in the field of public education. It soon became apparent that *Brown v. Board of Education* was not limited to public education. *Brown v. Board of Education* ended the era of government-imposed barriers to racial equality.

Protection against unequal treatment at the hands of the government is a right that all Americans enjoy, not just racial minorities. The meaning of the equal protection clause can be summarized in one sentence. *The government must treat all persons who are similarly situated alike.* This does not mean that the government is barred from making distinctions. Drawing lines and making distinctions is an inescapable part of legislating. Welfare programs, for example, cannot operate without income eligibility requirements. Income eligibility requirements result in persons with different incomes being treated differently. Differences in legal treatment offend the equal protection clause only when the distinctions made are *arbitrary*.

A law restricting welfare benefits to persons who have brown eyes is an example of an arbitrary distinction. The distinction is arbitrary because it serves no purpose. Fortunately, regulations like this are rare because legislatures generally have some reason for drawing the line where they draw it. Whether the distinction can survive an equal protection challenge depends on the standard used to test its constitutionality. Courts use three different review standards, called *levels of scrutiny*: *low*, *intermediate*, and *strict scrutiny*.

Statutory distinctions that do not involve race, color, nationality, religion, or gender are tested by the lowest standard, called rational relationship review. Deference is given to the legislature's judgment that the distinction is necessary. The distinction is presumed constitutional and the court is required to uphold it unless the challenger proves that the distinction has *no rational relationship to any legitimate government purpose*.¹¹² This is usually hard to do. As a result, statutory classifications reviewed under the lowest standard are generally upheld.

Classifications based on gender are subject to intermediate-level scrutiny. Courts examine the legislature's reason for making the distinction more closely. For a gender-based distinction to survive intermediate-level scrutiny, the government must establish *an exceedingly persuasive justification* for treating men and women differently. Virginia Military Institute's (VMI) all-male admissions policy, for example, was struck down years ago because VMI was unable to do this.¹¹³ The policy could have withstood rational relationship review because VMI advanced many legitimate reasons for why the school should remain all-male. However, gender-based distinctions require a stronger justification. The all-male admissions policy was declared unconstitutional because VMI was unable to come up with any exceedingly persuasive reason for refusing to admit qualified women into its program.

Race, color, religion, and nationality are known as *suspect classes*. Differences in treatment that turn on these factors are subject to the most rigorous review standard, called *strict scrutiny*. Under this standard, the statute is presumed unconstitutional and will be struck down unless the government establishes a *compelling reason* for treating members of one race, religion, or nationality different from members of another.¹¹⁴ Because a *compelling reason* is more difficult to establish than a *legitimate reason* (low-level scrutiny) or an *exceedingly persuasive justification* (intermediate scrutiny), distinctions based on race, color, religion, and nationality are generally found to be unconstitutional.

While strict scrutiny has traditionally served to invalidate laws that discriminate against members of suspect classes, laws that treat them more favorably are subject to the same analysis.¹¹⁵ Affirmative action programs were once thought to represent "benign discrimination" because the government's intention was to raise the economic status of disadvantaged minorities and not to discriminate. However, benign intentions are no excuse. Whenever the government deliberately treats members of *either* race different from members of the other, the equal protection clause is violated unless there is a compelling reason, no matter on which side the advantage and disadvantage fall.¹¹⁶

The Supreme Court has not yet decided where distinctions based on sexual orientation fit within this scheme. Courts for years used the lowest review standard,¹¹⁷ making sexual orientation discrimination claims hard to win.¹¹⁸ However, this became history in 2013 when the Supreme Court struck down the federal Defense of Marriage Act (DOMA), which defined "marriage" as a "union between a man and a woman."¹¹⁹ The purpose of Congress was to prevent same-sex couples whose marriages were valid under state law from enjoying the income tax, social security, pension, medical, and other benefits available to married couples under federal law. The Supreme Court found the federal law unconstitutional because it stigmatized and injured same-sex couples whose marriages were valid under state law solely for no legitimate reason.¹²⁰ The decision had an unexpected ripple effect, prompting lower courts to overturn state bans on similar grounds. Marriage equality now exists by legislation or judicial decree in more than half the states¹²¹ and the trend appears poised to continue.¹²²

Officers should not use race, religion, ethnicity, or national origin as a factor in selecting which individuals to stop, question, arrest, use force on, or subject other enforcement actions, except when seeking to apprehend a specific suspect whose race, religion, ethnicity, or national origin is part of the description of the suspect.

The equal protection clause applies to the enforcement of laws as well as their enactment. Selective enforcement of the law based on race violates the equal protection clause.¹²³ The perception that police inappropriately consider race in making enforcement decisions, a practice known as racial profiling, has emerged as one of the most critical issues facing law enforcement today. Few things poison race relations more thoroughly than selective enforcement. Racially biased policing fosters deep resentment, fear, and distrust of police, but the poison goes deeper:

People who see the criminal justice system as fundamentally unfair will be less likely to cooperate with police, to testify as witnesses, to serve on juries, and to convict guilty defendants when they do serve. In addition, people who have lost respect for the law's legitimacy are more likely to break the law themselves. . . . Finally, the perception and reality of a fundamentally unfair criminal justice system contribute to broader racial divisions in society. If we cannot believe that our nation's law enforcement officers will enforce the law in a racially neutral manner, then we will be left with a society where members of the minority community always view the actions of any police officer with great suspicion. . . .¹²⁴

Law enforcement agencies need to promulgate written policies condemning racial profiling and establishing formal guidelines spelling out when officers may legitimately consider race in discretionary enforcement decisions (*i.e.*, decisions on whom to stop, question, take into custody, arrest, search, use force on, *etc.*) and when they may not. The United States Department of Justice, Civil Rights Division, has issued the following guidelines regarding the use of race by federal law enforcement agents:

Two standards in combination should guide use by Federal law enforcement authorities of race or ethnicity in law enforcement activities:

- In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect description. This prohibition applies even where the use of race or ethnicity might otherwise be lawful.
- In conducting activities in connection with a specific investigation, Federal law enforcement officers may consider race and ethnicity only to the extent that there is trustworthy information relevant to the locality or time frame that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization. This standard applies even where the use of race or ethnicity might otherwise be lawful.¹²⁵

§ 1.17 Adjudication of Constitutional Questions

The Constitution is not self-defining. Determining what the Constitution demands in different contexts requires an ongoing process of interpretation. The Supreme Court is the ultimate authority on what the Constitution means. The Supreme Court's decisions interpreting the Constitution become the law of the land, establishing standards that are binding on police officers.

Most of the Supreme Court's criminal justice decisions stem from appeals brought by state prisoners. Non-lawyers are often curious about how a prisoner's case gets to the Supreme Court. This section examines how constitutional issues reach the Supreme Court.

Federalism results in a dual system of federal and state courts. Within each system, there are two types of courts—trial courts and appeals courts. Trial courts determine the facts, apply the law to the facts, and reach verdicts. Appeals courts do not retry facts. Their function is to review the trial judge's rulings on questions of law in order to determine if they were correct. Appeals courts have the power to reverse criminal verdicts only if the verdict resulted from incorrect rulings on questions of constitutional or statutory law, or rules of evidence.

Understanding how cases reach the Supreme Court requires a brief sketch of state judicial systems. Most states have three levels of courts. The trial courts are at the bottom. This is where criminal prosecutions take place. Directly above the trial courts are middle-level appeals courts. Their function is to hear cases that are appealed from trial courts. Appeal to middle-level appeals courts generally exists as a matter of right. The highest state court, often called the supreme court, is at the top of the judicial pyramid. Two levels of appeals courts exist to ensure that everyone has an opportunity to have a higher court review trial court rulings on questions of law and decide if the rulings were correct. Middle-level appeals courts perform this function. Review at the highest level—the supreme court level—is normally discretionary. State supreme courts generally have discretion whether to hear a particular appeal. This allows the state's highest court to control its docket and hear only cases that raise issues of special importance to the legal system.

This is also how it works with the United States Supreme Court. The Supreme Court has discretion whether to hear a particular appeal. Requests to the Supreme Court for discretionary review are instituted by filing a petition for a *writ of certiorari*. If at least four members of the Supreme Court vote to hear the case, the petition will be granted and the appeal will be allowed; if fewer than four are interested, the petition will be denied and the appeal will be dismissed. Each term (which begins the first Monday of each October and usually continues through June), the Supreme Court receives thousands of petitions seeking discretionary (certiorari) review. The Supreme Court usually hears about 150 appeals per term. The remaining petitions for discretionary review are rejected. Denial of certiorari does not mean that the Supreme Court agrees with the legal principles that were applied by the court below. This is a mistake commonly made in news reports. The only meaning that can be attributed to the Supreme Court's denial of certiorari is that fewer than four Supreme Court justices were interested in hearing the appeal.

Constitutional issues raised by state prisoners generally reach the Supreme Court through one of two routes: direct review and habeas corpus review.

Direct review. Criminal prosecutions for state crimes are tried in state courts. If the trial results in a conviction, the defendant can petition the United States Supreme Court for direct review after he or she receives a final judgment from the highest state court available.¹²⁶ In other words, a defendant seeking direct review must go up the state appellate ladder to the highest court available before petitioning the Supreme Court to have his or her case heard on direct review. State prisoners cannot ask the Supreme Court to review claimed violations of state law; their appeals must involve a substantial federal question.

Habeas corpus review. Constitutional errors are not always discovered in time to seek direct review. Federal law gives state prisoners a post-conviction remedy called **habeas corpus**.¹²⁷ Habeas corpus is a remedy used to secure release from an unlawful confinement. A state prisoner commences this action by filing a petition in federal court, alleging that he or she is being detained in prison in violation of his or her constitutional rights and requesting the issuance of a writ of habeas corpus. A writ of habeas corpus directs the party having custody, usually the warden, to produce the prisoner in court, so that the court can inquire into the matter.¹²⁸ The writ of habeas corpus enables state prisoners to have a federal judge review the constitutionality of their state court convictions. Federal habeas corpus involves a collateral attack on a state court judgment. The reason it is called a collateral attack is that the courts of one jurisdiction (federal) are exercising review powers over a case decided by the courts of another jurisdiction (state).

Federal habeas corpus is a common path that state prisoners travel on their road to the Supreme Court. A petition is filed in a federal district court.¹²⁹ If the prisoner's claim is denied by the federal district court, the prisoner appeals to the United States Court of Appeals and, from there, petitions the Supreme Court for discretionary (certiorari) review.

The number of state prisoners filing habeas corpus petitions in federal courts has increased exponentially through the years, growing from 127 in 1941 to 12,000 in 1990.¹³⁰ The flood of habeas corpus petitions from state prisoners became so heavy that lower federal courts were having difficulty managing their other dockets. In 1996, Congress restricted the availability of habeas corpus review, eliminating second and successive habeas corpus petitions¹³¹ and review of claims previously litigated in a state court unless the state court decision is contrary to clearly established constitutional standards.¹³² These procedural changes have made it more difficult for state prisoners to make their way to the Supreme Court.

§ 1.18 Federal Remedies for Constitutional Abuses

Why are students in training to become law enforcement officers required to study the United States Constitution?

There are three reasons. First, all citizens should have a basic knowledge of the Constitution, because preservation of our constitutional liberties depends on an

informed citizenry. Second, police officers are regularly required to make decisions with constitutional implications. The decision to detain a suspect for investigation, make an arrest, conduct a frisk, use force, search for evidence, and interrogate a suspect are some of the many decisions police routinely make that are regulated by the Constitution. Professionalism means taking constitutional rights seriously. In the words of the late Justice Brandeis:

Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for law. . . . To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.¹³³

Finally, constitutional violations carry serious consequences for the person whose rights are violated, for the criminal justice system, and for the officer personally. Constitutional misconduct can lead to:

1. exclusion of evidence procured in violation of the Constitution
2. reversal of criminal convictions
3. disciplinary action
4. civil liability
5. criminal prosecution.

These sanctions are covered in later chapters. We briefly mention them here to underscore the importance of the material that follows. Thus, it is extremely important that police officers “know the rules” and obey them.

§ 1.19 Summary

The Constitution of the United States is the highest law of the land. It contains seven articles. The first three articles apportion the powers of the national government among three branches (legislative, executive, and judicial) and describe the powers of each. The separation of powers among the three branches is permanently fixed. Encroachment and delegation are forbidden.

The apportionment of power between the national government and the states is accomplished by: (1) delegating a broad range of powers to the federal government (Article I, Section 8), (2) expressly prohibiting the exercise of specified powers by the states (Article I, Section 10), and (3) declaring that all powers not expressly delegated to the federal government, nor forbidden to the states, belong to the states (Tenth Amendment). When Congress enacts legislation within the scope of its delegated powers, federal law nullifies contrary state law. This results from the supremacy clause, which makes the Constitution and laws of the United States the supreme law of the land, superseding contrary state law. Our dual federal-state system of government

requires a distinction between matters that are truly national and matters that are purely local. Congress can regulate the former, but not the latter.

The Constitution establishes a process for amendment. There are now 27 Amendments. The first 10, known as the Bill of Rights, were adopted in 1791, two years after the Constitution was ratified. The Bill of Rights addresses many aspects of criminal procedure that are discussed in later chapters. Although the Bill of Rights originally limited only the federal government, the most important safeguards have been incorporated into the Fourteenth Amendment and are now binding on state governments as well.

The Fourteenth Amendment contains the due process and equal protection clauses. The due process clause provides two kinds of protection—one procedural and the other substantive. Procedural due process requires fair procedures before the government may take away a citizen's life, liberty, or property. Substantive due process prohibits: (1) arbitrary restrictions on "fundamental rights", and (2) conscience-shocking behavior by public officials. The equal protection clause prohibits state legislatures from making arbitrary distinctions between classes of citizens, and police officers from engaging in discriminatory enforcement of neutral laws.

The Supreme Court has discretion whether to hear an appeal. Criminal appeals generally reach the Supreme Court through one of two routes—direct review and habeas corpus review. Direct review requires the aggrieved party to take her case to the highest state court available before petitioning the Supreme Court for certiorari (discretionary) review. Habeas corpus review is a post-conviction remedy. The prisoner brings an action in federal court, challenging the constitutionality of her state court conviction and resulting confinement.

Violating constitutional rights can lead to five different sanctions: (1) exclusion of evidence procured in violation of the Constitution, (2) reversal of a criminal conviction, (3) disciplinary action, (4) civil liability, and, in extreme cases, (5) criminal prosecution.

Notes

- 1 ERIKSSON, AMERICAN CONSTITUTIONAL HISTORY, ch. 7 (1933).
- 2 EVANS, CASES ON CONSTITUTIONAL LAW, ch. 1 (1933).
- 3 ERIKSSON, *supra* note 1.
- 4 The dates that the individual states ratified the Constitution are as follows: Delaware—December 7, 1787; Pennsylvania—December 11, 1787; New Jersey—December 18, 1787; Georgia—January 2, 1788; Connecticut—January 9, 1788; Massachusetts—February 6, 1788; Maryland—April 26, 1788; South Carolina—May 23, 1788; New Hampshire—June 21, 1788; Virginia—June 25, 1788; New York—July 26, 1788; North Carolina—November 21, 1789; Rhode Island—May 29, 1790.
- 5 The Constitution is reprinted in the Appendix. You are encouraged to read the full text now and reread the individual sections when they are discussed in later chapters.
- 6 THE FEDERALIST No. 47, at 241 (J. Madison) (J. Gideon ed. 1831).

- 7 *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000) (invalidating a federal statute that attempted to overturn the *Miranda* rule).
- 8 *Touby v. United States*, 500 U.S. 160, 111 S. Ct. 1752, 114 L. Ed. 2d 219 (1991).
- 9 *Arizona v. United States* __ U.S. __, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2011).
- 10 *Minor v. United States*, 396 U.S. 87, 90 S. Ct. 284, 24 L. Ed. 2d 283 (1969).
- 11 *National Federation of Independent Business v. Sebelius*, __ U.S. __, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).
- 12 *Id.*
- 13 *See, generally*, *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941) (upholding Fair Labor Standards Act prohibiting the shipment in interstate commerce of goods produced by employees whose wages and hours of employment did not conform to requirements of the Act); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 62 S. Ct. 523, 86 L. Ed. 726 (1942) (stating that the commerce power extends to those *intra-state* activities "which so affect interstate commerce or the exertion of the power of Congress over it as to make regulation of them an appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce execution"); *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942) (holding that Congress could regulate a farmer's cultivation of wheat to feed his own livestock, even though none was sold on the market, because homegrown wheat satisfies needs that otherwise have to be met through purchases, thus affecting market supply, demand, and prices); *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (upholding authority to regulate cultivation of marijuana for personal medical use); *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (noting that there are three categories of permissible commerce clause regulation: (1) channels and instrumentalities of interstate commerce, (2) goods and people who move in interstate commerce, and (3) commercial activities that substantially affect interstate commerce); *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) (same).
- 14 These statutes are contained in 18 U.S.C. § 2423, 18 U.S.C. § 2312, and 18 U.S.C. § 1201.
- 15 *See, e.g.*, *Katzenbach v. McClung*, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964) (upholding power of Congress to ban racial discrimination in restaurants that serve food, a substantial portion of which has moved in interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) (upholding the power of Congress to prohibit hotels from discriminating based on race due to the disruptive effect on interstate commerce and travel).
- 16 *See, e.g.*, *United States v. Lopez*, *supra* note 13 (holding that enactment of the Gun-Free School Zones Act which made it a federal crime to possess a firearm in a school zone exceeded the powers of Congress under the commerce clause); *United States v. Morrison*, *supra* note 13 (holding that Congress lacked power to enact the Violence Against Women Act which created a federal civil remedy for victims of gender-motivated violence).
- 17 *National Federation of Independent Business v. Sebelius*, *supra* note 11.
- 18 *Id.*
- 19 *Kesler v. Department of Public Safety*, 369 U.S. 153, 82 S. Ct. 807, 7 L. Ed. 2d 641 (1962), *overruled on other grounds* 382 U.S. 111.
- 20 *Johnson v. Maryland*, 254 U.S. 51, 41 S. Ct. 16, 65 L. Ed. 2d 126 (1920).

- 21 John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).
- 22 *Perprich v. Department of Defense*, 496 U.S. 334, 110 S. Ct. 2418, 110 L. Ed. 2d 312 (1990).
- 23 **United States v. Comstock**, 560 U.S. 126, 130 S. Ct. 1949, 176 L. Ed. 2d 878 (2010) (the necessary and proper clause empowered Congress to enact statute providing for civil commitment of sexually dangerous federal prisoners beyond the date they would otherwise be released). *But see National Federation of Independent Business v. Sebelius*, *supra* note 11 (the necessary and proper clause did not empower Congress to enact the Affordable Care Act individual mandate because this provision was not ancillary to the exercise of a delegated power).
- 24 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819).
- 25 U.S. CONST., art. I, § 10.
- 26 *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).
- 27 *Calder v. Bull*, 3 Dall. 386, 390, 1 L. Ed. 648 (1798). Article I, Section 9, Paragraph 1 contains an identical *ex post facto* clause applicable to the federal government.
- 28 *California Department of Corrections v. Morales*, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995); *Johnson v. United States*, 529 U.S. 695, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000); *Wilkinson v. Austin*, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005).
- 29 *Carmell v. Texas*, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000) (retroactive application of statute authorizing conviction for certain sexual offenses on the victim's testimony alone, where corroborating evidence was previously required, violated the *ex post facto* clause); *Stogner v. California*, 539 U.S. 607, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003) (statute authorizing criminal prosecutions after prior limitations period for the offense had expired violated *ex post facto* clause).
- 30 *Lynce v. Mathis*, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997); *Miller v. Florida*, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987).
- 31 *Supra* note 28.
- 32 THE FEDERALIST NO. 45, at 313 (J. Cooke ed. 1961).
- 33 *See, e.g., United States v. Lopez*, *supra* note 13 (holding that enactment of the Gun-Free School Zones Act, which made it a federal crime to possess a firearm in a school zone, exceeded the powers of Congress under the commerce clause); *United States v. Morrison*, *supra* note 13 (holding that Congress lacked power to enact the Violence Against Women Act, which created a federal civil remedy for victims of gender-motivated violence).
- 34 *See, e.g., New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (holding that Congress overstepped the boundaries of federal power in directing the States to provide for disposal of radioactive waste generated within their borders); **Printz v. United States**, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) (holding that Congress lacked power to require local law enforcement officials to perform criminal background checks on gun purchasers); *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) (holding that Congress cannot require state courts to enforce private claims against the state governments for violating federal statutes enacted under Article I); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000) (same).
- 35 *New York v. United States*, *supra* note 33.
- 36 **Printz v. United States**, *supra* note 33.

- 37 *Alden v. Maine*, *supra* note 33 (Congress may not require state courts to enforce private claims against the state governments for violating federal statutes enacted under Article I); *Kimel v. Florida Board of Regents*, *supra* note 33 (same).
- 38 *Supra* note 33.
- 39 *Supra* note 9.
- 40 ERIKSSON, *supra* note 1, at 220.
- 41 *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 8 L. Ed. 672 (1833).
- 42 *Gitlow v. New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 630, 69 L. Ed. 1138 (1925); *Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931).
- 43 *Near v. Minnesota*, 283 U.S. 697, 701, 51 S. Ct. 625, 626, 75 L. Ed. 1357 (1931).
- 44 *DeJonge v. Oregon*, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278 (1937).
- 45 *Id.*
- 46 *McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).
- 47 *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).
- 48 *Id.*
- 49 *Hurtado v. California*, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884).
- 50 *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).
- 51 *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).
- 52 This provision applied, and continues to apply, only to the federal government. However, this fact ceased to be consequential with the passage of the Fourteenth Amendment which contains an identical limitation on state governments. The Fifth and Fourteenth Amendment due process clauses have received the same interpretation. The meaning of the due process clause is discussed in § 1.14–§ 1.15 *infra*.
- 53 *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897).
- 54 *Klopper v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967).
- 55 *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948).
- 56 *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).
- 57 *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).
- 58 *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 920, 18 L. Ed. 2d 1019 (1965).
- 59 *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).
- 60 *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 36 S. Ct. 595, 60 L. Ed. 961 (1916).
- 61 *Schilb v. Kuebel*, 404 U.S. 357, 365, 92 S. Ct. 479, 30 L. Ed. 2d 502 (1971) (stating that the Eighth Amendment proscription of excessive bail "is assumed to have application to the states through the Fourteenth Amendment").
- 62 *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* 532 U.S. 424, 121 S. Ct. 149 L. Ed. 2d 674 (2001).
- 63 *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422 (1947); *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 2736, 33 L. Ed. 2d 346 (1972).
- 64 **District of Columbia v. Heller**, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008); *McDonald v. City of Chicago*, *supra* note 46.
- 65 *Id.*
- 66 *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).
- 67 *Duncan v. Louisiana*, 397 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).
- 68 *Id.*

- 69 *Cooper v. California*, 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967).
- 70 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).
- 71 The Fifth Amendment contains an identical clause that is binding on the federal government and is interpreted in the same way. Consequently, federal and state officers are subject to identical constitutional limitation on their authority.
- 72 *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).
- 73 *Young v. Harper*, 520 U.S. 143, 117 S. Ct. 1148, 137 L. Ed. 2d 270 (1997); *Morissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).
- 74 *Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997); *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).
- 75 *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748, 6 L. Ed. 2d 1230 (1961).
- 76 U.S. CONST., amend. VI.
- 77 *Id.*
- 78 *Id.*
- 79 *Id.*
- 80 *Id.*
- 81 *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).
- 82 *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).
- 83 *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).
- 84 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). For a discussion of substantive due process, see, generally, Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501 (1999); Rosalie Berger Levinson, *Protection against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process?* 16 *U. DAYTON L. REV.* 313 (1991).
- 85 See authorities cited in notes 87–97 *infra*.
- 86 *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (holding that police conduct must “shock the conscience” to state a claim for denial of substantive due process).
- 87 See, e.g., *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (invalidating law prohibiting marriage between persons of different races); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974). (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”).
- 88 See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (invalidating law requiring sterilization of felons after third conviction of an offense involving “moral turpitude”).
- 89 See, e.g., *Troxel v. Granville*, *supra* note 72 (overturning court order granting visiting rights to grandparent as a violation of a parent’s fundamental rights “to make decisions concerning the care, custody, and control of their children”); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (invalidating law prohibiting teaching of foreign language to students below the eighth grade as undue interference with fundamental right of parents to make decisions about the education of their children); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (invalidating law requiring

- parents to educate their children in public schools as undue interference with the fundamental right of parents to make decisions about the education of their children).
- 90 See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (recognizing the right of married couples to privacy in use of contraception).
- 91 See, e.g., *Id.*; *Eisenstadt v. Baird*, 505 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972) (invalidating law prohibiting sale of contraceptives to unmarried persons).
- 92 See, e.g., *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (upholding the right of women to terminate an unwanted pregnancy); *Carey v. Population Services International*, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977). (“[T]he Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.”)
- 93 See, e.g., *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990) (recognizing a substantive due process right to avoid unwanted administration of antipsychotic drugs). Substantive due process also protects the right to bodily security and integrity. See, e.g., *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952) (holding that government may not pump a suspect’s stomach to retrieve evidence).
- 94 See, e.g., *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278, 110 S. Ct. 2841, 2851, 111 L. Ed. 2d 224 (1990) (recognizing right of competent adults to refuse unwanted lifesaving medical treatment). *But see* *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (right to assistance in committing suicide is not a fundamental right).
- 95 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *supra* note 84.
- 96 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986) (substantive due process does not protect the right to engage in homosexual sodomy).
- 97 *Id.* at 478 U.S. at 205, 106 S. Ct. at 2851.
- 98 539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003).
- 99 Before 1960, all 50 states outlawed sodomy. *Lawrence v. Texas*, *supra* note 98. At the time of *Bowers v. Hardwick*, more than half the states had repealed their sodomy laws. *Id.* By 2003, when *Lawrence v. Texas* was decided, only 13 states—Alabama, Florida, Idaho, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, North Carolina, South Carolina, Texas, Utah, and Virginia—made sodomy a crime. *Id.* Of these, only four states—Texas, Kansas, Oklahoma, and Missouri—criminalized sodomy only when both partners were of the same sex. *Id.*
- 100 *Id.* 123 S. Ct. at 2484.
- 101 *Id.* 123 S. Ct. at 2482. (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”)
- 102 *Id.* 123 S. Ct. at 2484. (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. ‘It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.’ The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”); *Lawrence v. Texas* was followed in *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013) (invalidating a federal statute known as the Defense of Marriage Act (DOMA), which defined

- "marriage" as a legal union between a man and a woman, resulting in the denial of federal benefits to same-sex couples whose marriages were valid under state law).
- 103 *County of Sacramento v. Lewis*, *supra* note 86. If the underlying behavior is already addressed by another, more specific provision of the Constitution, the claim must be analyzed under that provision, rather than substantive due process. See, e.g., *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).
- 104 See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (state has the duty to provide adequate medical care to incarcerated prisoners); *Watkins v. City of Battle Creek*, 273 F.3d 682 (6th Cir. 2001); *Carr v. Tatangelo*, 338 F.3d 1259 (11th Cir. 2003); *Haywood v. Ball*, 586 F.2d 996 (4th Cir. 1978); *El-Uri v. City of Chicago*, 186 F. Supp. 2d 844 (N.D. Ill. 2002); *Tagstrom v. Pottebaum*, 668 F. Supp. 1269 (N.D. Iowa 1987).
- 105 *County of Sacramento v. Lewis*, *supra* note 86 (establishing this standard and holding that where police act in an emergency with no time to deliberate, such as in the context of a high-speed chase, only an actual intent to inflict harm can satisfy this standard).
- 106 See cases *supra* note 104; *Wesson v. Oglesby*, 910 F.2d 278, 284 (5th Cir. 1990) (holding that an inmate's swollen and bleeding wrists from handcuffing did not constitute serious medical need); *Martin v. Gentile*, 849 F.2d 863, 871 (4th Cir. 1988) (cut over one eye, bruises on shoulders and elbows, and a quarter-inch piece of glass did not constitute serious medical conditions); *Davis v. Jones*, 936 F.2d 971 (7th Cir. 1991) (scraped elbow and shallow one-inch cut in temple sustained during arrest were not serious medical conditions).
- 107 For cases finding that the misconduct alleged in the plaintiff's complaint stated a claim for denial of substantive due process, see *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) (judge sexually assaulted women in his chamber); *Rogers v. City of Little Rock, Ark.*, 152 F.3d 790 (8th Cir. 1998) (police officer intimidated motorist into having sex); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (police left female passenger stranded in dangerous neighborhood late at night after arresting driver; woman was subsequently raped by unknown man from whom she accepted ride); *Reed v. Gardner*, 986 F.2d 1122, 1127 (7th Cir. 1992) (police arrested sober driver and left a drunken passenger to drive home on his own; drunken passenger later struck and killed a pedestrian).
- 108 The Fourteenth Amendment equal protection clause applies only to state governments. However, the Fifth Amendment due process clause has been interpreted as imposing an identical limitation on the federal government. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995); *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954).
- 109 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).
- 110 WOODWARD, *THE STRANGE CAREER OF JIM CROW* 83–86 (1965).
- 111 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).
- 112 *Heller v. Doe*, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (legislative classifications that do not involve race, creed, color, religion, national origin, or gender violate equal protection only if the disparity of treatment is not rationally related to any legitimate government purpose); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000) (age-based distinctions violate the equal protection clause only when there

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- is no rational relationship between the disparity in treatment and any legitimate state interest).
- 113 *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). See also *Tuan Anh Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001).
- 114 *Johnson v. California*, 543 U.S. 499, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005); *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996); *Adarand Constructors, Inc. v. Peña*, *supra* note 108; *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491, 109 S. Ct. 706, 720, 102 L. Ed. 2d 854 (1989); *Fisher v. University of Texas*, ___ U.S. ___, 133 S. Ct. 2411, 186 L. Ed. 2d 474 (2013).
- 115 See cases *supra* note 114. Since affirmative action is not required by the equal protection clause, voters can instruct the government to cease granting preferential treatment. In *Shuette v. Coalition to Defend Affirmative Action*, ___ U.S. ___, 134 S. Ct. 1623, 188 L. Ed. 2d 613 (2014) the Supreme Court upheld a voter initiative prohibiting state officials from granting race-based preferences in university admission decisions.
- 116 *Id.* Use of race and sex as criteria in police employment decisions is covered in § 10.8 *infra*.
- 117 See, e.g., *Hernandez v. Robles*, 7 N.Y. 3d 338, 821 N.Y.S. 2d 770, 855 N.E. 2d 1 (2006) (statute denying homosexual couples the right to marry did not violate the equal protection clause); *Anderson v. King County*, 158 Wash. 2d 1, 138 P. 3d 968 (Wash. 2006) (same); *Lofton v. Secretary of Dept. of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004) (statute denying homosexual couples the right to adopt children did not violate the equal protection clause); *Holmes v. California National Guard*, 124 F. 3d 1126 (9th Cir. 1997) (Pentagon's "don't ask/don't tell policy" barring gays and lesbians from serving openly in the military did not deny gays and lesbians equal protection); *Richenberg v. Perry*, 97 F. 3d 256 (8th Cir. 1996) (same).
- 118 See cases *supra* note 118.
- 119 *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).
- 120 *Id.*
- 121 These states include Arkansas, California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Idaho, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Hampshire, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Vermont, Virginia, and Washington State among others. See, e.g., Mark Sherman, *Court OKs Federal Benefits, Clears Way for Calif. Marriages*, *COURIER JOURNAL* at A1 (June 27, 2013), 6; Robin Cheryl Miller & Jason Binimow, *Marriage Between Persons of the Same Sex—United States and Canadian Cases*, 1 A.L.R. FED. 2d 1 (originally published in 2005); *Gay Marriages Rulings Build Momentum*, *CIN. DAILY HERALD* at 6 (January 16, 2014); Max Brantley, *Marriage Equality Comes to Arkansas*, *ARKANSAS TIMES* (May 14, 2014).
- 122 Nearly 50 cases are now on appeal in 26 states. Attorneys general have refused to defend bans on gay marriage in some of these cases. Richard Wolf, *Lower Courts Help Propel Gay-Marriage Movement*, *USA TODAY* at B1 (February 28, 2014).
- 123 *Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).
- 124 David Cole, *Policing and the Future of Criminal Law*, 26 *HUM. RTS.* 2, 3 (Summer 1999), quoted in *Martinez v. United States*, 92 F. Supp. 2d 780 (N.D. Ill. 2000).
- 125 United States Department of Justice, Civil Rights Division, *Guidance Regarding the Use of Race by Federal Law Enforcement Agents* (June 2003), available at <http://www.justice.gov>.

gov/crt/about/spl/documents/guidance_on_race.pdf (last visited on September 3, 2014). *See also* Farm Labor Org. Comm. v. Ohio State Highway Patrol, 308 F.3d 523 (6th Cir. 2002); United States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000); MN ST § 626.8471 (2010); Maryland State Conference of NAACP Branches v. Maryland State Police, 454 F. Supp. 2d 339 (D. Md. 2006).

126 28 U.S.C. § 1257.

127 28 U.S.C. § 2254.

128 28 U.S.C. § 2254(a).

129 United States district courts are the federal court system's trial courts. They have both criminal and civil jurisdiction. There are a total of 94 federal judicial districts—at least one for each state, the District of Columbia, and Puerto Rico. The 94 judicial districts are organized into 12 regional circuits, each of which has a United States Court of Appeals. The United States Courts of Appeals hear appeals from the district courts located within their circuits.

130 Withrow v. Williams, 507 U.S. 680, 697, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993) (O'Connor, J., concurring).

131 28 U.S.C. §§ 2254 and 2255.

132 28 U.S.C. § 2254(d).

133 Olmstead v. United States, 277 U.S. 438, 468, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting).