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Understanding Our Constitution

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That well-known Vice President of the United States, George M. Dallas (after whom Dallas, Texas, was named in 1846), once defended our highest law with these words: "The Constitution in its words is plain and intelligible, and it is meant for the homebred, unsophisticated understandings of our fellow citizens."

Yet a full half-century of squabbling by some of the most sophisticated men in America over what the words of the Constitution meant preceded his defense. Nor has that squabbling stopped today. Nearly every day the newspapers bring us reports that someone thinks something that somebody else did is unconstitutional and that that somebody else is equally convinced that what he did was entirely within the meaning of the Constitution.

The truth is that often the Constitution is very difficult to understand and apply. Consider the 7th Amendment to the Constitution, a seemingly straightforward provision:

In suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .
Suppose your neighbor plays with dynamite, that he has succeeded in blowing up the house on the other side of you, and that your house is next on his agenda. Suppose further that your house is worth more than $20. Afraid that your house will be destroyed, you go to court, asking that your neighbor be ordered to get rid of his explosives. Your neighbor responds by asking for a jury trial in order to determine whether his hobby is really dangerous. How should the judge rule?

Suspense is unnecessary. The answer is that neither in the state courts nor in the federal courts would a jury be allowed; the judge alone would decide the case. A lawsuit which seeks to stop someone from doing something is NOT a "suit at common law."

Does this sound unintelligible? Here is a case in which the Constitution is easy to apply but difficult to understand. The explanation lies in a tradition which began in England some five centuries ago, a tradition which is still vitally important today and which we will explore in Chapter 4 (see pp. 83-4, 162-3).

The plain fact is that the Constitution of the United States is in parts completely meaningless on its face. In order to understand the Constitution we must look to American history, for our history and the Constitution have shaped each other.

In 1687, around the time of the Massachusetts witchcraft trials and exactly one century before the Constitution was written, Sir Isaac Newton published a book outlining a theory of the physics of the heavens, a theory which with modifications by Einstein is still studied in physics courses today. That theory swept across the intellectual world; it was the last blow to the medieval view of the universe. No longer was the earth regarded as motionless in space like the center of a lazy Susan; the heavens were alive—not with witches—but with orderly movement. The Newtonian view held that the planets behaved according to precise, mathematical laws. Newton's equations were the logic of the universe.

Newton's theories had effects far beyond the world of physics. During the next century they wound their way into theology, political philosophy, and social thought. The political and social thinking which emerged—that reason and logic could solve man's problems, that man and society were perfectible, that human progress was inevitable—had a profound effect on the educated leaders of the colonies at the time of the Revolution—James Madison, Thomas Jefferson, Benjamin Franklin, John Adams, Alexander Hamilton, and others.

For a century and a half the American colonies had been gov-
cerned by countries across the ocean. Yet unless the colonists could control their own lives and direct their own fortunes, progress—in their view—was impossible. So a revolution against a distant despot was fought and won.

But the attempt at self-government following the Revolution was nearly disastrous. The Constitution was a reaction to the unpopular government which flourished in many of the states after the war. Some state legislatures openly passed laws in violation of provisions contained in their state constitutions, declaring jury trials invalid, taking property, sentencing men to death without a trial, destroying newspapers, reversing judgments of courts, and behaving often as arrogantly as the king who had been overthrown.

The Constitution was also a response to the inability of the states to get along among themselves. Because the people had successfully overthrown the heavy-handed rule of King and Parliament, they were wary of establishing a central government which could control them from a national capital. So from 1781, when the war ended, until 1789, when the Constitution went into effect, the states governed themselves in a loose federation under the Articles of Confederation. These articles gave very few powers to the national Congress and no significant ones; it could not raise revenues, it could not regulate commerce between the states, laws could not be passed without the unanimous vote of all thirteen states, and worse yet, even when laws were passed, the national Congress had no power to enforce them. The people of each state, meanwhile, were jealous of the commerce and progress of compatriots in the other states, and fierce competition threatened to ruin the economies of the smaller states and destroy what union there was.

By 1787, the situation had become intolerable to many. The British had begun to smile again, sure that the American effort at self-government was a pitiful exercise in futility. The overriding national concern had been how to pay off the war debt, amounting to $42,000,000. The Congress could not compel the states to pay, and some were unwilling. In 1786, Daniel Shays led a rebellion in Massachusetts. He and his fellow farmers had been hard-hit by the debt and they refused to pay, defying the authority of courts, attacking an arsenal, calling for paper money to help them out. For months a virtual state of war existed in the state. By then it was clear to most of the national leaders in all states (except Rhode Island, which took no part in drafting the Constitution) that something had to be done. On February 21,
1787, the Confederation Congress approved a proposal to call a convention to reform the Articles of Confederation.

Even before the Convention began in Philadelphia on May 25, 1787, many of the fifty-five men who were to attend realized that an entirely new Constitution would have to be written. During the four months in which the Convention met, the Articles of Confederation were abandoned and the new Constitution slowly and painfully drafted.

The fundamental problem which the Convention had to solve was, how could the power to control the actions of people itself be controlled? The power of the states was so disruptive that the stability of the union was threatened. Very well, the states must be controlled by a national government. But how? And who would control it?

These were the questions the Constitution was designed to answer. Like Newton, the Convention delegates used some notions of fundamental forces to construct and describe an orderly, working system. They had five basic principles:

1. Federalism. Since the states had too much power, they created a national, “federal” government to moderate and control their activities. Two basic governments over every square inch of land instead of one. Give certain powers to each and deny certain powers to each. Make each dependent in part on the other so that each can check the power of the other.

2. Separation of Powers. Since an all-purpose federal government run by one group of men would be able to crush anyone who opposed it, the delegates created three organs with different powers. Let a Congress pass laws, let a President see that they are carried out, and let a Supreme Court resolve disputes when they arise.

3. Checks and Balances. Since any one of these branches might try to destroy the others, the Convention gave each of them power to check the others’ actions. Let the President have power to veto the laws of Congress. But let the Senate have power to disapprove the President’s treaties and to keep out of office people the President chooses. Let the President have power to appoint the judges, but let the judges have power to decide in certain cases when the President and his assistants are acting unlawfully. Delegate certain powers to Congress and let the judges decide when Congress goes beyond its delegated authority.

4. Rule by Majority. Since a government responsible to no one is usually responsive to no one, the people are empowered
to elect their representatives by a majority vote. Let the members of Congress pass laws only when a majority agree, and let a similar majority prevail in the cases decided by judges. Hold elections frequently so that the people can say whether or not they like what their officials are doing. If the members of Congress and the President know they can be voted out of office, perhaps they will govern for the people and not simply dominate them.

5. Unalienable Rights. Since majority rule can be oppressive if a minority is disliked, those who drafted the Constitution made sure that a minority cannot be dealt with unjustly simply because a majority wishes to do so. Let the Constitution be the highest law and let it declare that certain unalienable rights are guaranteed to all, no matter what color, no matter what religion, no matter what language they speak. Let judges hold office for a lifetime, so that they need not fear the wrath of the majority when they rule that the “right to life, liberty, and the pursuit of happiness” cannot arbitrarily be taken from anyone.

These were the principles the delegates to the Philadelphia Convention considered in order to solve the problems of exercise and control of power. The Constitution was supposed to contain the solution to these problems.

No great sigh of relief or applause greeted the delegates when the Convention adjourned. Compromise always brings dissatisfaction—the Constitution was not perfect. The Federalist Papers, written by Madison, Hamilton, and Jay, brilliantly argued the case for the Constitution. Others found strong reasons against it. But the fear of too little power to stop the collapse of the country outweighed the fear that the new government would have too much. And the knowledge that Washington and Franklin favored the new Constitution did more than a little to help, since they above all others were universally esteemed and admired.

“I confess that there are several parts of this Constitution which I do not at present approve,” Franklin said in a speech delivered to the Convention by his fellow delegate from Pennsylvania, James Wilson. Not strong enough to speak to the assembly at the age of eighty-one, Franklin pointed the way to approval when he said, “But I am not sure I shall never approve them. For having lived long, I have experienced many instances of being obliged by better information or fuller consideration, to change opinions... which I once thought right, but found to be otherwise...
Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure that it is not the best."

It was this kind of thinking—that the proposed Constitution was, if not perfect, at least a good compromise and one which should be given a chance to prove itself—that led to its ratification. By the summer of 1788, all but North Carolina and Rhode Island had agreed to the Constitution, and the Confederation Congress proclaimed it in effect the following March.

Thus it was the failure of the Articles of Confederation to meet the responsibilities of the United States that made the Constitution necessary. Power clustered in thirteen state centers was tearing the Union apart. But it was the willingness of the former colonists to experiment, to seek the new, their sense of compromise and optimism, and their belief that problems could be solved by human reason, that made the Constitution possible.

For a fundamental characteristic of the American people was their willingness to try change. Their very presence in the New World signified that fact—else why would they be here? Indeed, America was to be a severe drain on all parts of the world, taking from abroad so many who were daring, open-minded, and ready to experiment.

In the Constitution, the Founding Fathers attempted to create a form of government which would be stable yet allow for change. This was the basic tension in America, and still is: a yearning for democratic stability and peace, but a dedication to constant, ceaseless change.

The Constitution was to be the chief written instrument to control and channel the change. How could it provide stability? If the Constitution had been a long, tightly written code, spelling out in detail every minute aspect of how power should be exercised and controlled it could not have survived. To be permanent, to lay down a guideline and philosophy for free government, the Constitution had to be written in broad language. The delegates to the Constitutional Convention were interested in a basic framework to endure for all time. This meant that 18th century concepts, grammar, and vocabulary had to be broad enough and strong enough to reach out and talk to the future. It meant that though the centuries would bring changes so startling the Framers would not recognize the America that is today, the Constitution could nevertheless contain that change within its fundamental principles.

So the Constitution which emerged from the Philadelphia Con-
vention was short, broadly phrased, and in parts, due to political compromise, terribly ambiguous. The original Constitution—now a fading yellow document on public display in the National Archives in Washington, D.C.—is only 4,000 words long, more or less. (The twenty-five Amendments have added approximately 2,500 more words.)

Had it been the product of pure logic, the Constitution would have failed. But like Newton’s laws, it was founded on a mature observation of the facts. Although it is in many ways an extraordinary document, the Constitution was not suddenly invented by those fifty-five men. It came from the experience of the states in the decades before. Many of its clauses are to be found word for word in the constitutions of the states in the 1780’s. The experience of the states grew in turn from the long centuries of English legal tradition which had preceded. Some of the Constitutional phrases were taken verbatim from the Articles of Confederation. The Constitution came from the past and looked to the future.

In looking to the future it is not necessary to resolve with clarity what later years and generations can decide case by case, as disputes arise. Thus the meaning of many of the words in the Constitution was not fixed, nor could it be. This quality of the Constitution’s words—that they can change meaning as circumstances change—makes them unlike most other words. They are alive. This quality makes the Constitution a document apart from nonlegal documents: it is a storehouse of living words. This life cannot be entrusted to the hands of the private dictionary makers. It is not for the publisher to say what “due process of law” means (a phrase which appears twice in the Constitution) or what is included within the meaning of “equal protection of the laws.”

Judges, not publishers, define the meaning of the words. The definitional process, if complex, is not mysterious: the Constitution is defined through lawsuits. And the ultimate interpreters are the nine Justices of the Supreme Court. “We are not final because we are infallible, but we are infallible only because we are final,” wrote Mr. Justice Jackson. Subsequent rulings of the Supreme Court, and Amendments to the Constitution, show that not even the Supreme Court is final. Nothing is final when men want change.

The most important limitation on the Supreme Court’s power to pass on the constitutionality of laws—whether of Congress or of state legislatures—is that it can make legal pronouncements only when deciding a lawsuit and even then, only when the inter-
interpretation is necessary to the correct decision in the specific case.

Should Congress pass a law abolishing the right to jury trials in federal criminal cases, for instance, the Supreme Court would be powerless to strike down the obviously unconstitutional law (see 6th Amendment, p. 151). The Court must wait until someone, during the course of a regular trial in a lower court, was refused a jury on the grounds that Congress had abolished it. If the loser appealed the trial judge's ruling, he could appeal the case to a higher court, urging reversal of the judgment on the grounds that his right to jury trial had been unconstitutionally taken away. From the decision in that court an appeal could be made to the Supreme Court—the government arguing that the Congressional law abolishing juries was constitutional, the private citizen arguing that it was not. Then, and only then, in the course of deciding the case in favor of the private citizen, could the Court declare the law unconstitutional because it conflicted with the 6th Amendment. Nor would this be the end of the case: the Supreme Court would "remand" or return the case to the trial court and order it to start all over, this time with a jury. Thus, it is only within the context of a specific dispute that the Court interprets the Constitution. This power of "judicial review," as it is called, is one of the many ways in which one branch of the federal government can check the unlawful actions taken by another.

The Supreme Court, too, is limited in power, for there is no way by which the Court can make sure its judgments are carried out. In 1832, John Marshall, the great Chief Justice, set forth the Court's ruling that the treaty ceding land within Georgia to the Cherokee Indians was federal law and that the state of Georgia had no right to exercise authority over such lands. But President Andrew Jackson was not willing to carry out the Court's decision in this and related cases. "John Marshall has made his decision," he reportedly said; "now let him enforce it." Marshall had no means at his disposal, nor could anyone help the Indians without the backing of the President. In the end, the United States Army forced the Cherokee out of Georgia.

*Footnote numbers throughout the text refer to cases in the alphabetical Table of Cases, p. 218ff. Whenever the name of a case is omitted in the text, the reader will be referred to a more complete description of the case in the Table. Cases named in the text are not footnoted: the reader will find the case in its alphabetical place in the Table. For more detailed explanation of the Table, see p. 217.
That episode proved that the Court's voice is a legal one but its power a moral one only. Even if the Supreme Court can eventually protect the constitutional rights of those persecuted, it cannot nip the persecution in the budding. It can take years to fight a case through the lower courts in order to ask that highest court in Washington to take the appeal. By then, the litigant may have lost his job, his friends, his savings, his land. Prosecutors, goaded by the impassioned mob of the moment, can bring a person to trial to harass him, even in the face of his constitutional rights.

Getting through the lower courts is no guarantee that the Supreme Court will agree to review a case. The Court can refuse even to consider a case in all but the following five circumstances: (1) when a lower federal court has ruled that a state law is unconstitutional; (2) when the highest state court rules that a federal statute or treaty is unconstitutional; (3) when the highest state court rules that a state law is constitutional and the losing party thinks not; (4) when a federal court holds a federal law unconstitutional in a suit to which the United States is a party; and (5) when a federal court grants or denies an injunction against enforcement of a state law or Act of Congress. In these instances, the Supreme Court must agree to decide the case, if one of the parties insists. (Law in the United States is based on the "adversary system," and courts do not ask parties to appeal. Parties to suits are pitted against each other. They are responsible for going to court, gathering evidence, presenting it in the proper fashion, proving their cases. Courts do not initiate law suits; they wait for individual litigants to come to them. And in criminal cases, it is the executive branch of the government, not the court, that brings the case and prosecutes the defendant.)

Suppose a federal court rules that a law is constitutional. This is not one of the three circumstances in which the Court must agree to review, and it may and often does refuse to hear such cases. Nevertheless, Congress has given the Court jurisdiction to take the appeal if it wants to, by issuing a "writ of certiorari" to the lower court. This simply means that at least four of the nine Justices thought the case important enough to consider. The Court does not "grant cert" for trivial cases, but when a conflict occurs between lower federal courts or when a state court interprets a federal law in a new way, the Supreme Court will usually take the case. Of the some 2,000 requests for certiorari each year, more than 1,700 are denied.
Once the Court accepts a case, either on appeal or on certiorari, lawyers for both sides get busy. They must present printed copies of a "brief" in which they argue why they thought the lower court was right or wrong and what they think the Supreme Court should do. On an appointed day, the Justices hear each lawyer's "argument"—sometimes interrupting with fierce and intensive questions. Each lawyer has but one hour. In the following weeks and months, the Justices must each consider this and other cases argued before them. When a decision is reached, one Justice will write the "majority opinion," any who agree with the Court's ruling (but for different reasons) can write "concurring opinions," and those who disagree write "dissenting opinions."

Central to the Court's holding is the written opinion stating the reasons for its decision. Conclusions should be made logically. Congress can pass a law without giving any reason at all, but the Supreme Court should not decide a case without giving reasons why it arrived at the result it did.

The importance of "reasoned decision" cannot be overemphasized. Sometimes the Court's decision will be less convincing than it could be, for judicial opinions have a way of masquerading in fancy phrases. But the Court can never stray too far for too long. Without the support of the public and the other branches of government, the Supreme Court's declarations are worthless. The power of the Court is, after all, merely the respect and heed a society pays to its reasons and decisions.

Because people do respect logic and reason, the decisions of the Supreme Court play a crucial role in our day-to-day life. Since the only way to conquer logic is by better logic or by guns, the Court's opinions must be contended with.

The process of interpreting the Constitution is not simple. The nine Justices must draw on a wide variety of materials in deciding on the meaning of the phrase in dispute. Sometimes they look to The Federalist Papers, since two of the three men who wrote that collection of essays also helped to write the Constitution. Sometimes they look at Madison's notes of the proceedings at the Convention. Sometimes they read the debates of the first Congress, since many of the men elected to national office had participated in the framing of the Constitution.

The intention of the men who wrote the Constitution can never be fully ascertained, however, and the disputes among themselves show that there was no consensus on the meaning and application of each part of the Constitution. Therefore the Court relies
far more often on past decisions—"precedents" which it has made. The meaning of the Constitution is developed on a case-by-case basis. Of the tens of thousands of cases which the Court has decided, more than 4,000 have involved constitutional questions. Hundreds of doctrines have been developed to cope with the innumerable things about which people fight.

But as circumstances change, even these past decisions may not be adequate to the task of determining how the Constitution should be applied in the controversy at hand. Some doctrines which once flourished, like the "original package" doctrine in the field of interstate taxation, have died a graceful death. Some are just beginning to grow, like the doctrine that a person has a "right to privacy." In developing and applying these doctrines, judges must be conscious that a changing society, which has grown from horse power to atomic energy, from covered wagons to spaceships, requires an evolving law.

Difficult cases can go either way; in the long run they must go the way the people want. "We must never forget it is a Constitution we are expounding," Chief Justice Marshall wrote. He meant simply that when it interprets the Constitution the Court must be conscious of the nation's purpose and not restrict the people in trying to realize their goals.

These purposes and goals are best expressed in the Preamble to the Constitution. Though not part of the law itself, the Preamble has become one of the dimensions of the federal government's powers, indicating the purposes to which such power is to be committed. It reads:

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.

A law that did not meet one of these purposes might have a difficult time in meeting a test of constitutionality. To these principles Congress, the courts, and the President daily refer.

In the days when the Constitution was written, a popular social theory said that the only legitimate government was one in which the people themselves agreed on the form of their government. The Constitution is one of the few examples in history in which a people took charge of their own destiny, consciously shaping their future course, and largely succeeding.
Since 1789 the nation has encountered rapid change, in science, in commerce, in the arts. Not the least significant change is the growing maturity of the American people themselves. There still are intolerant, ruthless, and lawless people in the United States. There still are riots and injustices. But gradually our sense of justice has grown.

We no longer make property a qualification for political rights—for decades at the beginning of United States history, only a small percentage of the citizenry could vote and hold office. We no longer restrict public office to those of a particular religious faith. Well into the 19th century in some states, persons of minority religions were by law barred from serving the public. And we no longer scorn knowledge and education for all; in the early years, many people ridiculed the scientific, inquiring mind. Benjamin Franklin was called an "agent of the devil" for installing lightning rods on buildings and houses.

For a century and three-quarters, the Constitution has remained a document enabling America to cope with the changes which developments in science, technology, commerce, and culture have brought. Congress, the President, the courts, and the states—all were dealt with in the Constitution, and all exist to this day. But the power relations among these various branches of government have changed tremendously. For the most part, these changes were carried out peacefully, through the established processes of law. In deciding whether a law of Congress or an act of the President is constitutional, the Supreme Court plays its most important role. Through the power of judicial review it determines who is to have what power. For if Congress cannot pass a law, then either some other institution has the power (the President or the states), or else the people are free to act. The relations among the various organs of government and the people are fluid. Later Courts are not forever bound by the decisions of earlier Justices. When corporations became gigantic, far too large for the individual states to exercise effective control over, Congress acted and the Supreme Court approved the Sherman Act and other antitrust laws, through a liberal interpretation of the "commerce clause." These laws reduced the power of the states in this area of commerce and put in it Congress. Thus the interplay of Congress, the Court, and the Constitution has brought about a shift among powers.

Change is effected not alone by judicial interpretation of the Constitution. Congress and the states pass laws, most of which are never contested in the courts. Over a period of time these laws...
become accepted as part of the culture, as part of the processes and substance of the legal system. Social acceptance is as important as court approval. As society changes its opinions, laws change. Different legislators are elected; different judges are appointed; the Constitution itself is amended.

But the catalogue of changes is long, and this is not the place for its listing. What follows is not a history of the Supreme Court, of the United States, or even of the Constitution. Yet to understand our Constitution it is necessary to explore some of the Supreme Court cases, to see something of United States history, and to look at some of the philosophies which the Constitution is said to contain.

The Constitution was not fixed for all times in 1789. It is a set of fundamental ideas by which orderly change can take place in a stable society. To the degree that violence is avoided while progress is made—to that degree the Constitution is the successful character of American freedom.