CHAPTER 4

The First Changes to the Constitution

The Bill of Rights or the first ten Amendments – Suits against the states: The Eleventh Amendment – The process of the President's election: The Twelfth Amendment – The Supreme Court of the United States and its constitutional function – Judicial Review: *Marbury v. Madison* – The Necessary and Proper Clause and the Federal supremacy: *McCulloch v. Maryland* – The Commerce Clause: *Gibbons v. Ogden*

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In the previous Chapter we saw that several states objected to some aspects of the new Constitution and imposed conditions for its ratification. Massachusetts ratified the Constitution at the beginning of February 1788, but on the condition that the first duty of the new Congress would be to consider its modification. The ratification by New Hampshire on June 21st of the same year reached the requirement majority imposed in Article VII, and the new Constitution became effective. Another eight states had already ratified although New Hampshire had also requested modifications as the first priority for the new delegates. On June 24th, by which time the Constitution had already been

adopted, Virginia, unaware of the acceptance status, submitted its ratification document together with a proposal for a Bill of Rights comprising twenty articles. One month later, New York followed suit, proposing in its case 25 articles in a Bill of Rights and 31 additional amendments.

As already mentioned, one of the main problems that the preceding *Articles of Confederation* had exhibited was its inflexible character, since any significant change required the unanimity of the states, an objective that had proved unachievable with just thirteen states in the Union. The framers of the new constitution clearly understood the need to redress this critical weakness. But they also understood, from their experience of working with their own state constitutions, that an overly accommodating method of amendment was equally undesirable. So, the framers came out with an innovative procedure that proved to be exceptionally effective. The procedure has given the American Constitution the form of a fairly rigid norm, but coincidentally has ensured its survival for more than 220 years by allowing essential changes when circumstances dictate them.

The process to amend the Constitution is spelled out in Article V. There are two phases in the amendment process, and each of the phases can take two possible paths. The first phase is the proposal to the states of the new amendment text for its ratification. The second phase is the actual ratification by the states. The first phase requires a highly qualified two-thirds majority. The majority required in the second phase is even higher, requiring three-fourths of all the states in the Union to approve the proposals within the time defined for the ratification to be concluded. (This means that if during the period ratification is in progress additional states should join the Union, the total number of states that have to ratify increases to reach the three-fourths requirement.) However, there is no case requiring the total unanimity of the states.

One of the two possible paths in the first phase is that two-thirds of the House of Representatives and two-thirds of the Senate approve the same text for an amendment. The other path is that two-thirds of the state legislatures request of Congress that a constitutional convention be called. So far, only the first path has been followed; the path of the constitutional convention has been considered highly dangerous because, once summoned, a constitutional convention has the power to change everything, even to draft an altogether new constitution, were the delegates so minded. Only once, in 1912, regarding what is now the Seventeenth Amendment, was a constitutional convention close to being called, but at the last minute the Senate, which for years had been blocking every effort to introduce that amendment, reconsidered its position. The Senate was the subject of that amendment, and it was only recognition of the disadvantages of forcing state legislatures to demand a convention that finally persuaded it to approve a joint text to be proposed to the states.

Once the proposing phase is successfully completed, the amendment text is sent to the states for their ratification and, once again, there are two possible paths to be followed. One path is that the proposed amendment is ratified by the ordinary legislatures of each of the states. The other path is for the ratification to be decided by conventions specially called in by the executive of every state. Whichever path is chosen, three-fourths of the states have to ratify it for the proposed text to become an Amendment and part of the Constitution.

Because of the significantly high majorities required in the federal legislative,

only 33 amendments, out of thousands and thousands proposed, have been sent to the states in the 223 years of the Constitution. Of those 33 amendments, only 27 have been ratified by the states. Of the remaining six, four are still pending ratification and two have already been discarded. (Some of the four pending have very little chances of ever being ratified.)

It is important to note that although some of the ratified Amendments were signed by the then President of the United States, he has no active legal part in the process of amendment. Contrary to ordinary laws, which must be presented to the President for his approval or the exercise of his "negative" or veto power, Amendments do not need to be presented to him for his approval nor can he veto them.

The Bill of Rights or the first ten Amendments

Thus, the First Congress of the United States was inaugurated with an express mandate to modify the very Constitution that had created it and, particularly, to add a Bill of Rights to its text. One of the toughest discussions during the Philadelphia Convention had been about the need to include a catalogue of fundamental rights within the Constitution. In 1787, eight of the thirteen states in the Union had such a declaration of rights in their constitutional texts or as documents approved separately, but with equally supremacy over ordinary laws. The Constitution had been drafted in 1787 without such declaration, but not because of a *lapsus calami* (slip of the pen). Those drafters who favored its omission alleged that the constitutions of several states did not include such declarations, but that the constitutions were nevertheless considered valid. For example, during the ratification convention in Pennsylvania, Thomas McKean, who had been one of the signers of the Declaration of Independence, argued that, "[a] bill of rights, though it can do no harm, is an unnecessary instrument." He went on to say "[t]he constitutions of but five out of the thirteen United States have bills of rights" (Bancroft, v. 2, p. 247). Moreover, as already mentioned, the Constitution actually included several individual rights already. Furthermore, the declarations of rights were originally agreements between the monarch and his subjects, limiting his prerogatives and reserving certain rights that the people had denied to the king as a result of the historic struggles in England against the supreme power of the monarch. Consequently, such a declaration was not directly applicable to the American constitutions established on the sovereignty of the People. The People were not handing anything over to their government, but were retaining everything, so that eliminated the need to reserve anything.

Another allegation was that the Preamble to the Constitution –"We, the People, [...] do ordain and establish this Constitution for the United States of America"– was a much better acknowledgement of civil rights than all the books of aphorisms because these belong to a treatise of ethics rather than to the constitution of a government, the purpose of which was to regulate the political interests of the nation. Alexander Hamilton went as far as to consider the declarations of rights not only unnecessary but also even dangerous. He argued that establishing exceptions to powers that had not been granted in the first place was to give cause to the government to demand more powers than those it held legitimately. Finally, in Hamilton's opinion, the Constitution

was in itself a bill of rights, since the first of its purposes was to declare and state specifically the political rights of the citizens within the structure and rule of the government. A second purpose was to describe the immunities and the due processes to be followed in all private and particular matters, and Hamilton reasoned that the Constitution of the United States was doing both. James Wilson was of a like mind and considered a declaration of rights unnecessary because the United States was a limited government with powers clearly defined and delimited, and which it was not allowed to exceed. Consequently, it could never invade individual liberties on issues beyond its specific jurisdiction.

But many citizens continued to demand a declaration of rights as an integral part of the Constitution itself, before they would consider it complete. On the 12th of September of 1787, at the Philadelphia Convention, just three days before the final draft of the new constitution was completed, the delegates Elbridge Gerry of Massachusetts and George Mason of Virginia, proposed to add a bill of rights. Mason, who in 1776 had been the author of Virginia's Declaration of Rights, argued that "[i]t would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours" (Killian, p. 955). But the motion was rejected by a very large majority. Mason then left the Convention and did not sign the Constitution. Richard Henry Lee, one of the representatives from Virginia in the Continental Congress, who had declined to attend the Philadelphia Convention having disagreed with its intended ends, demanded: "Where is the contract between the nation and the government? The constitution makes no mention but of those who govern, and never speaks of the rights of the people who are governed" (Bancroft, v. 2, p. 227). All these protests were widely reflected in the newspapers of the time.

Among many other publications against the new Constitution, several letters were published in newspapers under the pseudonym *The Federal Farmer*. These essays were collected under the title Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; and to Several Essential and Necessary Alterations in It. *The Federal Farmer* (probably Richard H. Lee) declared in his second letter that "[t]here are certain unalienable and fundamental rights, which in forming the social compact, ought to be explicitly ascertain and fixed –a free and enlightened people, in forming this compact, will not resign all their rights to those who govern, and they will fix limits to their legislators and rulers;" and that "[t]hese rights should be made the basis of every constitution." In a fourth letter, *The Federal Farmer* restated that "[t]here are certain rights which we have always held sacred in the United States, and recognized in all our constitutions, and which, by the adoption of the new constitution in its present form, will be left unsecured" (Storing, pp. 40-41, 55). Several other Anti-Federalist authors were also publishing, some under pseudonyms such as *Brutus*, "The Minority [delegates] of the Convention of Pennsylvania", or the Impartial Examiner. Some under their own names, such as Patrick Henry, defended in their pamphlets the need for a bill of rights and specified which were those sacred rights.

The Federal Farmer gave a long list of matters that he believed should be included as the rights of the people. For example: the free exercise of religion; freedom from hasty and unreasonable search warrants for searching and seizing men's papers, property, and persons; trial by jury in criminal and civil causes; right to cross examine witnesses; freedom of the press; the right to hold and enjoy property; that property

cannot be taken away without the consent of the owner or of his representatives and receiving a reasonable compensation for it; to have free recourse to the laws; not to be

> Patrick Henry (1736-1799) was an American attorney, farmer, orator and radical politician. Born in Virginia into a wealthy family, after failing twice in business, Henry studied law and was admitted to the Bar. In 1765 he was elected to the House of Burgesses. There he proposed the radical Virginia Resolves against the Stamp Act enacted by the British Parliament. In 1773 Henry, with other Patriot leaders such a Thomas Jefferson and Richard H. Lee, created the Committee of Correspondence of Virginia to inform similar committees in other colonies of the events that were taking place, and from which the first Continental Congress evolved. After the approval of the Constitution of 1776, Henry was elected the first governor of Virginia. He was re-elected in 1784 and 1786. In 1787, Henry declined to attend the Constitutional Convention in Philadelphia because, as he said, he "smelt a rat" and feared the Convention would create a monarchy in the new United States. Once the Federal Constitution was drafted, Henry opposed its ratification because in his opinion it limited the powers of the states and the liberties of the citizens. Patrick Henry is popularly remembered mainly for his shout (probably apocryphal) "Give me Liberty, or give me Death!"

subjected to laws or taxes not assented to by the peoples' representatives, constitutionally assembled; the writ of habeas corpus; the right to a speedy trial in the local vicinage (legal term for the vicinity from which jurors can be drawn); to be heard in court while representing themselves or with the aid of legal counsel; not to be compelled to furnish evidence against themselves; to have witnesses give their evidence face to face the accused; for anyone to confront his adversaries in front of a duly elected judge; to assemble in an orderly manner; to petition the government for a redress of wrongs (Storing, pp. 58-59, 71). The Impartial Examiner added to those rights, that excessive bail should not be required; that excessive fines should not be imposed; and that cruel and unusual punishments should not be inflicted (Storing, p. 288).

As indicated, the inauguration of the first session of the Congress of the United States took place on March 4, 1789. One of the first actions of Congress was to approve the text of twelve amendments to be proposed to the states. On the 25th of September copies of these proposals were sent to the several states for their ratification by the state legislatures. On the 20th of November, New Jersey was the first state to ratify eleven of the twelve amendments. During the next two years, the states ratified several of the proposed amendments and, on the 15th of December of 1791, the ratification by Virginia gave the authorization for ten of the amendments to become part of the Constitution. These are popularly known as the Bill of Rights.

The most recent amendments each address a specific and particular right, such as feminine suffrage, the prohibition of slavery, or the right to vote at 18 years of age or older. But in the first ten amendments a catalogue of rights are bundled and grouped in the amendments by their common nature. At least 21 rights and two general clauses can be recognized in those ten amendments.

The First Amendment recognizes the free exercise of religion, the freedom of speech, the freedom of the press, the right to assemble peacefully, and the right to petition to the government. The Second Amendment (and probably the one that nowadays is most controversial) guarantees to the people the right to bear arms, but it also recognizes the militia. The Third Amendment protects people from being forced to

house and feed troops. The Fourth Amendment protects the people from unreasonable searches and seizures of "persons, houses, papers, and effects."

The Fifth Amendment is dedicated to the rights of citizens accused of an infamous crime, requiring the indictment by a Grand Jury before being held to answer; not to be tried twice for the same capital offence (the Double Jeopardy Clause); not to be compelled in any criminal case to be a witness against oneself; not to be deprived of life, liberty, or property, without due process of law; the right to a just compensation when private property is compulsorily taken for public use. The Sixth Amendment includes the right to a speedy and public trial, by an impartial jury of the vicinity; to be informed of the accusation; the right of the accused to confront the witnesses against him; to obtain witnesses in his favor; and to be assisted by counsel.

The Seventh Amendment preserves the right to a trial by jury in civil cases and to the rules of common law. The Eighth Amendment protects against imposing excessive bail or fines, and inflicting cruel and unusual punishments before or after coming to trial.

The Ninth and Tenth Amendments are two general clauses that protect against the Federal government's invasion of other unnamed rights "retained by the people", or of taking powers not delegated to the United States by the Constitution (*Reserve Clause*).

These ten Amendments recognize explicitly the character of the United States as a "limited government" (as opposed to the absolute governments of the time).

Initially, the Bill of Rights imposed limits on the Federal government, but the rights included were neither applicable nor enforceable on the states. James Madison had proposed in Congress a different version of the First Amendment in which the states were compelled to apply the mandates of the Bill of Rights, but that proposal was rejected, and after ratification, the Supreme Court has systematically shown itself to be of the opinion that the states were free to ignore any of the mandates included in the Bill. Unless those rights were written into their own constitutions, the states were not obliged to protect any of the individual rights declared in Amendments One to Seven. The ratification of the Fourteenth Amendment, in 1868, made that, as part of the Due Process Clause of that Amendment, certain individual rights recognized in the Federal Constitution were equally applicable to the states, and that their legislation and executive measures had to honor those rights. But it was not until 1887 that, in the opinion *Spies v. Illinois*, the Supreme Court declared that the individual rights defined in the Bill of Rights applied even if a state had not specifically recognized them in its own constitution.

Actually, to this date there are only three rights in the Bill of Rights that the Supreme Court has signaled are not strictly applicable to the states: the Second Amendment "right of the people to keep and bear Arms;" the Fifth Amendment requirement for an "indictment of a Grand Jury;" and the Seventh Amendment "right of trial by jury In Suits at common law," that is, in civil suits. (In 2008, the Supreme Court's opinion *District of Columbia v. Heller* recognized the right of the people to bear arms in Federal lands, such as the capital Washington, DC. But it made no reference to the rest of the country, thus allowing the states the freedom to regulate the sale and possession of arms, or even to prohibit them altogether without infringing the Second Amendment.) The rest of the rights and liberties of the Bill of Rights are considered

nowadays to be part of the state laws, whether included or not in the state constitutions.

Just as examples, the following Supreme Court opinions have recognized the relevance to the states of particular rights in the Bill of Rights: in *Chicago, Burlington and Quincy Railroad v. City of Chicago*, 166 U.S. 226 (1897), the right for a fair compensation for expropriations; in *Near v. Minnesota*, 283 U.S. 697 (1931), the freedom of the press; in *De Jonge v. Oregon*, 299 U.S. 353 (1937), the right to assembly peaceably; in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the free exercise of religion; in *Everson v. Board of Education*, 330 U.S. 1 (1947), the free establishment of religions; in *In re Oliver*, 333 U.S. 257 (1948), "the right to a speedy and public trial, and to be informed of the nature and cause of the accusation;" in *Mapp v. Ohio*, 367 U.S. 643 (1961), against arbitrary searches and seizures; in *Robinson v. California*, 370 U.S. 660 (1962), against "cruel and unusual punishments;" in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the right of the accused "to have the Assistance of Counsel for his defense;" in *Malloy v. Hogan*, 378 U.S. 1 (1964), the right not to be "compelled in any criminal case to be a witness against himself;" in *Aguilar v. Texas*, 378 U.S. 108 (1964), to the need of a court's writ for any search; in *Pointer v. Texas*, 380 U.S. 400 (1965), "to be confronted with the witnesses against him;" in *Klopfer v. North Carolina*, 386 U.S. 213 (1967), to a speedy trial; in *Washington v. Texas*, 388 U.S. 14 (1967), "to have compulsory process for obtaining witnesses in his favor;" in *Duncan v. Louisiana*, 391 U.S. 145 (1968), to a "public trial, by an impartial jury of the State and district wherein the crime shall have been committed;" and in *Benton v. Maryland*, 395 U.S. 784 (1969), not to "be subject for the same offence to be twice put in jeopardy of life or limb."

Suits against the states: The Eleventh Amendment

The next ratified Amendment was the result of the Supreme Court's opinion *Chisholm v. Georgia*, U.S. 419 (1793). The Eleventh Amendment modified Section 2 of Article III of the Constitution, removing the extent of the jurisdiction of the Federal courts "to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

In 1792, Alexander Chisholm, a citizen of South Carolina, acting as executor of Robert Farquhar, sued the State of Georgia in the Supreme Court of the United States over a certain amount of money due and unpaid for supplies that Farquhar had made to the State of Georgia during the War of Independence. Georgia had not denied the debt, but refused to appear in court to defend itself on the allegations that, as a "sovereign" state, it could not be sued without giving its own prior consent to the suit. In a 4 to 1 decision, the Supreme Court of the United States ruled for the plaintiff, arguing that the text of Section 2 of Article III of the Constitution was unmistakable and definite, and limited the sovereign immunity of the states since it explicitly granted to the Federal courts the jurisdiction over "Controversies between a State and Citizens of another State." This, they said, was the case before the Court.

Fearing a rush of suits against the states based on this opinion of the Supreme Court, Congress was quick to respond. In its first Session after the Court's ruling,

Congress proposed the Eleventh Amendment to protect the immunity of the states against suits by individuals from other states of the Union or from foreign states. The Eleventh Amendment was ratified in less than a year.

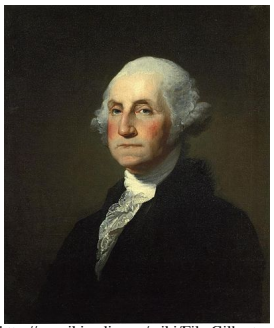
Although this Amendment protects the states against suits from individuals in federal courts for debts or compensations, subsequent decisions by the Supreme Court have ruled that the states are not protected when the suits are for violations by the states of any of the enumerated powers of the Federal government. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Supreme Court ruled that citizens of another state, or foreign individuals, can sue in federal courts if Congress, pursuant to a valid exercise of the Fourteenth Amendment, abrogates the states' immunity from suit.

The Eleventh Amendment equally protects the state officials from suits by citizens of another state or of foreign nations, but not if the officers exceeded their authority or pretended to enforce any law declared unconstitutional. State officers are not protected, either, in suits for torts, when such officers are safeguarded by a state act or law. In these cases, the defendant is not treated as a member of government, but rather as a private individual, who must respond to the action as such.

Finally, the states have the freedom to renounce their immunity and consent to be sued in federal courts. But the state's consent must be clear and unambiguous, which implies that it is insufficient for the state simply to appear in court.

The process of the President's election: The Twelfth Amendment

The delegates to the Philadelphia Convention recognized that the process for electing the President should be included in the Constitution, and a unique and innovative procedure was therefore devised. The process, however, has caused constitutional disputes ever since, and the year 2000 Presidential election provides a good example of that controversy.



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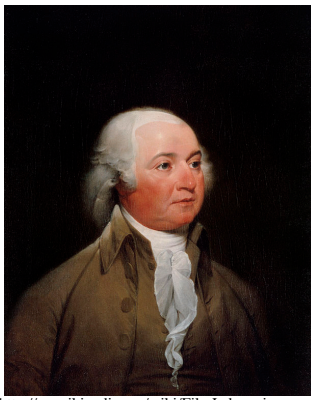
Gilbert Stuart, 1797

George Washington

The original Presidential election process has been directly or indirectly modified by seven amendments. The many and frequent proposals for revision continuing in Congress indicate that the process may be modified again in the future. In 2009, for example, three joint resolutions for the elimination of the Electoral College were on the Congress floor.



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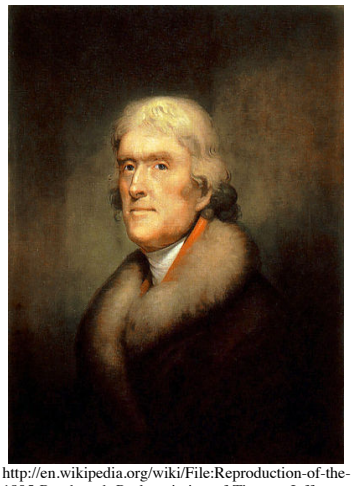
John Trumbull, 1793-94

John Adams

The earliest failures of the original Presidential electoral process became apparent shortly after the Republic was founded, as a result of radical bipartisan attitudes following George Washington's departure from politics. Washington, who was enormously popular as the commander-in-chief who had defeated the British in the War of Independence, was unanimously elected in 1789 as the first President of the United States. He was re-elected in the 1792 elections. Such "unanimity" made it

impossible to test the adequacy of the election procedure in situations where the popularity of the candidates was more equally balanced. By 1796, when Washington decided not to become a candidate for a third term as President, the country divided into two irreconcilable factions behind the Federalists of John Adams on one hand and the Democrat-Republicans of Thomas Jefferson on the other.

Without Washington's stabilizing influence, candidates and electors gave their allegiance to one or other of the two parties. Indeed, each candidate expected, correctly as it turned out, that electors of his own party or persuasion would vote for him without question. In the elections of 1796, there were 138 electors and, according to Section 1 of Article II of the Constitution, a candidate needed no less than 70 votes to become elected President. John Adams got 71 (Federalist) votes, and Thomas Jefferson 68 (Democratic-Republican), becoming President and Vice-President respectively. The party differences between the top two men in the country led to all kinds of intrigues and partisan infighting within the executive power, making it extremely difficult to manage the country's affairs effectively.



http://en.wikipedia.org/wiki/File:Reproduction-of-the-1805-Rembrandt-Peale-painting-of-Thomas-Jefferson-New-York-Historical-Society_1.jpg
Rembrandt Peale, 1805

Thomas Jefferson

The elections of 1800 illustrated further deficiencies in the electoral process. This time, the Electoral College resulted in a tie between Thomas Jefferson and Aaron Burr, both Democrat-Republicans. That tie had to be resolved by the House of Representatives, so the problem moved from the Electoral College to Congress. But like the College, the House was also very evenly divided, so it took eight days and 36 suffrages to finally give the Presidency to Jefferson and the Vice-Presidency to Burr.

To avoid the same problems in future elections, Congress approved and sent the text of the Twelfth Amendment to the states for its ratification, separating the elections of President and Vice-President and limiting the time that the House had to choose a President in the eventuality of a tie in the Electoral College. (Note, however, that the Senate made no such stipulation on the time limitation for choosing the Vice-President.) By this revision to the Constitution, problems seen in the previous two Presidential elections could not repeat themselves. The Amendment also spelled out the same eligibility requirements for Vice-Presidential candidates as originally stated for the President, making it impossible for a non-native American to become President of the United States should circumstances require the Vice-President to step up to the responsibility.

http://upload.wikimedia.org/wikipedia/commons/4/4b/Aaron_Burr.jpg

Aaron Burr

In spite of the changes introduced in 1804 by the Twelfth Amendment the Presidential Electoral process frequently continued to be troublesome, requiring new amendments in 1933 (Twentieth Amendment), 1951 (Twenty second Amendment), and

1967 (Twenty fifth Amendment).

The Supreme Court of the United States and its constitutional function

The United States applies what is called a diffuse model for controlling the constitutionality of laws and acts. The doctrine of judicial review implies that, in the application of any law, treaty, or government act, any court, at state or federal level, may and must determine its conformance to the Constitution of the United States. This obligation to determine the adequacy and conformance of the laws to the Constitution logically implies that all courts have the capacity to construct the laws and, thus, to vary the Constitution itself. When that construction is applied by the Supreme Court of the United States, and given that its decisions are the ultimate authority because there is no court above it, the construction effectively becomes an integral part of the Constitution. The validity of the court's decision remains until it is either formally modified by a constitutional Amendment, or the Court itself changes its own previous ruling. As a consequence, the study of the text of the American Constitution and its Amendments is not complete without the study of the constitutional opinions of the Supreme Court of the United States.

But nowhere in the original text of the Constitution is there any explicit reference to the judicial review mechanism. The constitutional text states in its Article III that there is a judicial power in the United States and that it is "vested in one supreme Court" and in other inferior courts. All these courts have jurisdiction over "all Cases, in Law and Equity, arising under this Constitution". In Article VI, "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." Finally, and in the same Article, the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof [...], shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Thus, no law at the local, state or federal level, nor any act of government can be contrary to the Constitution, which is supreme in its nature, and all other laws or acts must yield to it. This concept of the Constitution as the supreme law of the country is the main contribution of American constitutionalism to the universal history of Law (Enterría, pp. 95 ff).

Nevertheless, nowhere in the Constitution is it stated that the Supreme Court of the United States has the exclusive right or privilege to define what the Constitution is and what it is not. Actually, in the earliest days of the Republic many people, for instance Thomas Jefferson, sustained the idea of *departmentalism*. According to this doctrine, every department (power or branch) of government had both authority and responsibility to interpret the Constitution (Whittington, p. xi), provided this was in the course of performing their own departmental duties. Jefferson was also of the opinion that neither the legislative nor the judiciary could over-ride the President's constitutional interpretation of the executive powers and duties.

It was by an opinion of the Supreme Court of the United States –the already mentioned *Marbury v. Madison*, written by Chief Justice John Marshall in 1803– that

the doctrine of judicial review became established and fixed, and then accepted by the other two powers of government and by the states. This early acceptance by the legislative made it possible to avoid an amendment that, as was the case with the Eleventh Amendment in the case *Chisholm v. Georgia*, could have overruled the Court's decision.

> John Marshall (1755-1835) was an American politician and Jurist, 4th Chief Justice of the Supreme Court of the United States. Born in Virginia, in what today would be considered a middle-class home, Marshall received his earlier education from his father. During the first years of the War of Independence he served in the Continental Army, reaching the rank of captain. In 1780, Marshall was admitted to the Virginia Bar after studying law at the College of William and Mary. Between 1782 and 1796 he was elected to the Virginia House of Delegates (the old House of Burgesses) as a candidate for the Federalist Party. In 1795, Marshall declined George Washington's offer to become Attorney General of the United States and Ambassador to France, although in 1797, during John Adams' presidency, he accepted a mission to travel to France to negotiate with the *Directoire*. The next year, Marshal declined the office of Associate Justice of the Supreme Court of the United States. In 1799 he was elected Representative for Virginia, but the President John Adams instead appointed him Secretary of State. When Adams lost the presidential election of 1800 to Thomas Jefferson, he tried to fill in, before Jefferson was inaugurated, as many federal offices as possible with members of his Federalist Party. That included the offices of Chief Justice of the Supreme Court of the United States, vacated by the resignation of Oliver Ellsworth. Adams nominated Marshall, who was confirmed immediately by the Senate. Marshall was Chief Justice from 1801 until his death in 1835, the longest serving Chief Justice in the history of the Court. The mandate of Marshall resulted in the most significant change to the Supreme Court. Marshall declared the doctrine of *judicial review*, which gave the judiciary "the energy, weight, and dignity" that previous Chief Justice John Jay had recognized the institution was lacking. Marshall made of the judiciary a power on equal terms with the legislative and executive arms of government. During his term, the Court issued more than 1,200 decisions, of which Marshall himself wrote 519. Marshall advocated a strong, central federal government, and he repeatedly asserted the supremacy of the federal Constitution and laws. In many of his decisions he extended the reach of the "enumerated powers" far beyond the limits established in the original text of the Constitution, expanding the powers of the federal government at the expense of the states.

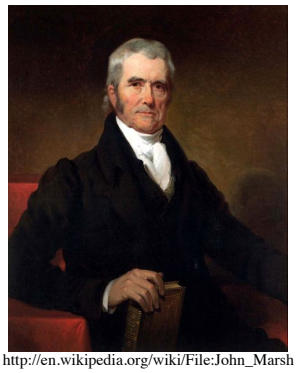
To fully understand the constitutionalism of the United States, it is required that a number of constitutionally related opinions of the Supreme Court be studied. Among these, and in the early years of the Republic, the following two are fundamental: *McCulloch v. Maryland*, which in 1819 established the doctrines of the necessary and proper and of the federal supremacy, and *Gibbons v. Ogden*, which declared in 1829 the extension of the (interstate) Commerce Clause. As in the case of *Marbury v. Madison*, Chief Justice John Marshall wrote both these opinions.

Prof. Fioravanti holds that "judicial review is fundamental and essential, not only as an instrument to protect the rights of the individuals and of minorities –as Hamilton himself sustained– against the arbitrary acts of legislators or of the political majority, but also, and above everything else, to avoid that one of the government branches, the most powerful one such as the legislative, try to occupy all the

constitutional space, becoming not only the foundations of the Constitution but rather the people themselves. [...] The actors and instruments of judicial review are the judges, who continually remind the legislators that, no matter how relevant their power is, it is always derived from the people through the Constitution" (Fioravanti 2001, p. 109).

Judicial Review: *Marbury v. Madison*

In *Marbury v. Madison* Chief Justice John Marshall elaborated two essential principles of modern constitutionalism: the supremacy of the Constitution and *judicial review*. The supremacy principle means that, in a case of conflict between the Constitution and either state or federal law, the controlling norm will always be the Constitution. Further, if the conflict is between a state law and a constitutionally valid federal law, the latter has precedence. The *judicial review* doctrine states that it is the province of the courts, especially of the Supreme Court, to interpret the Constitution and to determine if the laws or the executive acts conform to it. Prior to the adoption of the Constitution, Alexander Hamilton had asserted in *The Federalist* No. 78 the power of the judges to declare void any legislative act opposing the Constitution, so the Chief Justice was simply endorsing the original concepts in this area.



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Henry Inman, 1832

John Marshall

After the 1800 elections, in which the Federalist Party was widely defeated, in the last day of his office term the outgoing President John Adams nominated 42 new Justices of the Peace. Adams was attempting to fill in as many federal offices as possible with his supporters before handing the government to the new President and leader of the Democratic-Republican Party, Thomas Jefferson. However, the officer in charge of sending the commissions to new appointees was the outgoing Secretary of State John Marshall. He did not have enough time to deliver all the commissions before handing over his office at the White House to the new administration, leaving the remaining commissions in his desk. The new Secretary of State, James Madison, found the commissions and reported them to Thomas Jefferson, who ordered him not to deliver them to the appointees.

One of the intended Justices of the Peace for the District of Columbia was William Marbury, an enthusiastic federalist and follower of John Adams. His commission was essential to the exercise of office, and Marbury therefore requested the Supreme Court of the United States to issue a writ of mandamus to force Madison to hand over the commission. As part of its original jurisdiction, the Supreme Court had authorization from Congress, in the *Judiciary Act of 1789*, to issue writs of mandamus to any officer of the United States.

The Supreme Court ruled unanimously, in a 4 to zero decision (two of the Justices were absent for illness), that while Marbury was entitled to his commission, the Court had no way to force Madison to hand it over. Notwithstanding the Judiciary Act of 1789, the Supreme Court took the view that it had no power to issue writs of mandamus because this law –the *Judiciary Act*– was contrary to Article III of the

Constitution and, consequently, unconstitutional, null and void.

Chief Justice John Marshall wrote the opinion of the Court stating that it had only the judicial power to determine what was and what was not constitutional. "It is emphatically the province and duty of the Judicial Department," Marshall said, "to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each."

"So," Marshall continued, "if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

"If, then," Marshall went on, "the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

"Those, then," Marshall concluded, "who controvert the principle that the Constitution is to be considered in court as a paramount-law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law."

"This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure."

Marshall concluded "[t]hat it thus reduces to nothing what we have deemed the greatest improvement on political institutions – a written Constitution, would of itself be sufficient, in America where written Constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favour of its rejection."

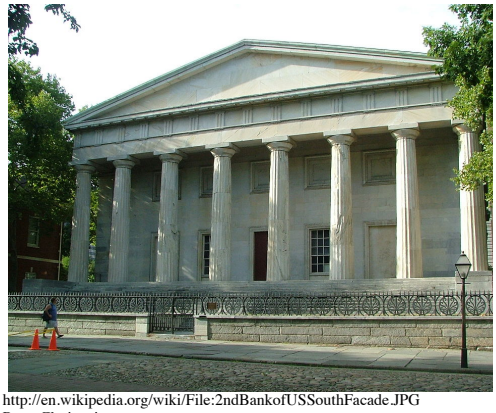
Thus, "[t]he judicial power of the United States is extended to all cases arising under the Constitution." (*Marbury v. Madison*, 5 U.S. 137, 177-178.)

Prof. Nicola Matteucci believes that the constitutional edifice was not finished with the original text of 1787, or even with the inclusion of the Bill of Rights, because there still lacked a body that allowed government to exist within constraints, and that prevented the dangerous tensions of a federal state. The edifice was lacking a judge on earth. The Constitution had set limits to government, but it had not assigned the task of determining if those limits had been exceeded or not. As far back as 1761, James Otis had pronounced that a law opposed to the constitution was null and void. But it was not apparent which branch of government was authorized to declare that nullity and at the same time to guarantee the efficacy of associated constitutional mandates. An assumption that such responsibilities came under the responsibility of the judicial power was not because it was ordained in the Constitution –it was not!–, or because

the Constitution defined the doctrine of judicial review –it did not!–, but because it was established by the Supreme Court itself in the case of *Marbury v. Madison*. As a result of this court opinion "the American constitutionalism is completed and, as the Great Seal of the United States proclaims, a *novus ordo seclorum* begins. By replacing the king we find the democratic political process of a pluralistic society; the old customary laws are replaced by one written constitution, with rights guaranteed to the citizens by a judge who says what the law is" (Matteucci, pp. 168 ff).

The implied powers of the Necessary and Proper Clause: *McCulloch v. Maryland*

The last clause of Section 8, Article I, of the Constitution was the cause of great controversies even since the Philadelphia Convention itself. The clause reads: "The Congress shall have Power [...] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Anti-Federalists were against such an open statement that, theoretically at least, gave free rein to the Federal government; the Federalists protested that the clause was indispensable for the Federal Government to carry out the duties assigned by the Constitution. In *The Federalist* No. 44, James Madison stated: "without the substance of this power, the whole Constitution would be a dead letter."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Peter Clericuzio

El *Second Bank of the United States*, Philadelphia.

This debate continued in the background until Chief Justice John Marshall, fifteen years after the case of *Marbury v. Madison*, ruled in *McCulloch v. Maryland*, that the Federal government could exercise more powers than those explicitly enumerated in Section 8, Article I, of the Constitution. Nevertheless, he applied the constraint that, whatever actions were taken by the government, they must be related to the enumerated powers and must not be forbidden by the Constitution. The fact that the Necessary and Proper Clause was included within Section 8, listing the enumerated powers, quite separately from the prohibitions listed in Section 9, meant that the intention of the Framers was to expand the powers of the Federal government and not to reduce them. Besides, it was not possible to enumerate in the Constitution each and every one of the powers needed by a government to run its business efficiently, as for example, by the creation of a federal bank. The defendant in *McCulloch v. Maryland* (i.e. the State of Maryland) argued that necessary meant "absolutely essential." Marshall, however, was more liberal in his interpretation and considered the Necessary and Proper Clause as a power granted to Congress and not as a limitation imposed on it.

In order to prevent the operation in its territory of a federal bank, such as the

Second Bank of the United States, the State of Maryland had passed a law to impose a tax on any bank note issued by any bank not constituted in the state. The law had the appearance of a general law, applicable to any bank from any state; but actually it was aimed at the federal bank since this was the only foreign bank operating in Maryland's territory at the time.

The manager of the Second Bank's branch in Baltimore, James William McCulloch, refused to pay the Maryland tax. Then, Maryland's State Attorney sued him and McCulloch was convicted. He appealed to the Maryland Court of Appeals, which ruled that the Second Bank of the United States was unconstitutional because the Constitution did not grant Congress any authority related to federal banks and upheld the lower judgment.

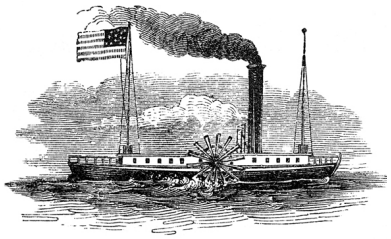
McCulloch then appealed to the Supreme Court of the United States, which decided that the Necessary and Proper Clause, in Section 8 of Article I, provided the authorization for Congress to create the bank in order to carry out the functions ordained by the Constitution to the Federal Government. Chief Justice John Marshall wrote the opinion of the Court, stating that, in the first place, the federal government was supreme since "the Government of the Union, though limited in its powers, is supreme within its sphere of action [...]. It is the Government of all; its powers are delegated by all; it represents all, and acts for all [...]; the people have, in express terms, decided it by saying, 'this Constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land.' Federal supremacy was also evidenced by the requirement for the members of State legislatures and the officers of the executive and judicial departments of the States to take the oath of fidelity to it. The Government of the United States, then, though limited in its powers, is supreme, and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding'."

In the second place, Marshall pointed out that the Congress of the United States is always required to act according to the powers explicitly or implicitly granted by the Constitution. "A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." Marshall continued: "Although, among the enumerated powers of Government, we do not find the word 'bank' or 'incorporation,' we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation are entrusted to its Government. It can never be pretended that these vast powers draw after them others of inferior importance merely because they are inferior." The Taxing and Spending Clause implicitly authorized Congress to create a bank to carry out its constitutional mandate. Consequently, the Supreme Court was "unanimously of opinion that the law passed by the Legislature of Maryland, imposing a tax on the Bank of the United States is unconstitutional and void". The

Supreme Court went on to rule that "the said Court of Appeals of the State of Maryland erred, in affirming the judgment of the Baltimore County Court, in which judgment was rendered against James W. McCulloch; but that the said Court of Appeals of Maryland ought to have reversed the said judgment of the said Baltimore County Court, and ought to have given judgment for the said appellant, McCulloch. It is, therefore, adjudged and ordered that the said judgment of the said Court of Appeals of the State of Maryland in this case be, and the same hereby is, reversed and annulled."

The Commerce Clause: *Gibbons v. Ogden*

As the reader saw earlier, John Marshall's doctrine of judicial review resulted in a power that had not been explicitly included in the Constitution by the constituent delegates. His generous interpretation of the Necessary and Proper Clause opened to Congress and the President the gate to powers that also were not explicitly included in the constitutional text. Five years after McCulloch, Chief Justice Marshall would once again deliver an opinion that would expand the influence of the federal government over almost every single aspect of American life. The case of *Gibbons v. Ogden* was about commerce, and commerce is, of course, present in almost everything we humans do. In *Gibbons v. Ogden*, Chief Justice Marshall stated that the federal government had power to regulate interstate commerce far beyond the narrow meaning of a buying and selling transaction. As a collateral casualty of this ruling, the Tenth Amendment was left with little meaning.



Hatzigeorgiou, Karen J. *U.S. History Images*. 2011, Ibid. Scott, David B. *A School History of the United States*. New York: Harper & Brothers, 1883.

Vapor de Fulton

The State of New York had granted to Robert Livingston and Robert Fulton the "exclusive privilege" (i.e., a monopoly) to operate steamboats in its territorial waters, authorizing them to seize any boat operating in those waters without prior successful application for their license. Aaron Ogden obtained a license from Livingston and Fulton to operate a steamboat service between New York and New Jersey. When Thomas Gibbons –a previous partner of Ogden– started the same service in competition for commuters, Ogden sued him in the Court of Chancery of New York, asking the Court to issue a restraining order against Gibbons. Gibbons claimed to have a federal license for coastal navigation. Both the Court of Chancery and the Court of Errors of New York ruled in favor of Ogden. Then Gibbons appealed to the Supreme Court of the United States.

The Supreme Court of the United States, in an opinion written by Chief Justice John Marshall, ruled in his favor, stating that the Commerce Clause authorized Congress to issue a license for coastal water navigation. Section 8 of Article I assigned to the federal government the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Prior to 1824, this Clause had been construed in a restrictive way, leaving to the legislation of every state any commercial activities carried on within their borders. According to Marshall, coastal water navigation played an integral part in conducting commerce "among the several

states."

The issue was interpretation of the word "among" in the Commerce Clause, since this was the only argued source of the power of Congress to promulgate the questioned federal law. The Court had to answer whether the law regulated "commerce" that was "among the several states." With respect to "commerce," the Court held that commerce is more than mere traffic or trade of commodities. It also included the general intercourse of communities. This broader definition included navigation. Without navigation –at that time– there was no intercourse of the states; and without intercourse of the states, there was no commerce among them. Marshall interpreted "among" as "intermingled with." "Commerce among the States," Marshall said, "cannot stop at the external boundary line of each State, but may be introduced into the interior." The Supremacy Clause implied that the power of Congress to ensure the freedom of commerce overrode any state law to the contrary. "If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." For Marshall, "All America understands, and has uniformly understood, the word 'commerce' to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed."

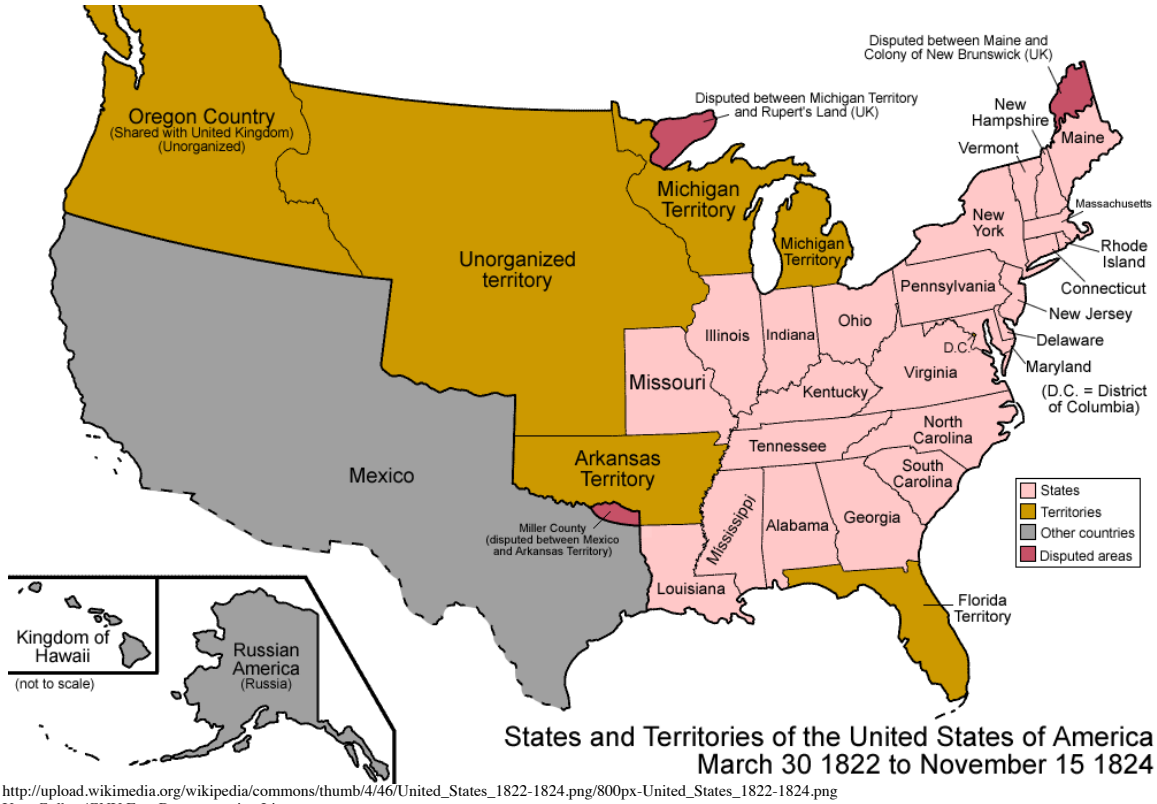
As in other previous cases, Marshall managed once more to resolve over a totally different issue that what was asked in the original claim. In Marbury the case was over a writ of mandamus, and the finding of the Supreme Court instituted the judicial review. In *McCulloch*, the case was over a bank, and in his finding Marshall established the extension of the Necessary and Proper Clause. In *Gibbons* the original claim was over navigation, and Marshall used it to provide a ruling over interstate commerce.

Marshall first established that the power to regulate commerce included navigation, since the constitutional power reached any commercial agreement and, without navigation –at the time and in the United States– it would have been impossible to conduct any commercial intercourse or trade. From the constitutional power was excluded –and, thus, reserved to the states– all commerce that was conducted totally within a state. But foreign commerce and the commerce between the states (and with the Indians) were part of the federal regulation without any limit. No limit was established in Section 9 of Article I, which set up the powers prohibited to the Federal Congress. Thus, no state could regulate any part of such foreign or interstate commerce since Congress had entire sovereignty on these matters. On this basis Marshall construed that the power to regulate interstate commerce included the boats that carried passengers and the licenses for coastal navigation.

On the other hand, the "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of" the state regulations.

The Court held this generous –for the federal government– and broad construction of the Commerce Clause until 1895 when, in the case *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895), it ruled that manufacturing, including oil refining, was a

local activity, not subjected to the congressional regulation of interstate commerce. The Supreme Court maintained this strict line until the *New Deal*, when in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 US 1 (1937), but without overturning *E. C. Knight*, sustained that the federal government could regulate those aspects of internal state commerce that had any influence over interstate commerce.



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