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## Constitutional Law

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## Constitutional Law, United States

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Constitutional law, in the USA, is the body of cases through which the courts, especially the Supreme Court, have interpreted the US constitution (or the state courts the meaning of state constitutions). More rarely, it is a descriptive term for the text of the constitution itself.

The shortest constitution in the world (about 7500 words, including the amendments), the constitution does not serve as a detailed code of rights or conduct. In structuring the federal government, establishing its relationship with

state governments, and granting and limiting its powers, the constitution necessarily speaks in general, even obscure, terms, requiring courts to determine whether challenged laws and governmental practices are consistent with its text. That courts do so is the consequence of the Supreme Court's decision in 1803 in *Marbury v. Madison*, which held that the judicial review is part of the power assigned to the courts in Article III of the constitution itself.

Constitutional law does not embrace every part of the text, in part because some structural provisions are so specific that they are imperious to constitutional challenge and in part because the Supreme Court has limited the sorts of issues that can be raised. On the structural side, the text is explicit, for example, that each state is entitled to elect two members of the Senate, that to become law a bill must be enacted by both houses of Congress and be presented to the president for signature, and that presidents may veto bills. Courts cannot alter these foundational rules, though in permitting Congress to delegate power to federal administrative agencies, the Supreme Court has overseen the development of the administrative state, a significant constitutional structural revolution in lawmaking not contemplated in the original text.

On the judicial side, the Supreme Court has drawn rules and principles from the constitution that determine what claims courts may hear and decide. Unlike the practice in constitutional courts in Hungary, India, Israel, South Africa, and some other nations, US federal courts may not take it upon themselves to render "advisory opinions" or pronounce on constitutional issues if the parties do not have "standing" – an interest in the litigation outcome resulting from a direct injury suffered or to be suffered. The standing requirement is one of a number of principles that insulate some constitutional questions from judicial decision-making – for example, the constitutionality of various public welfare and spending programs. Another such principle is the bar on courts considering "political questions" that are committed to other branches of government – for

example, whether or not to veto a bill or engage in foreign affairs is exclusively a question for the president.

The vast bulk of constitutional law, therefore, consists in the elaboration of rules that determine the limits of federal and state authority. Some cases challenge the breadth of power exercised. By far, the most numerous constitutional cases concern whether the government has (1) violated specified rights (to speech, press, religion, association, equality, liberty, and property); (2) disregarded specific restraints (prohibitions against *ex post facto* laws, self-incrimination, and cruel and unusual punishments); and (3) ignored procedural rules (guaranteeing criminal defendants a fair trial by an impartial jury, the writ of *habeas corpus*, the right to counsel and to confront witnesses against them, and the due process requirement that the government not act arbitrarily or irrationally).

Although structural cases are rarer, an important body of constitutional law concerns "separation of powers" – the assignment of principal powers of government to its three branches (legislative, executive, and judicial). The Supreme Court is called on now and then to police the borders of these branches, declaring when one branch has usurped the powers of another and when the branches may legitimately share in powers. Under this heading, constitutional law has authorized administrative agencies to make and enforce federal law.

In crafting constitutional law from the few express textual commandments, the courts frequently look to principles that lie outside the explicit text. They use various "canons of construction" and interpretive rules to guide their decisions. For example, the Supreme Court will try to avoid answering constitutional questions if the case can be resolved otherwise. It professes to adhere to *stare decisis* – that is, to follow precedent – and often, but not always, does. Whether to abide by the "original intent" of the constitutional framers or ratifiers is a matter of continuing controversy, but the text itself is silent on the issue. Its

only rule of interpretation is in the Ninth Amendment, which says that the absence of a specific right from the text may not serve as a ground to deny the right – a rule on which the Supreme Court has almost never relied as the basis of a decision.

Until the Civil War, federal constitutional law, including, importantly, the restraints in the Bill of Rights, applied only to the federal government. Ratification of the Fourteenth Amendment in 1868 worked a significant change. Federal courts acquired jurisdiction over state actions, pre-eminently denial of due process and equal protection, that previously had been free of federal oversight. Ultimately, the Supreme Court applied most of the Bill of Rights to the states, forged strong constitutional rules against racial and other forms of discrimination, and recognized rights not expressly covered in the constitutional text, like the right to privacy and its associated right to individual autonomy in such matters as abortion.

The constitution may be amended under procedures in Article V. But the formal process is difficult and has succeeded only 18 times in 225 years. Constitutional flexibility arises from the courts' power to declare constitutional law: reinterpreting text as conditions warrant and become politically possible, but only in those areas in which cases can be framed as genuine questions in justiciable controversies. Constitutional law is thus the body of judicial interpretations of the most important of the delphic and undefined rights, restraints, and powers set out in the constitution.

**SEE ALSO:** Constitution, Unwritten; Constitutionalism; Separation of Powers

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## Constitutionalism

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Constitutionalism is a central and protean political concept that for more than two millennia has never surrendered to a formal, fixed definition. In its earliest incarnation, constitutionalism was taken merely as descriptive fact. To the ancient Greeks, the constitution meant "the state as it actually is" (McIlwain 1966: 26). Today the idea of constitutionalism comprises a cluster of particular jurisprudential and sociological attributes, summed up as "limited government under a higher law" (Fellman 1973: 485). Manifestly, not every state claiming independent sovereignty can lay claim to the constitutional mantle.

Beginning in the Roman Republic, and wandering in and out of political and legal consciousness for a millennium and a half, the concept mutated: it came to be held that there was law antecedent to the state, that it came from the people, or custom, or God, or the natural order, and that even private citizens, as members of the public, may seek relief from the government's abuse of the citizenry's public rights. The idea was fitful and equivocal. Some kings acknowledged they were subject to the law; others, at different times and in different places, clung to a divine right to command at will. In England, from the twelfth century, the judges held that the king was obligated to follow the law, meaning, for example, that he could not imprison someone who had not been tried in court. By the sixteenth century, "a man's home is his castle" that not even the king could invade was an adage that expressed the deeply entrenched notion of rights superior to

the arbitrary will of the ruler. Through Magna Carta (1215), the Habeas Corpus Act (1614), the Bill of Rights (1689), the Act of Settlement (1701), and other parliamentary enactments, a British constitution was gradually assembled.

Modern constitutionalism in practice emerged with the American Revolution. For the drafters and ratifiers of the world's oldest continuing written constitution, a constitution was, as Thomas Paine put it, "the act of the ... people constituting a government," and, he might have added, with terms and conditions attached (Paine 1991: 82). As Walton H. Hamilton wryly observed: "Constitutionalism is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order" (1937: 255). Constitutionalism is not just any government and not just any order. Constitutionalism rejects arbitrary government; it recognizes and respects people's rights despite the contrary will of officials or even popular majorities.

Different commentators have made these points in different ways: "Constitutionalism has one essential quality; it is a legal limitation on government" (McIlwain 1966: 21). Constitutionalism is "a determinate, stable legal order which prevents the arbitrary exercise of political power and subjects both the governed and the governors to 'one law for all' [people]" (Dunne 1964: 120). A "constitution is necessary in order to limit government and ... if there is to be government by consent" (Scruton 1984: 94). And, from the time of Montesquieu, constitutionalism absorbed the maxim, in James Madison's words, that the "accumulation of all powers ... in the same hands ... may justly be pronounced the very definition of tyranny" (Madison 1961: 301).

Modern constitutionalism, then, seems to consist of these ingredients: (1) a fixed and public constitution, (2) ratified by the people, (3) equally applicable to all, that restrains arbitrary decrees by (4) separating government powers and (5) mandating impartial and fair procedures, and (6) that permits the people through regular elections to select their leaders,

all in order (7) to preserve space in which at least some degree of individual autonomy may flourish.

Promulgation of a constitution does not guarantee constitutionalism. Sham constitutions, like the Soviet Union's, or illiberal constitutions, like Iran's, often prescribe restraints on government (for example, guarantees of freedom of speech, press, and assembly). But these are cosmetic dressing on an authoritarian skin, ignored when their exercise would "harm" the interests of the state or society or counter the interests of an entrenched ruling class. Nor do such constitutions provide people procedures to enforce their rights. In the Soviet Union, as in other nations that pretend to constitutionalism, the basic charter did not restrain the government; rather, the unelected Communist Party, which alone dictated the interests of state and society, emasculated the constitution. Likewise, in many illiberal states, as for example in theocratic Iran, the constitution may expressly restrain the government, but in favor not of individual rights-holders but of a clerical class who rule on theological principles that lie outside constitutional norms and procedures.

Despite the general agreement on the essential norms and practices of constitutionalism, there is no definitive model and some basic questions remain unsettled. Students of the subject point to a host of constitutional variables, no single one of which appears to be crucial to determining whether a people enjoy constitutionalism: must the constitution be written or unwritten, detailed or general, long or short, judicially enforceable or not, republican or monarchical, parliamentary or presidential, federal or unitary? So, for example, though constitutionalism is often said to require a written constitution, some practices are observed as constitutional norms despite the lack of text. Until Franklin D. Roosevelt violated it in 1940, an unwritten tradition dating back to Washington in 1796 kept US presidents from serving more than two terms; Roosevelt's disregard of it led to the 22nd Amendment, mandating the limit.

A central problem for constitutionalism is the enforcement of constitutional norms. In the USA, there is no effective dissent from the practice, established in 1803 by Chief Justice Marshall in *Marbury v. Madison*, that courts in appropriate cases may overturn statutes as unconstitutional. But the idea of a constitutional court, though gaining ground around the world, is not a necessary component of constitutionalism. Legislatures and executives may feel bound by constitutional norms, even though they have the formal power to disregard them. Not since 1707 have British monarchs vetoed legislation enacted by parliament, though they have the "legal" authority to do so. In the USA, decisions to impeach and convict federal officials, such as the president and judges, are wholly in the hands of Congress under the constitution itself, but the impeachment power has been used only sparingly and when, occasionally, it was misused, the Senate refused to convict. That said, it is also indisputable that constitutional norms can change so that what was once thought to be perfectly plain and acceptable to one generation becomes unthinkable, as a matter of constitutional law, to another. The most spectacular example in American history is the Supreme Court's change of mind on the question of racial segregation from its 1896 decision in *Plessy v. Ferguson* to its decision in 1954 in *Brown v. Board of Education*.

While far from universal – there remain many repressive governments with only farcical claims to constitutionalism – the idea of constitutionalism has spread throughout the world during the second half of the twentieth century and is continuing still. Human rights principles adopted at Nuremberg during the trial of Nazi war criminals, in the International Declaration of Human Rights, and in many other international treaties and instruments, and the establishment of such bodies as the International Criminal Court in The Hague, all point to an emerging consensus on the value and necessity of constitutional regimes that promote individual and human rights. Whether countries that have survived political