CONSTITUTIONAL LITERACY
WORKBOOK TO THE 25-PART DVD SERIES

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Purpose

After listening to this lecture and completing this chapter, you will:

- Recognize the responsibilities of an enlightened citizen.
- Identify the three elements of constitutional knowledge.
- Understand the two kinds of unconstitutional acts.

Parlance

Using the glossary, write the definitions for the following vocabulary words:

constitution

Ultra Vires

Enumerated Powers
Preamble

“We the people.” These are the first words of the United States Constitution. “We the people . . . do ordain and establish this Constitution of the United States of America.” Those aren’t just pretty words. They are a clear statement of the origin of all authority and power in this country. This government by the people derives its power from the people—power flows from the bottom up, not from the top down.

The Constitution is not a document whereby an all-powerful government grants certain rights and privileges to its citizens. No, it’s the other way around. The Constitution is a document whereby the citizens of the United States grant certain authorities and powers to their government. “We the people” aren’t passive recipients of rights granted in the Constitution; “We the people” are the actors, the initiators in this exchange.

At least, we’re supposed to be. The truth is, “We the people” have grown quite passive when it comes to our relationship to the government that we empower. As a nation, we have grown quite ignorant of how and why government works. And in our ignorance and passivity, we have surrendered too many rights and freedoms to our government.

George Nicholas, a hero of the War for American Independence, found it hard to imagine a scenario in which free Americans would allow their government to abuse the powers that the people granted to it in the Constitution. He said, “An enlightened people will never suffer what was established for their security to be perverted to an act of tyranny.”

However, when it comes to the Constitution, today’s Americans could hardly be described as “an enlightened people.” As a result, we have been subjected to many acts of tyranny. The goal of this course is to re-enlighten students, families, and patriotic Americans in order to stem the tide of tyranny in this country.

Ponder

Watch the lecture with your workbook open and the pause button handy. Answer the workbook questions as you go along.
I. WHAT SHOULD WE KNOW?  
WHAT SHOULD WE DO?

What does it mean for us to be the kind of citizens that George Nicholas believed would prevent the rise of tyranny? In order for us to become “an enlightened people,” we need to do the following:

- First, we need to understand what the Constitution requires of our government.
- Second, we need to understand what our government is actually doing today.

What happens when we discover that there’s a gap between what the Constitution requires and what our government is actually doing? It is our duty as citizens to vote out elected officials who abuse the Constitution and replace them with new officials who will faithfully preserve, protect, and defend the Constitution.

Effective citizenship begins with a good working knowledge of the Constitution. Very few Americans—including those serving at the highest levels of government—possess an appropriate level of understanding of our Constitution. Truly being an enlightened American citizen requires three aspects of constitutional knowledge:

1. What does the Constitution actually say?
2. What did the Founding Fathers mean by the words of each of the phrases and clauses? (Language changes through the years, and it takes some effort to work out the “original meaning” of the words used by the Constitution’s framers.)
3. In the years since the drafting and ratification of the Constitution, how has the Supreme Court ruled on the various parts of the Constitution?

As you explore these three aspects of constitutional knowledge, it will become apparent that there is quite often a disparity between the first two components—the
text and its original meaning—with the third component—the Supreme Court’s decisions. The rulings of the Supreme Court are often significantly at odds with the original meaning of the Constitution.

It is important to understand that we don’t study the Supreme Court’s decisions in order to determine what the Constitution really means. Rather, we study the Supreme Court’s decisions in order to understand how our nation has drifted so far away from the original meaning of the Constitution and the intentions of the Founding Fathers of our nation.

Understand that adherence to the Constitution is not a partisan political issue. Republicans and Democrats alike have violated the Constitution while in power. Republican-appointed justices on the Supreme Court—with rare exceptions—have been just as unfaithful to the Constitution as those appointed by Democrats.

**QUESTION 1**

When we become aware of a gap between the requirements of the Constitution and the actions of our government, what is our responsibility as enlightened citizens?
**Question 2**
What are the three aspects of constitutional knowledge?

**Question 3**
Of the three aspects of constitutional knowledge, one area of study (or, more specifically, our motive for studying that area) is quite a bit different from the other two. Explain the difference.

**II. What Is the Purpose of a Constitution?**
The Preamble of the United States Constitution declares the specific purposes of the document:

- To form a more perfect union
- Establish justice
- Insure domestic tranquility
- Provide for the common defense
- Promote the general welfare
- Secure the blessings of liberty to ourselves and our posterity
But there is a more basic question we must address: What are the purposes of the type of legal document that we call a constitution?

In a constitutional republic, a constitution is the document that grants power to various agencies of government, limits that power, and secures the rights of people against abuses by the government. The actions of private people are not controlled by the constitution. Accordingly, private people can never violate our Constitution. Only the government, or a person acting with governmental authority, can do something that is unconstitutional.

**QUESTION 4**

Why can a private citizen never violate the U.S. Constitution?
Although small, shy, and often sickly, James Madison became one of the most important figures at the infancy of the United States. Born in Virginia on March 16, 1751, Madison used his mind to overcome his physical deficiencies, graduating from Princeton in only two years, serving in the Virginia legislature, and becoming the youngest delegate to the Continental Congress. These experiences helped shape his views on the course of the new country.

Seeing a worrying trend toward anarchy in the state governments under the Articles of Confederation, Madison helped spur the nation toward convening the Philadelphia Constitutional Convention. And he came prepared, presenting what was known as the Virginia Plan early in the convention. Although the Virginia Plan was heavily debated and altered throughout the convention, it eventually formed the basis for the United States Constitution, earning Madison the title of “Father of the Constitution.” Madison was also vitally important in moving the debate between federal and states’ rights to a more balanced middle ground of shared sovereignty, where both sides were subject to checks and balances. His detailed minutes of the meetings, though unofficial, provide us with the only comprehensive record of what took place.

And his efforts did not stop there. When it seemed like the states would refuse to ratify the new Constitution, Madison united with Alexander Hamilton and John Jay to write the Federalist Papers, arguing point by point in favor of ratification. When it became apparent that ratification would only take place if amendments were promised to be added as soon as the new government began, Madison took it upon himself to author the original draft of the Bill of Rights in the first Congress.

After breaking with Hamilton (as Madison’s views adapted to changes in the political scene), Madison joined with Thomas Jefferson to form the Democratic-Republican party. When Jefferson was elected president in 1801, he asked Madison to be his Secretary of State, a position Madison held for eight years, during which he oversaw the management of Jefferson’s Louisiana Purchase.

In 1808, Madison campaigned for the office of president and won, serving two terms in total. He became the first president to oversee a declaration of war and is the only sitting president to come under enemy fire, as during the War of 1812 the British invaded Washington, DC, and set fire to the White House. After a series of American naval victories turned the tide of the war, peace was declared in 1815, shortly before the end of Madison’s presidency and his retirement.

Madison’s contributions to the formation of the United States—both in principle through the drafting of the Constitution and in practicality through the decisions he made in office—were invaluable.
III. TWO KINDS OF UNCONSTITUTIONAL ACTS

The government and government officials can violate the Constitution in two basic ways: They can 1) act beyond their authority or 2) violate the constitutional rights of a person or persons.

Whenever a government agency has acted outside the bounds of its authority, it has violated the Constitution. Generally speaking, only the federal government can violate the U.S. Constitution in this manner. If any portion of the federal government—the president, Congress, any executive agency, or any court—acts outside of the power assigned to it by the Constitution, it has committed an *ultra vires* act. (*Ultra vires* is a Latin phrase meaning “beyond its power.”) Such an act is therefore unconstitutional.

You may hear a person say that the government “had the right” to perform some act. Strictly speaking, this is not correct. Governments do not have rights; governments have authority. Either the government is acting within the bounds of its authority or it is acting beyond the scope of its authority. When it acts beyond its authority as set forth in the Constitution, it has acted unconstitutionally.

The second way the government can act in an unconstitutional manner is to do something that violates the constitutional rights of one or more persons.

Let’s consider an example of a hypothetical law so that each kind of unconstitutional act is clear. The Constitution gives Congress the power to regulate interstate commerce. Imagine that Congress has passed a bill regulating the wages of babysitters. Now imagine that the legislation included a provision stating that no born-again Christian can be a babysitter because the babysitter might get raptured, leaving the child abandoned.

What would happen if someone challenged this law as being unconstitutional? Two questions would need to be answered:

1. Does the Constitution give Congress the power to regulate the wages of babysitters?
2. Does the rule against born-again Christian babysitters violate the First Amendment provision that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”?

Question 1 is a question of ultra vires. The Constitution grants certain powers to Congress, and Congress may not step beyond those powers. Question 2 is a question of personal rights. The First Amendment to the Constitution guarantees that everyone has the right to exercise his or her religion freely.

If the Supreme Court were to hold that Congress had overstepped its authority in regulating the wages of babysitters, that would be the end of the case. There would be no need to consider the constitutionality of the religious discrimination provision because the entire law has been declared unconstitutional. But if the Court ruled that Congress acted properly and within the bounds of its authority, the Court would then have to deal with the second issue of religious freedom.

Therefore, there are always two general questions we must consider when trying to determine whether or not some act of government is in compliance with the Constitution:

1. Did the government have the authority to do this act?
2. Even if it had the authority, did the government act in a way that violated the rights of one or more persons?

The vast majority of people think only about the second issue—the rights of the people—when they think about the Constitution. While it is very important that we have the Bill of Rights as a means of protecting the rights of the people, the Founders believed that limitations placed on the power of government were even more important in protecting personal liberty. In fact, many of them believed there was no need for a Bill of Rights because the constitutional limitations on the power of government would be so effective in protecting our liberties.

There is little doubt that it has been a very good thing indeed that Patrick Henry and others succeeded in demanding the adoption of the Bill of Rights. But we should not forget the importance of Alexander Hamilton’s argument that limitations on the power of the federal government are essential for the protections of our liberty. The Constitution does not permit Congress to regulate “every species of personal and private concerns.”
ALEXANDER HAMILTON

Alexander Hamilton was a self-made man, rising from illegitimate birth to become a soldier, statesman, and author. Born on January 11, 1755, Hamilton spent his childhood in the West Indies. When some influential citizens recognized his talents, they paid for him to attend Kings College (now Columbia University) in New York. Before graduation, however, the Revolutionary War broke out, and Hamilton joined the militia in 1775.

Hamilton craved the glory of the battlefield and declined several offers of advancement that would have removed him from active combat. That is, until George Washington asked him to become his aide. Hamilton served as Washington's chief of staff for four years, but eventually, sitting on the sidelines became unbearable. Hamilton threatened to resign, Washington relented, and Hamilton returned to active duty in time to command three battalions at the Battle of Yorktown.

In 1787, Hamilton was elected to represent New York in the Constitutional Convention. However, his influence over the proceedings was diminished because the other New York delegates soon quit the convention, leaving Hamilton without a vote. Though not entirely satisfied with the Constitution, Hamilton nevertheless signed it, believing it to be a drastic improvement over the ineffective Articles of Confederation.

Yet upon returning home, Hamilton found New Yorkers were reluctant to ratify the Constitution. He recruited John Jay and James Madison to help him persuade the populace to ratify it. The Federalist Papers they wrote and published laid the groundwork not only for ratification, but also for Hamilton to form the Federalist Party, the first political party in the new United States.

In 1789, Washington appointed Hamilton as his Secretary of Treasury, putting him in charge of managing the finances of the new republic. Soon, Hamilton's friendship with Madison began to crumble, as Madison felt that Hamilton was following his own ambitions rather than acting in the best interests of the country. Madison and Thomas Jefferson formed a rival political party, the Democratic-Republican Party.

The Federalists believed in a strong federal government and were willing to take liberties with constitutional interpretation, whereas Jefferson's party wanted to put more power in the hands of the states and adhered to a strictly literal interpretation of the Constitution.

In 1795, Hamilton resigned his position because of an extramarital affair, though he continued to influence political events on both the state and national levels. Later, Hamilton made an enemy of Jefferson's vice president, Aaron Burr. In 1804, the quarrel reached critical proportions, and Burr challenged Hamilton to a duel. On July 11, Burr shot and mortally wounded Hamilton, who died the next day.
QUESTION 5
What does it mean to say that the government has no rights?

QUESTION 6
Explain the difference between the two kinds of unconstitutional acts.

QUESTION 7
Why did Hamilton believe that the Bill of Rights was unnecessary? Do you agree with him?
Does Congress have the power to regulate health insurance and doctor visits? The Founders did not intend for Congress to have power over areas of “personal and private concerns.” Even Hamilton would have agreed that health insurance and doctor visits fall outside the purview of Congress for this very reason. Later we will study both the General Welfare Clause and the Commerce Clause and the contemporary claim that these provisions give Congress the power to regulate health care and insurance. For now, we can readily see that the Founders believed that the preservation of liberty required Congress to stay within its boundaries.

Thomas Jefferson gave an eloquent explanation of the importance of the federal government’s staying within its enumerated powers in a statement he wrote for George Washington regarding the bill that authorized a national bank:

> It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they please. Certainly no such universal power was meant to be given them. [The Constitution] was intended to lace them up straightly within the enumerated powers and those without which, as means, these powers could not be carried into effect.

We will study many of the enumerated powers of Congress later in this course. But for now, it is sufficient to note one conclusion: The greatest threat to American liberty is not found in a persistent violation of the Bill of Rights. Rather, our liberty is shrinking at an alarming pace every time Congress acts beyond the scope of its enumerated powers.

If we want to preserve our freedoms, it is absolutely essential that Americans become well versed in the constitutional limits on the power of the federal government and then insist that these limits be obeyed.
Probe

Do some research on your own to explore how the concepts discussed in this episode relate to contemporary issues. Write at least one well-formed paragraph to explain your answers to each of the following:

- How does it change our thinking when we place our focus on the limitations of government power rather than on the individual rights guaranteed in the Bill of Rights?
- Discuss the ways in which the healthcare legislation of recent years is an *ultra vires* act.
- Do some research to identify a case in which the Supreme Court ruled that the government did have the authority to perform an act (in other words, was not guilty of an *ultra vires* act) but acted in a way that violated the rights of a person or persons.
**Purpose**

After listening to this lecture and completing this chapter, you will:

- Recognize that, according to the Constitution, only Congress has the power to make laws for the United States.
- Understand why it is vitally important that Congress, and only Congress, make laws.
- Understand how judges, executive-branch functionaries, and even foreign bodies frequently make U.S. laws despite the fact that only Congress has that power.

**Parlance**

Using the glossary, write the definitions for the following vocabulary words:

Legislature

Vest

Congress
Preamble

There was a time when every basket scored in the NBA was a two-point shot. If you scored from just under the basket, you got two points. If you made it from twenty-five feet away, you still got two points. You could heave it from midcourt if you liked; if it went in—two points.

In the 1970s, there was a great deal of discussion about the benefits and drawbacks of adding the three-point shot to professional basketball. Toward the end of the decade, it seemed apparent that this major rule change would indeed take place. Players, fans, even referees saw the value of the three-point shot. But none of them had the authority to change the rules of the game. A referee has considerable power on the basketball court, but only within the existing rules of the game; he doesn’t have the power to award three points.
(or four, for that matter) to a twenty-five-foot jumper if the rules specify that every shot—whatever its distance—is worth two points.

The NBA three-point shot came into being in 1979 when the NBA Rules Committee voted to change the rules of the game. No other entity had the power to make such a change.

In games, as in civil society, rules are made and rules are changed. When forming a sports league or a democratic government or any other organization, perhaps the most fundamental question is this: *Who has the power to make and change the rules?* The rules can’t be changed on the fly to suit those who happen to be in power at a given moment. Otherwise, how will the players know they’re still playing basketball—or politics, as the case may be? There is a process—often a maddeningly slow, even inefficient process—by which rules are changed.

**Ponder**

Watch the lecture with your workbook open and the pause button handy. Answer the workbook questions as you go along.

**I. WHO HAS THE POWER TO MAKE THE RULES?**

Article I, Section 1 of the United States Constitution is the provision that answers the question, “Who has the power to make and change the rules for the United States?” The answer is very straightforward:

*All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.*

In other words, only one entity has the power to make U.S. laws, and that entity is Congress. The idea is so simple that it’s easy to miss its importance.

**QUESTION 1**

Look at the phrase “herein granted.” Who grants the legislative powers that Congress exercises?
The answer, of course, is “the American people.” The government doesn’t grant rights to the people. Quite the opposite. The people who are governed grant power to those who govern them. A key principle of representational democracy is that the people who vest (or grant) power to those who govern are able to divest (or take away) that power.

THE DECLARATORY ACT OF 1766

Every student of American history knows the phrase “No taxation without representation.” The American colonists who threw off the yoke of British rule were adamant that they should not be taxed by the British government unless they were fairly represented in the British Parliament. The more important part of that formulation wasn’t taxation, but representation. In other words, the central motivation behind the Boston Tea Party wasn’t so much an issue of the pocketbook as an issue of self-determination. The colonists understood the necessity of taxes and expected to pay them. But taxation had previously been a matter for the colonial legislatures.

In 1766, the British Parliament repealed the Stamp Act of 1765, which the American colonists had strongly protested and boycotted. This would seem to have been a victory for the colonists. But at the same time, Parliament passed the American Colonies Act, also known as the Declaratory Act, which declared that the British Parliament “had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America . . . in all cases whatsoever.”

The Declaratory Act, in other words, declared that the Parliament sitting in London—an ocean away from America—had the authority to impose its legislative will on the American colonists. This was a huge change from the precedent of self-government that had prevailed in the colonies up to that point. Perhaps the most alarming thing about the Declaratory Act was the fact that its language matched very closely the Irish Declaratory Act of 1719, which had virtually enslaved the Irish people to the British. Though many acts of Parliament—including the Stamp Act, the Quartering Act, the Townshend Revenue Act, the Sugar Act, and the “Intolerable” Acts—elicited more vehement reactions from the colonists, none represented a deeper or wider-ranging threat to the colonists than the Declaratory Act.
II. THE HISTORICAL BACKGROUND

Every American citizen should be familiar with the phrase “No taxation without representation,” as it was a rallying cry for the colonists to rise up against British oppression.

QUESTION 2
How do the colonists’ concerns about representation relate to Article I, Section 1 of the Constitution?

In his influential work The Rights of Man, Thomas Paine accurately reflected the view of the founding generation when he drew a distinction between trust and usurpation:

*All power exercised over a nation must have some beginning. It must either be delegated or assumed. There are no other sources. All delegated power is trust, and all assumed power is usurpation. Time does not alter the nature and quality of either.*

A body that exercises power as a trust uses that power to benefit the people who entrusted the body with that power. A body that assumes or usurps power, on the other hand, is unlikely to serve the people from whom this power has been usurped.

QUESTION 3
To what body have the American people, through the Constitution, delegated the power to make laws?
III. EXECUTIVE OVERREACH
AND JUDICIAL ACTIVISM

English philosopher John Locke made the case that the people’s delegation of power to a legislative body is the one and only appropriate method for making a law. Other entities may make rules, of course. The First United Methodist Church, the National Football League, and the Connersville Ladies’ Sewing Circle all have rules they expect their members to abide by. But none of those rules can have the force of law for society in general. As Locke wrote, “Nor can any Edict of any Body else [besides the legislature], in what Form soever conceived, or by what Power soever backed, have the force and obligation of a law.”

In addition to a legislative branch, the U.S. Constitution created an executive branch for enforcing laws and a judicial branch for
John Locke

John Locke, it seems, was born to think differently about the world. He was born in England in 1632, an era when the English people were struggling mightily to figure out the relationship between the power of the king—who claimed to hold his power by God’s direct appointment—and the power of the people, as represented by their elected Parliament. Meanwhile, Puritans and other non-conformists were starting their own churches independent of the state-run Church of England. The Church of England, backed by the power of the king, responded by seeking to impose conformity on these freedom-minded believers by forcing them to worship in its own churches.

John Locke’s parents were among those Puritans who experienced persecution at the hands of the king and his church. His family probably knew Puritan families—certainly knew of Puritan families—who had sailed to New England in order to worship as they saw fit. Locke was ten years old when the English Civil War broke out, pitting Parliamentary and Puritan forces against forces loyal to King Charles I. Locke’s own father took up arms against his king.

An enemy of authoritarianism, Locke believed in the equality of all men. He founded a political philosophy based not on the divine right of kings to rule, but on the natural rights of human beings. In Locke’s view, the rights of the people were not granted by kings. Rather, the rights of the people were given by God.

According to Locke, it is the prerogative of the people to grant power to the civil authorities who will govern them—and to withdraw that power when they see fit. This is the heart of Locke’s political philosophy: The people have sovereignty over their government, not the other way around.

Locke wasn’t able to see this philosophy take root in his own time and country. But his political writings had an enormous influence on America’s Founding Fathers. Thomas Jefferson counted John Locke (along with John Newton and Francis Bacon) as one of the three greatest men who ever lived.
interpreting laws. These are vitally important roles—indeed, no less important than the law-making role of Congress. But the law-making role belongs exclusively to the legislative branch.

Nevertheless, both executive-branch bureaucracies and federal judges find ways to legislate, though they rarely admit to it. In creating the Environmental Protection Agency, Congress gave the EPA jurisdiction over “the waters of the United States.” So far, so good. It is entirely appropriate for Congress to delegate powers of enforcement to another entity. As Thomas Paine said, delegated power is a trust. Assumed power, however, is usurpation.

However, the EPA has since assumed additional powers not granted by Congress by altering the definition of “the waters of the United States.” Originally meant to signify navigable waters—waterways large enough for commercial boats to travel on—the definition was expanded to include even small ponds, thus extending the power of the EPA and trespassing on the rights of landowners, farmers, and businesspeople across the country.

This is an example of executive overreach. The EPA never claimed to be passing new laws. While pretending to enforce the laws of Congress, the EPA has created rules and restrictions never contemplated or specifically authorized by that body. The EPA has become the real lawmaker, not Congress.

To understand judicial activism, let’s return to the world of sports. According to the rules of Major League Baseball, the strike zone is that space located directly above home plate that extends from the batter’s knees to the midpoint between his shoulders and his belt. The home plate umpire’s job is to determine whether or not each pitch passes through this defined strike zone. If it does, the pitch is to be called a strike. If it does not, the pitch is a ball. Occasionally, however, an umpire calls balls and strikes according to another, more personal standard. Perhaps he missed a previous call and is trying to make up for it. Perhaps he is trying to move the game along and so he “expands” the strike zone by calling
more strikes in order to motivate batters to swing. Perhaps he feels sorry for a pitcher who can’t seem to find the strike zone. If he does any of these things, he is no longer interpreting the agreed-upon strike zone; he is legislating a new strike zone. He is guilty of the baseball equivalent of judicial activism.

The *Roe v. Wade* decision (1973) is a well-known example of judicial activism, in which a court rules with the formality of a court but with the heart of a legislature. In this particular decision, the U.S. Supreme Court ruled that the Fourteenth Amendment to the Constitution protecting a citizen’s right to privacy and “due process” applies not only to the question of the legality of abortion, but that it applies differently at different stages of a woman’s pregnancy! The Court simply rewrote the Constitution, adding rules on abortion that cannot be justified by a fair reading of the Fourteenth Amendment or the history behind that section.

**QUESTION 6**

What is really at stake when bureaucrats or judges hand down edicts that have “the force and obligation of a law”? What is the big deal?

**QUESTION 7**

If “today always trumps yesterday,” why is it not acceptable for today’s judges to overrule yesterday’s legislators?
The Constitution divides the United States government into three branches with three different kinds of powers:

The legislative branch (Congress) has the power to make laws. Every member of Congress is accountable to the voters he or she represents. Members of the House of Representatives are elected every two years; Senators are elected every six years. If voters don’t like the laws that their congressional representatives make, they can kick them out.

The judicial branch (federal courts: district courts, courts of appeal, and Supreme Court) has the power to interpret the laws made by Congress by applying the general principles of law to specific cases. Federal judges are not elected but are appointed by the president and confirmed by the Senate. By design, they are not directly accountable to voters as legislators are. The Founding Fathers intended this as a way to protect the judges’ decisions from the back-and-forth of politics. However, this freedom from direct accountability can be dangerous if judges overstep their bounds and begin to make laws rather than simply interpreting them.

The executive branch (the president, vice president, the cabinet, and all departments and agencies reporting to the president) is responsible for enforcing the laws that have been made by the legislative branch and interpreted by the judicial branch. The president and vice president are elected and therefore directly accountable to the voting public, but every other member of the executive branch is appointed. And while the highest-ranking members of the executive branch come and go with presidential administrations, the vast majority of people employed in the various offices of the executive branch are career bureaucrats with no direct (and scarcely any indirect) accountability to the voters. This can become a problem if executive-branch bureaucrats overstep their role and make laws rather than enforcing laws made by Congress.

IV. TREATIES AND INTERNATIONAL LAW

Article VI, Clause 2 of the Constitution reads, “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” A disturbing
trend since World War II has been the use of international treaty law to control
the domestic public of the United States. A great many of the laws that are made
and enforced in the U.S. are created at the state level. When the U.S. enters into a
treaty with another country, the provisions of that treaty become the law of the land.
If those provisions in any way conflict with state laws, then technically speaking,
the provisions of the treaty trump the provisions of state law. (We will study this
problem in detail in a later chapter.) So then, just as in the Declaratory Act, matters
that had customarily been decided at a local or state level are now being decided in
international forums, especially the United Nations.

Payoff

It’s likely no one would claim there was a time in American history when all of the
nation’s laws were perfect and didn’t need to change. Even the most conservative
political thinker wouldn’t want to make it impossible to change the law of the land,
whether to fix bad laws or to alter or add laws to deal with changing circumstances.
The conservative position on the matter is simply this: It is the job of legislatures—
both Congress and state legislatures—to pass laws. No other body should do it.
Today’s laws always trump yesterday’s laws, and so they should. But today’s judicial
decisions and executive orders should never trump yesterday’s laws.

A foundational principle of American democracy is that the people who
make our laws are directly accountable to the voters. This allows us to “throw the
rascals out” any time they make laws that do not serve our best interests. Neither executive-branch bureaucrats nor judges are directly accountable to the voters. They are appointed, not elected. That is why it is so important that they leave law-making to Congress and state legislatures.

Probe

Do some research on your own to explore how the concepts discussed in this episode relate to current issues. Write at least one well-formed paragraph to explain your answers to each of the following:

- Find a recent example of executive overreach—an instance in which an entity from the Executive Branch handed down an edict with the “force and obligation of law.” Why should the specific action you’ve selected be considered executive overreach?
- Find a recent example of judicial activism—an instance in which a federal court has created law rather than simply interpreting the law as written. Why should the specific action you’ve selected be considered judicial activism?
- The Constitution allows for international treaties, and international treaties play an important role in the relations between two or more nations. However, treaties such as the United Nations Convention on the Rights of the Child and the UN Convention Eliminating All Forms of Discrimination Against Women are fundamentally different from the treaties the Founding Fathers had in mind. What is the fundamental difference between these UN treaties and the treaties the Founding Fathers would have been familiar with?
- Investigate the UN Convention on the Rights of the Child. How might this treaty impact your home or the homes of people you know if it were ratified by the United States?