

P A R T 1

# Defining the Constitutional Ethic



## CHAPTER OBJECTIVES

- 1 Place the issue of public service within its Constitutional context.
- 2 Make explicit the underpinnings of the American approach to governing.
- 3 Identify the connections among ethical public service, the US Constitution, and America's founding political philosophy.

# The Constitution, Law, and Public Service Ethics

Every society must address the most basic questions of governance. These questions are: How should people live together? Who should exercise power and how? What limits should authority respect? What is the proper role of the state? What is legitimacy? And what duties do those who serve in government owe to the people? The cultural roots of a society will obviously influence the answers to those questions; the behavior of public managers in regimes rooted in notions of personal liberty will differ rather significantly from the behavior of officials in theocratic or authoritarian regimes. The ethics of public management in systems founded on a belief in the equal status of citizens is going to be different from systems reflecting traditions of aristocracy or caste.

Any study of public policy and administration requires that we examine and analyze management of the public's business *as that business is defined by a particular society at a particular time*.

Every society also creates rules to support its chosen system of governance. As private citizens, those rules will limit and control our actions in a number of ways. (The most obvious: We cannot freely engage in actions the government has labeled criminal.) If we become government employees or lawmakers, our ability to do our jobs well will depend upon how well we understand what the rules are; why we have these particular rules rather than others; and why we choose to solve some problems collectively through government action, while we choose to leave other problems to individuals or to voluntary associations and nonprofit organizations.

A genuine familiarity with constitutional principles is important to all of us, however, and not just to government workers and lawmakers. It is certainly true that our elected officials and legislators cannot make intelligent public policy decisions unless they understand our constitutional framework, because, as we shall see, government legitimacy and the rule of law require that our laws and policies be consistent with that framework.

But the need for what David Rosenbloom (2000) has called “constitutional competence” goes well beyond government. Media figures (who, as we shall see, have a special constitutional status and corresponding “watchdog” responsibilities) cannot report adequately on government action unless the reporters, editors, and others involved in our “Fourth Estate” understand the legal and constitutional context of public action. Citizens cannot evaluate the job performance of either their elected officials or the media and cannot participate effectively in public life unless they understand America’s constitutional philosophy and framework, because that philosophy and framework dictate the proper standards against which public performance must be measured.

To be clear, it is not necessary that members of the media or the public be lawyers or constitutional scholars, but it *is* necessary that they have an understanding of the general principles and values upon which our nation has built its governing structures. Throughout this book, we will refer to those principles and values as America’s *constitutional ethic of public service*. This ethic, we argue, dictates a core set of values that provide guidance for public administrators, those administering public or government funded programs, and those performing other public functions. This ethic offers a foundation for how these actors should act and make judgments when serving the public.

Why a constitutional ethic of public service? As the politics and political disagreements in the United States of the last few years demonstrate, there are significant questions about what role the government should play in the economy and society. Debates across the political spectrum regarding government regulation of the economy, abortion, sanctioning or prohibiting same-sex marriages, the use of eminent domain to encourage economic development, and civil liberties and rights issues such as voting rights and protection of the rights of those accused of crimes make the headlines and highlight important policy differences and views on the role of the government. Often forgotten in these debates are questions about the role of government officials—elected, appointed, and civil servants. It is almost trite to say that their duty is to serve the people and the public good, but what does that really mean in practice? For good or ill, government officials are given significant authority to act and there should be standards that guide their judgments and actions. Lacking such guidance, the fear is that they may abuse the power given to them leading them to act unethically, if not illegally. The purpose of this book is to help provide guidance to government officials and others who are charged with the duty of serving the people as agents of, or surrogates for, the government. This book takes seriously the proposition that there is an ethic, rooted in the US Constitution and the Bill of Rights, which provides this guidance. In the pages that follow, we will construct that ethic from the Constitution and Bill of Rights in an effort to clarify the duties and roles that government officials assume when entering public service.

It is the thesis of this book that the US Constitution dictates a very particular approach to public service—that the legal philosophy animating the Constitution and Bill of Rights, properly understood, establishes certain ethical norms. The conduct of the government’s business must be consistent with those norms, which is true whether the “people’s business” is being conducted by government employees, or by for-profit or nonprofit contractors or surrogates. Indeed, we will argue that the requirement to adhere to the ethical norms established by our constitutional system extends beyond government actors, and includes those who have what we might call constitutional status, most notably the media, but also certain government contractors. Understanding the constitutional ethic requires us to begin the study of public administration with a review of political philosophy, because governments are an expression of the cultural and political beliefs of the people who created them. Unless we understand that culture and those beliefs, we will not have an adequate framework for understanding the legal and constitutional underpinnings of our government, and we will not be able to develop an appropriate philosophy and ethic of administration.

In this chapter, we will introduce and outline some basic concepts and ideas necessary for understanding the arguments and analysis to be found in the remainder of the book. These concepts grow out of an exploration of some basic questions about democratic governments in general. We will then examine the original historic, religious, and philosophic influences on the men who crafted the US Constitution and Bill of Rights, the evolution of the governing principles that animate those documents, and the general themes and subjects in the chapters that follow. Our American system of government is rooted in certain beliefs about the role of government. It is important that we identify and understand those beliefs; however, it is also important that we recognize the fact that these beliefs were not and have never been universally held.

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## American Constitutional Culture

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Before turning to a discussion of the ways in which our particular national history has influenced America’s contemporary legal and political culture, we need to define certain very basic terms that will be used throughout this book. Understanding that terminology, as we will use it throughout this book, is a necessary foundation for any detailed consideration of the American constitutional and administrative framework, and the constitutional ethic.

### What Is Government?

That seems like a silly question, but, when pressed, many otherwise functioning adults have difficulty defining what we mean by the terms government, the state,” or “the public sector,” terms we will use interchangeably throughout

this book. For purposes of the following discussions, the term “government” will refer to entities vested with the exclusive right to exercise *legitimate* coercive power. Governments were first established to keep the peace and to control the kinds of behavior that a given society believes to be inconsistent with public order. In the United States, the Constitution controls government behavior and limits its use of coercive power.

As we shall see when we consider outsourcing (what Americans sometimes like to inaccurately call “privatization”), the United States defines liberty in a way that makes it particularly important that its citizens are able to identify when and how government has acted. It can also be complicated to do so, first of all because we have government agencies operating at the local, state, and national levels, and second, because those government agencies are increasingly operating through third-party surrogates—contractors who deliver goods and services on behalf of the state. One way to determine whether an agency is public or governmental is to ask whether it is supported by our tax dollars and administered by people we elect or by people appointed by people we elect.

### What Is a Constitution?

Constitutions are different *in kind* from the laws passed by legislative bodies. They are statements of broad principles that govern and limit what kinds of laws legislatures may properly enact and what sorts of actions administrators can properly take. Performing that function requires that constitutional provisions be more general than legislatively created laws. A city council, for example, may pass an ordinance or other local law requiring that “There will be a stop sign at the corner of First and Main Streets” or “There will be no smoking in public places.” The state legislature can decide to increase the penalties for theft or to adopt daylight savings time. Such laws can be changed fairly easily if circumstances change or if enough members of the responsible legislative body decide to change them. Constitutions, however, are statements of *principles and values* that are intended to limit the kinds of laws that legislative bodies may enact and the kinds of actions that elected officials may properly take, and, as such, are more difficult to change. Statements of principles are also, again, by their very nature, less concrete and specific than legislative enactments.

The US Constitution, as we shall see in much more detail, has essentially two parts: The body of the document, which is primarily concerned with dictating the mechanics of our government, creating public offices, allocating responsibilities among them, describing how elections will be held, and so forth; and the Bill of Rights, *which lists things that government is forbidden to do*. That list is immensely important. It sets out broad principles that were intended to limit and constrain subsequent legislative and executive actions,

and thereby protect our individual liberties against both government infringement and popular passions. The US Constitution and the Bill of Rights provide the foundation for the constitutional ethic of public service, but obeying them is not the sum or total of what this ethic requires.

### What Is the Bill of Rights?

It may be helpful to think of the Bill of Rights as a collective moral code or code of proper government conduct. Its provisions grew out of the Founders' beliefs that the first task of government is to protect the natural rights and liberties of citizens as the Founders defined those rights. Understanding the Bill of Rights requires that we recognize its basic premise: that governments cannot and do not give us rights. Rather, those who devised our legal system believed that human beings are born with rights—that we possess these rights simply by virtue of the fact that we are human. The Founders believed the primary role of government was to protect these basic, “inalienable” human rights against interference from other citizens and, importantly, from government itself, *even when that government is acting on the basis of majority desires and preferences*. This last point is widely misunderstood; too few people realize that in America, the majority does not always rule.

### What Are Civil Liberties?

One consequence of our particular approach to government and our belief in a limited government state is a distinction between civil liberties and civil rights. *Civil rights* are statutory protections against discrimination, enacted by legislative bodies to regulate activities in the private sector. If you think you have been discriminated against by your private-sector landlord or by your employer at the local widget factory, your remedy would be provided by a specific statute or ordinance, not by the Constitution or the Bill of Rights. *Civil liberties* are the rights we have against the state, that is, against government.

Civil liberties disputes all revolve around finding the proper balance between the power of the state and the right of individuals to live as they choose. This is primarily—although not exclusively—a *procedural* issue: who shall decide? In other words, who has the authority to decide what books you read, what church you attend, what prayers you do or do not say, what political opinions you hold or express, or what neighborhood you live in? In our system, such questions (and many others) are left to the individual; government does not have either the power or the right to answer them.

Citizens frequently fail to recognize that the essential characteristic of our constitutionally protected liberties is this restraint on the government's power to decide certain matters, and they, therefore, fail to make a critical distinction: they fail to distinguish between the act of limiting government's power and the endorsement of a particular outcome. When a court refuses

to allow an agency of government to censor a particular book, for example, the court is not endorsing the content of that book. It is upholding the principle that citizens have a right to choose their own reading material, free of government interference. When courts refuse to allow official prayer in public schools, it is not because the judges are hostile to religion; it is because parents have a right to control the religious upbringing of their children, free of government interference. When courts refuse to allow police to conduct random searches, they are not acting out of a desire to protect criminals; they are upholding the rule that says government must have articulable, individualized suspicion to justify searches of a person or a property. The constitutional emphasis is upon *how* decisions are made and *who* gets to make them, rather than *what* decisions are made. In the American legal system, good ends cannot be used to justify improper means. The study of the Bill of Rights is the study of civil liberties.

### What Is Original Intent?

When courts apply the principles of the Constitution and the Bill of Rights, they look to the original intentions of the Founders. But original intent is best understood by asking the question: What were the *values* the Founders were trying to protect? Both the eminent legal scholar John Hart Ely (1980) and Supreme Court Justice William Brennan, among many others, have asserted that the Founders saw themselves, first and foremost, as guardians and protectors of individual liberty—that *liberty* understood as personal *autonomy* was at the very heart of the values they wanted to protect.

To say that the Bill of Rights rests primarily on the Founders' intent and their definition of liberty does not mean that constitutional principles should (or could) only be applied to questions or issues within their actual contemplation—that is, only questions that existed when the Constitution was ratified. For example, it is obvious that James Madison did not worry about pornography on the Internet; it is safe to assume that he and the other Founders could never have imagined the creation of something like the Internet, or the invention of radio, movies, or television, for that matter. But they certainly understood the dangers of government interference within the free exchange of ideas, whatever the mechanism through which those ideas were being communicated.

The freedom of speech that Jefferson, Madison, Hamilton, and the rest of the Founders wanted to protect was the right of each individual *to access and exchange information free of government interference*. Courts today must apply that governing principle to new mediums of communication, just as they are called upon to apply other constitutional values to situations far removed from the world of the Founders. Most, although certainly not all, constitutional scholars agree that applying settled constitutional *principles* to



new and emerging issues and technologies is consistent with and obedient to original intent.

On the other hand, giving judges free reign to decide cases based only upon their personal policy preferences would violate our understanding both of original intent and fidelity to the Constitution. Fortunately, political rhetoric notwithstanding, this is not common. The doctrine of *stare decisis*, which requires courts to decide cases in a manner that is consistent with applicable precedents, ensures that our laws change incrementally, and that each decision builds on prior understandings of Constitutional meaning and application. While it is unavoidable that judges will interpret Constitutional requirements based upon their own experiences and understandings, most of them work very hard to avoid allowing their own preferences and prejudices to dictate their rulings.

Why is original intent so important? After all, the world is changing very rapidly; why not simply fashion new rules as conflicts arise? Why do Americans believe it is important to be faithful to the original intent of those who established this nation? There are two reasons: First, fidelity to constitutional principles is an essential attribute of government legitimacy. If there is not an overarching framework that lawmakers and judges are bound to respect, the law at any given time will be nothing more than a statement of majority preferences at that particular time, preferences that can be reversed when a different faction takes power. The second reason is that fidelity to our founding documents is an important element of the rule of law. Adherence to rule of law, as we will discuss more fully in Chapter 2, is critically important to American democracy. It is what separates the proverbial “nation of laws” from the acts of arbitrary and capricious individuals. For the framers of our constitution, the rule of law was a reaction to the exercise of power by the monarchs of their day. Today, the rule of law is necessary to check both overzealous public officials and popular majorities (as we will discuss more fully in Chapter 3) who may be intent on suppressing the rights of minorities or unpopular groups.

### **What Is “The Rule of Law”?**

When we talk about “the rule of law,” we are referring to a system in which everyone, even government officials, is obligated to follow the same rules, a system in which no one is above the law. The Founders believed that the only alternative to the rule of law was the exercise of raw power by monarchs and dictators. John Adams famously described the system devised by the Founders as “A government of laws, not men” (1774). The rule of law requires both specificity and transparency, because citizens cannot be expected to understand and obey vague or overbroad enactments, or laws crafted in secrecy.

Helen Yu and Alison Guernsey (n.d.) noted that “Economic growth, political modernization, the protection of human rights, and other worthy

objectives are all believed to hinge, at least in part, on ‘the rule of law.’” In the most basic sense, the rule of law is a system that protects the rights of citizens against arbitrary and/or abusive use of government power.

In his book, *The Morality of Law* (1969), Lon Fuller identified eight elements that have been recognized as necessary to the rule of law. Fuller’s list included:

- Laws must exist and those laws should be obeyed by all, including government officials.
- Laws must be published.
- Laws must be prospective in nature so that the effect of the law may only take place after the law has been passed. For example, courts cannot convict people of crimes committed before a criminal statute making the conduct criminal was passed. We sometimes refer to this as the constitutional principle against ex post facto laws.
- Laws should be written with reasonable clarity and specificity, in order to avoid unfair or arbitrary enforcement.
- Law must avoid contradictions.
- Law must not require that people do the impossible.
- Law must stay sufficiently constant through time to allow rules to be formalized; at the same time, however, the legal system must also allow for timely revision when the underlying social and political circumstances (the reasons for the law) have changed.
- Official action should be consistent with the declared rule.

Needless to say, these elements are more easily listed than applied. But the task of government officials is to apply these elements. Simple legality or compliance with the law is not enough to ensure respect for rule of law. Nazis in Germany during World War II obeyed the laws of their regime, but few would be willing to argue that they respected the rule of law. The rule requires some “inner morality” or set of values (Fuller, 1969) for the law to be really respected. In other words, the law is to be obeyed not simply because it is the law, but because other factors compel obedience. This is what Fuller refers to as the law’s inner morality. The various chapters of this book are intended to inform that inner morality, to give it content by rooting it in our political culture (Chapter 2), our Constitution and Bill of Rights (Chapter 3), the concepts of representation and neutrality growing out of the First Amendment (Chapter 4), the Fourteenth Amendment (Chapter 5), and rules of administrative law and due process rooted in the Fourteenth Amendment (Chapter 6).

### **What Are Checks and Balances?**

Checks and balances foster the rule of law and are absolutely basic to the American constitutional structure. The most fundamental of our checks and

balances is the *separation of powers*—the assignment of executive, legislative, and judicial authority to distinct branches of government. The Founders wanted to avoid concentrating power in a single institution. The concept of checks and balances thus begins with the separation of powers, but it also includes a number of other elements that were built into our constitutional structure. Those who drafted the Constitution recognized that the central government needed enough authority to govern effectively. The fatal defect of the Articles of Confederation, which the Constitution replaced, had been the weakness of the federal government. The Constitution attempted to remedy that defect without endangering America’s newly won individual liberties, or offending the prerogatives of the existing states, which were jealous and suspicious of their central government’s powers. Accordingly, the entire system was designed to *check*, or limit, use of the greater authority delegated to the federal government and to reassure both the states and the citizens that their rights would be respected.

In addition to separation of powers, drafters of the new Constitution opted for representative, rather than direct, democracy. Representative government was intended to provide an important buffer between public passions and government action; the Founders believed that the process of electing representatives who would then cast the actual votes on public issues would encourage deliberation and compromise. *Federalism*, a structure within which federal and state governments each retained significant powers, was intended to act as a check on the authority of both. A *bicameral legislature*, consisting of a House of Representatives and a Senate, together with a requirement that laws be approved by both, was designed to further slow the legislative process and encourage deliberation.

These decisions about our constitutional architecture grew out of a view of human nature firmly rooted in the philosophy of the Enlightenment. Enlightenment philosophers believed citizens were entitled to personal autonomy—the right to make their own political, moral, and religious decisions. Unlike the early Puritans, they defined liberty as freedom from government interference with the rights of the individual, unless and until that individual was harming the person or property of a nonconsenting other. They believed that the proper role of the state was to protect individual liberty, not to impose “right” behavior. This role requires checks and balances, and requires mechanisms that, as Madison put it in *Federalist* No. 10, will set “faction against faction” and thus safeguard against the tyranny, which is unavoidable when too much power is concentrated in one person or government institution.

In the Founders’ worldview, protection of individual liberty and the creation of an educated and empowered citizenry were necessary to the cultivation of our true nature as human beings. Protecting liberty required the establishment of a state where no one would be above the law, and where

government would be accountable to its citizens, rather than the other way around. Checks and balances were intended to provide that accountability. Individual liberty, newly defined to require limits on state power, was also seen as essential to the emerging system of capitalism. It was no accident that belief in limiting state power first took root in a nation with no feudal history, composed primarily of bourgeois, property-owning small businessmen and farmers—people who understood the importance of property rights, and the dangers that arbitrary exercises of power posed not just to personal autonomy but also to private property and commerce.

Finally, the Founders believed that effective checks and balances would create the sort of open and accountable system that would be likely to attract people of integrity and substance to public service. Just as the new Constitution required that American trials be public in a way that European trials had never been, American government was to be public and accountable in ways that European monarchies had never been.

Ultimately, of course, a fair election process in which citizens (informed by a vigorous press) had the right to vote officeholders out of power was designed to be the most important check of all.

Understanding these terms, and the roots and consequences of America's constitutional choices, is essential to an understanding of the managerial and ethical obligations of today's public servants. We turn now to the roots of those choices.

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## Historic Antecedents

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It is impossible to understand American constitutional history without understanding the profoundly important role that religion played in the lives of those who first came to the New World. While Chapters 2 and 3 will develop that history in more detail, some preliminary comments are in order here.

The Puritans who first settled in the colonies were religious dissenters who conceived of America as “the Shining City on the Hill.” John Winthrop preached that God had made a covenant with the early American settlers, and later religious figures would reinforce the conviction of America's special relationship with Deity (Kennedy, 2007). For better or worse, that Puritan belief in American exceptionalism would become an indelible part of the American psyche. The American nation was called to be an example, an ideal, a light to other nations. But in order to fulfill that destiny, its citizens all had to live up to God's plan. In the Puritan imagination, the Exodus of the Old Testament was reimagined: England became Egypt, the Atlantic Ocean became the Red Sea, the American wilderness became their own land of Canaan, and the Puritans themselves became the new Israel. Americans became the “chosen people.” The worldview that developed out of the Puritan and Calvinist distinction

between the elect and the damned, between “us and them,” and good and evil, continues to shape American public policy in numerous ways, as we will see more fully in Chapter 2.

In his introduction to *The Founding Fathers and the Place of Religion in America*, legal historian Frank Lambert (2003) wrote:

In 1639, a group of New England Puritans drafted a constitution affirming their faith in God and their intention to organize a Christian Nation. Delegates from the towns of Windsor, Hartford and Wethersfield drew up the Fundamental Orders of Connecticut, which made clear that their government rested on divine authority and pursued godly purposes. . . .

One hundred and fifty years later, George Washington took another oath, swearing to “faithfully execute the office of president of the United States,” and pledging to the best of his ability to “preserve, protect, and defend the Constitution of the United States.” The constitution that he swore to uphold was the work of another group of America’s progenitors, commonly known as the Founding Fathers, who in 1787 drafted a constitution for the new nation. But unlike the work of the Puritan Fathers, the federal constitution made no reference whatever to God or divine providence, citing as its sole authority “the people of the United States.”

The Continental Congress had drafted, and the legislative bodies of the several colonies had ratified, a constitution for the new nation that would have been incomprehensible to their Puritan antecedents, the religious dissenters that Lambert dubs “Planting Fathers” to distinguish them from the Founding Fathers. A religious and intellectual paradigm shift had moved the country’s predominant, but by no means exclusive, worldview from that of a Christian nation to that of a secular republic in a mere 150-year period.

The change owed a great debt to the intellectual ferment caused by the new ideas coming from Europe, collectively called the Enlightenment. In the United States at that time, it was called the “new learning.”

It was probably inevitable that since the Enlightenment caused a new emphasis on reason and scientific method, it would be extended to questions about the nature of man and the proper form of his governing institutions. John Locke was one of the first to make that leap, and his philosophy was extremely influential in the colonies. Although his book *An Essay Concerning Human Understanding* (1690) is generally considered Locke’s greatest work, it was his *Two Treatises of Government* (1690/1980) that left an indelible imprint on the American Constitution.

Locke spent much of the first treatise demolishing arguments that had been advanced to justify the institution of monarchy; in the second, he

dealt with “life, liberty, and property.” Locke asserted that men are born free and equal, that they are entitled to the ownership of what they create (whatever man “mixes his labor” with is rightfully his property), and that a “social contract,” in which individuals give up certain freedoms in exchange for protection of their persons and property, is the true basis of legitimate government. A government based upon such a contract will necessarily have limited powers, Locke explained, because government’s primary purpose—the purpose that induces free individuals to enter into the contract in the first place—is to protect the liberty and property of its citizens. Its rightful powers will be limited to those necessary to achieve that purpose (1690/1980). In his book *A Letter Concerning Toleration* (1689/1990), Locke spelled out what the limited nature of government authority should mean for religion. “The business of laws,” he wrote “is not to provide for the truth of opinions, but for the safety and security of the commonwealth” (1689/1990). In an argument remarkably similar to one advanced earlier by John Milton in *Aereopagitica*, (1667), Locke concluded: “If truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her” (1689/1990).

The intellectual revolution ushered in by these and other Enlightenment thinkers (notably Hobbes, Montesquieu, Hume, Voltaire, and Rousseau) was reinforced by yet another movement that was gaining currency in the colonies: Common Sense Realism. Common Sense Realism (or the Scottish Philosophy, as it was often called), was a product of the Scottish Renaissance of the 18th century. Its first significant exponent in the New World was John Witherspoon, who came to the colonies from Scotland to become president of Princeton University. Adherents of Common Sense Realism were, like other Enlightenment figures, scientific and empiric. But they concentrated their empiric efforts on “clarifying the nature of man’s faculties.” They emphasized the agency of man; that is, they held that man is possessed of a “rational freedom” that empowers him to act (and not just be acted upon).

Because they did accord with the “common sense” of things, the Scottish philosophers produced, in short, precisely the kind of apologetic philosophy that Christians in the Age of Reason needed. Above all they provided a wonderful philosophical corollary to the one thinker who vies with Hume as Scotland’s greatest philosopher of the century, and who outdistanced them all in concrete influence: Adam Smith. (Ahlstrom, 1972)

Adam Smith’s *Theory of Moral Sentiments* (1761) and especially his *Wealth of Nations* (1776) were immensely popular in the colonies. Smith’s theory of markets, especially, bolstered a new emphasis on the individual and justified the importance of private property by demonstrating the connection



between personal incentives to productivity and the contribution that productivity made to the common good. His theory of the operation of markets, which he likened to an “invisible hand,” legitimized the competition that had long characterized commercial life and had come to characterize religious life in the colonies as well. Smith advocated a free market in goods and a free market in ideas, including religious ideas. In a country characterized more by dissent than orthodoxy, it is not surprising that such ideas found a willing audience.

It would be a mistake to think of the Enlightenment as a single phenomenon; it included literally hundreds of other thinkers, scientists, political economists, and philosophers, many of whom considered themselves staunch defenders of religious tradition. The Enlightenment was certainly not a doctrine nor a set of agreed-upon principles; rather, it was a new way of thinking about reality based in science and reason. (It also required the ability to live with a certain level of uncertainty and ambiguity—something that made many people as uncomfortable then as it does now.) As the new learning spread within the educated segments of colonial society, it generated genuine intellectual excitement and a rising optimism about man’s potential to achieve and to control his own fate.

The impact of the Enlightenment on colonial life cannot be understood as a one-way encounter between new ideas and an established and static culture. Americans had been living in a new country that, while overwhelmingly White and Protestant, was nevertheless characterized by far more pluralism than existed on the European continent. As one historian wrote:

The proliferation of religious sects, and a hands-off policy toward religious pluralism on the part of many of His Majesty’s governors, was a conspicuous feature of colonial society. Any pope or church-sanctioned king would have been taken aback by the thanksgiving services held in August, 1763 in New York City to commemorate the British victory in the French and Indian War. There is of course nothing unusual in the annals of human conflict about the victorious side thanking God. What was unusual, indeed unprecedented in a world of unquestioned union between church and state, was the religious diversity in evidence on the day of thanksgiving proclaimed by His Majesty’s colonial governor. The services were held in Episcopal, Dutch Reformed, Presbyterian, French Huguenot, Baptist, and Moravian churches. Even more extraordinary was the participation of Congregation Shearith Israel, representing the city’s small community of Sephardic Jews. (Jacoby, 2004, pp. 14–15)

Furthermore, Protestantism itself encouraged a much greater emphasis on the individual and the “here and now” than Catholicism had. There were several

reasons for this. The European Reformation had broken with the Catholic belief that morality must be nurtured collectively, within the family and especially within the church; instead, Protestantism encouraged the radical new notion that every man was his own priest. This spiritual individualism reinforced a still potent strain of Renaissance humanism that had emphasized intellectual individualism. Because Protestantism also had deeply anticlerical roots, seen especially in its rejection of the pope, it was congenial to the growth of a much broader antiauthoritarian spirit. In Europe, substantial support for the Reformation by the newly vigorous middle class had reflected the merchants' growing impatience with religious constraints on competition, trade, and commercial activity. All of these elements of the Reformation foreshadowed the competitive pluralism that would later thrive in the colonies, half a world away from the conformity-enforcing presence of kings, popes, and cultural traditions.

The early Puritans had defined religious liberty as freedom to establish the "correct" religion. By the time the American Revolution dawned, however, both religious colonists and their more secular counterparts were much less likely than their forebearers to think of human liberty as the Puritans had, as "freedom to do the right thing" as those in authority defined the "right thing," and much more likely to accept the Enlightenment belief that liberty meant the right of people to act upon the basis of their individual conscience, free of the interference of government, at least so long as they did not thereby harm their neighbors.

The growth of literacy in the colonies, and the burgeoning interest in science and the "new learning" (at least among members of the more privileged classes), led to the emergence of new religious thought, reflected in Deism, Unitarianism, and even Freethought, the latter best reflected in the works of such American Revolutionary heroes as Thomas Paine and Ethan Allen. The Founders were not only well educated, they were also men of considerable intellectual gifts and accomplishments. In addition to his other talents, Benjamin Franklin was a noted scientist, whose discovery that lightning was electricity that could be diverted by the simple expedient of a lightning rod was only one of a number of discoveries that recast the way the colonists perceived natural phenomena not as acts of God, but as part of an increasingly comprehensible natural world.

Franklin's well-known, yet unorthodox religious beliefs were centered on questions of morality and virtue, rather than theology. In this, he was similar to Thomas Jefferson, who denied the deity of Jesus and produced his own version of the Bible, edited to exclude everything but Jesus's moral teachings. Jefferson was a Deist (or, as his political opponents preferred to describe him, an infidel and godless atheist) who wrote in his *Notes on the State of Virginia* that:

[T]he legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg. (Jefferson, 1781/1853)



It is a mark of popular opinion in the colonies at the time that the *Notes on the State Virginia* circulated for some 20 years without causing any particular stir; it was only during Jefferson's later campaign for the Presidency that his "infidelity" became an issue.

James Madison was an even more passionate advocate of religious and civil liberty than Jefferson; Madison believed that religion and government were separate realms, with separate jurisdictions: that religious observance and belief must be free of government interference, and that government must be equally free of religious interference. In a famous passage, Madison wrote:

If Religion be not within cognizance of Civil Government, how can its legal establishment be said to be necessary to Civil Government? What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have seen the upholding of the thrones of political tyranny; in no instance have they been seen the guardians of the liberty of the people. Rulers who wish to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure and perpetuate [liberty] needs them not. (*Federalist* No. 62)

In 1791, Madison proposed that the Bill of Rights specifically prohibit states from passing any law interfering with freedom of conscience, an extension of the application of the First Amendment that would not become a reality until after the Civil War, when passage of the Fourteenth Amendment began the process of applying the Bill of Rights to the states.

Thomas Paine was probably the most radical of all the Founding Fathers. During his early years as a tax collector in England, Paine had argued that forcing Jews to pay taxes while depriving them of the right to vote violated the natural rights of man, a highly unorthodox position at the time, and lobbied Parliament for salary increases for his poorly paid fellow tax collectors. Not surprisingly, he was fired. Benjamin Franklin convinced Paine that the colonies would be more receptive to his ideas and helped Paine resettle in America, where his very first publication was a denunciation of slavery. *Common Sense* (1776), with its attack on monarchy and its argument for American independence, made his reputation; *The American Crisis* ("these are the times that try men's souls") (1776–1783), written during the Revolutionary War, was used by General Washington to rally his dispirited troops. To suggest that *The Rights of Man* (1791) and *The Age of Reason* (1795), published after the American Revolution, were less well received would be a considerable understatement. *The Age of Reason* in particular created many

enemies for Paine; in it, he attacked all religious beliefs that could not be justified through science and reason.

The views of these Founders certainly did not reflect those of a majority of the colonists, although Deism and similar “heretical” beliefs like Unitarianism were far from unusual. On the other hand, their views on the necessity of separating church and state were widely shared by devoutly religious Evangelicals and other dissenters, although for very different reasons. What may seem surprising is that the omission of any mention of God from the Constitution apparently occasioned little or no controversy at the Constitutional Convention. Two politically persuasive reasons have been advanced for this relative lack of concern: First, the new constitution did not interfere with the existing religious establishments of the various states; and second, the drafters were preoccupied with the need to deal with the highly contentious issues of slavery. The one proposal about religion to receive support was offered by Charles Pinckney, who suggested the phrase that eventually became part of Article VI, “but no religious test shall ever be required as a qualification to any office or public trust under the authority of the United States” (Witte, 2000).

Only one delegate objected to the motion—not because he favored religious test oaths, but because he thought it “unnecessary, the prevailing liberality being a sufficient security against such tests.” (Witte, 2000)

The issue of the Constitution’s “godlessness” did arise during the subsequent state legislative debates over ratification, and the drafters were roundly criticized both for the omission of any reference to God and for the prohibition on religious tests for public office. A speaker at the Massachusetts convention warned that unless the president was required to take a religious oath, “a Turk, a Jew, a Roman Catholic, and what is worse than all, a Universalist, may be president of the United States” (Jacoby, 2004, p. 29). Nevertheless, efforts to amend the Constitution by adding religious references failed, and the Constitution was ratified subject only to the promise that the first session of the new Congress would prepare a Bill of Rights.

The congressional debates over the language of what is now the First Amendment of the Bill of Rights, especially the religion clauses, included consideration of at least 20 drafts, and the recorded discussions make it clear that, whatever ambiguities remain in the final version, the intent was to remove religious matters from the jurisdiction, or as Madison might have put it, the “cognizance”, of the federal government. Drafts stating simply that there would be “no state Church” were thus deemed inadequate.

The determination to place religion beyond the scope of the new government’s powers was undoubtedly based upon the delegates’ genuine conviction that such a separation was in the best interests of both church and state. But

there were equally compelling political reasons for omitting religion from the new nation's governing document and for excluding religious establishment from the new government's powers. It is important to remember that the Founders were not a group of elitist intellectuals who had somehow managed to become entrusted with devising the constitution of a new country. However educated, propertied, and privileged the majority of them may have been, most were also seasoned and savvy politicians, aware of the immense difficulties of unifying the colony's contending philosophies, factions, and interests into a single nation. Religion was a divisive issue; any position adopted to mollify some would incur the wrath of others. "Fractured by pluralism and enflamed by sectarianism, Americans were unlikely to agree upon any federal establishment, no matter how broadly stated" (Lambert, 2003, p. 14).

The Founding Fathers embraced Locke's theory of limited government not because they were persuaded of its philosophical superiority, although most undoubtedly were, but also because it seemingly solved the central political problem of pluralism. A government limited in scope to those issues that absolutely had to be decided collectively was a government least likely to incur the hostility of citizens who deeply disagreed about those matters of "ultimate concern" addressed by religion. As reasonable as that premise might have been, the subsequent history of the country would be characterized in large part by the continuing tension between those citizens who see America as a Christian nation and those who accepted the Founders' decision to create a secular republic.

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## A Limited, Secular State

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The solution adopted by the Founding Fathers was consistent with other elements of their liberal democratic worldview. By limiting government to secular, civic concerns, and prohibiting its interference with individual beliefs, they effectively "privatized" religion. Such privatization did not remove religion from the "public square," but it did remove it from the jurisdiction of the public *sector*—that is, from government. (Churches and other voluntary associations, however "public," are part of the private sector.)

The adoption of a secular constitution has had a number of notable consequences, among them a not insignificant amount of social conflict. This is because the liberal democratic solution devised by those who drafted the Constitution was based firmly on an Enlightenment worldview, despite the fact that a significant number of citizens had not yet adopted that worldview, and have not done so since. A number of others have adopted selected aspects only. A constitutional system that separated church and state thus set up a conflict that continues to this day between the Puritan impulses of the Planting Fathers and the libertarian principles of the Founding Fathers. The

Puritans believed that building the “City on the Hill” required the support of civil authority, and many Christian denominations continue to embrace all or part of that Puritan worldview. Many others, especially the more liberal Protestant denominations, incorporated or embraced Enlightenment worldviews, and adapted their theologies accordingly.

Any effort to understand later American public policy disputes and our ongoing arguments about the role of the state must begin with the particularities (and peculiarities) of the constitutional system devised by the Founders, a system in which the role of government and the scope of state power are the central constitutional concerns. Public policies in the United States are constrained by a constitution that incorporates assumptions—built into the very fabric of that constitution, but never universally held—about individual rights and limits to the authority of government. Primary among those assumptions is the belief that rights are negative; that is, unlike most other western democratic countries, the American legal system has never guaranteed so-called affirmative rights. Any entitlement of citizens to health care, adequate housing, education, or social welfare is a creation of statute (or occasionally, state constitutional provisions) subject to revision by a simple act of Congress. Instead, in the US legal system, fundamental rights are understood in the classic Enlightenment construct, as limits on the reach and authority of the state. The Founding Fathers who crafted our Constitutional framework “saw constraining discretionary power of government officials—the central focus of the rule of law—as essential to the society they hoped to create” (Cass, 2001, p. xii).

It is important to understand that both the Federalists and the Anti-Federalists argued from Enlightenment worldviews. The early arguments between them over the necessity of a Bill of Rights had nothing to do with the importance of individual rights, nor with this particular understanding of the nature of those rights. The dispute was tactical: Federalists believed that, since the government they had created had only the powers specifically delegated to it by the Constitution, it lacked any power to infringe upon the “inalienable” rights of its citizens, and thus a Bill of Rights would be superfluous. Federalists like Alexander Hamilton also argued that such an enumeration of rights would be dangerous, as any right not specifically enumerated might be deemed to be unprotected, an objection that prompted the inclusion of the Ninth and Tenth Amendments.<sup>1</sup> (The Ninth Amendment is quite straightforward: “The enumeration in the Constitution, of certain rights, shall not

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<sup>1</sup>Sometimes called the “rights and powers” amendments, the Ninth and Tenth Amendments emphasize that the omission of a right—the fact it is not specifically enumerated—is not to be taken as evidence that the people do not retain it, and that the federal government has only those powers that are specifically delegated to it. Other powers remain with the states or the citizenry.

be construed to deny or disparage others retained by the people.” This language has not kept Justices like Antonin Scalia from arguing that a right to privacy is not constitutionally protected because the word privacy is not specifically mentioned.) The Anti-Federalists, on the other hand, believed it was in the nature of governments to acquire powers not originally contemplated. They therefore felt that it was prudent to spell out specific limitations on the jurisdiction and authority of the state.

The vast majority of the colonists agreed with the Anti-Federalist argument, and the Bill of Rights was ratified in order to function as a libertarian “brake” on the power of popular majorities to authorize actions by government that would infringe upon individual rights. This Enlightenment focuses upon the proper role of a limited state, however, runs headlong into more Puritan desires to ensure the morality of one’s neighbors.

The extent to which passage of the Fourteenth Amendment in the wake of the Civil War changed the way in which America defined these Constitutional principles is also not widely understood. The Fourteenth Amendment, by its terms, extended to the inhabitants of the states the “privileges and immunities” of citizenship, and it prohibited the states from denying to persons within their respective jurisdictions “the equal protection of the laws.” The equality protected by the Fourteenth Amendment is narrower than equality as described by most political philosophers; consistent with the original constitutional architecture, it is limited to the right of similarly situated citizens to be treated equally by their government.

Scholars like Theodore Lowi (1996) have argued that it was the passage of the Fourteenth Amendment and the ensuing application of the Bill of Rights to state and local government that ignited what are sometimes called the “Culture Wars,” the widespread conservative revolt against liberal Enlightenment principles. In this analysis, so long as local communities had been able to use state and local laws to ensure conformity with their religious and moral worldviews, the rules governing a largely distant federal government were not particularly troublesome; accordingly, relatively few conservatives made efforts to influence the central government, preferring instead to focus on state and local issues. As Lowi put it,

There was never a shortage of conservatives. But going to Washington would have been a waste of time for them. You do not go to Washington to change the divorce laws or to clarify adoption or custody of children. You do not go to Washington to tighten compulsory education requirements or to regulate sexual practices or abortion and the status of women. (p. 129)

When the Bill of Rights was applied to state and local governments, conservatives were prevented from using local laws to require that their neighbors live

in accordance with their beliefs. The resulting outrage generated a significant political backlash.

So-called culture war clashes between the Puritan and Enlightenment worldviews have intensified as government at all levels has expanded into areas that were previously entirely private. As government agencies and regulations have become more pervasive over the years, the ways in which those agencies conduct business and the ways in which they use their power to shape law and institutionalize value judgments becomes subject to very divisive and polarizing debates.

Perhaps paradoxically, one feature of the Enlightenment emphasis on markets and individual autonomy has been enormously beneficial for American religion. Sociologists tell us that the voluntary nature of affiliation, and the encouragement of a religious “marketplace,” has contributed substantially to the vigor of American religiosity (Kennedy, 2007). (America is an “outlier” among western industrialized nations with respect to its robust levels of religious belief and denominational affiliation.) Membership in a church or synagogue (there were no mosques or Buddhist temples at the time) stood at less than 17% when the Revolutionary War ended, and some estimates put it considerably lower. In the nearly two and half centuries since, the proportion of Americans who formally affiliate with a religious community has risen steadily. Religiously affiliated voluntary groups are prominent in the nonprofit sector. Americans self-report high levels of belief in God, prayer, and other indicators of religious salience (Norris & Inglehart, 2005; Paul, 2005). The importance of religious constituencies in politics is the subject of academic dissertations and talk show shouting matches. Whatever else one might say about the American Constitution and religion, it would be hard to argue that the secular character of our national charter has caused religion to become irrelevant.

The voluntary nature of American religion has also enabled the enormous pluralism that is perhaps the most significant feature of our religiosity. If religious expression in the United States is robust, it is anything but monolithic. The earlier diversity within Protestantism has become diversity characterized by thousands of different sects and religious traditions from all over the world. As a result, contemporary differences in worldviews are not between “people of faith” and secular Americans, no matter how insistently some conservative religious spokespeople make such an assertion.

The American religious and ideological marketplace is just that—a marketplace, characterized by a multitude of religious beliefs, cultures, and traditions that are often in conflict. If a large majority of Americans are religious—and that certainly seems to be the case—it is equally true that no majority exists for any particular religious doctrine or worldview. The vitality and multiplicity of beliefs and practices that describe American religion in the early 21st century



are to a significant extent a product of the 18th century Enlightenment constitutional system bequeathed to us by America's Founding Fathers.

It is impossible to understand contemporary American policy debates, whether religious or secular, without recognizing the conflicting Puritan and Enlightenment worldviews that shaped this country's earliest history, and, to important and varying degrees, continue to shape our contemporary policy debates. While we will argue that the constitutional ethic defines an essentially secular role for the government and public officials, it is also a role that necessitates respect for religion. This is true both in terms of how the government interacts with third parties but also how it treats its own employees. However, as will be discussed in both Chapters 7 and 9, the use of private, nonprofit, and religious or faith-based organizations to deliver government services challenges the relationship between government and religion. The government certainly cannot tell members of a religious organization what to believe or how to pray. But when, for example, faith-based organizations contract with government, and accept tax dollars to administer or implement government programs, public officials have an affirmative obligation to place certain limits on the ways in which that money is used. Certainly, they can limit the ability of such organizations to proselytize during the conduct of contractual governmental duties. When faith-based organizations are discharging governmental responsibilities they too must adhere to the constitutional ethic.

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## **Constitutional Philosophy and Public Administration**

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Understanding the philosophic roots of the US Constitution is critical to the enterprise of public management, because constitutions are the original declarations of, and frameworks for, public policy. They embody a society's most fundamental assumptions about law, legitimacy, and government power. They dictate the ways in which government officials formulate issues and address problems, and they effectively foreclose exploration of certain potential solutions to those problems. For example, the US Constitution does not permit American officials to entertain martial law as the "solution" for high burglary rates, nor does it permit government censorship as the "solution" for too suggestive music lyrics. It does not permit us to reduce welfare rolls by refusing to feed Hispanic children or to combat pollution by appropriating privately owned property. The Constitution controls how we choose our public policies and how we proceed with their implementation.

But constitutions do more than simply circumscribe and prescribe the arena within which a particular public policy debate may occur. Familiarity with constitutional principles also provides a common language that facilitates meaningful democratic dialogue. Students need not agree with every choice

made by the nation's founders, but they do need to understand what those choices were, why they were made, and why they matter today. Without that essential framework, public policy issues cannot be properly framed or clearly understood; they will tend to be viewed as isolated and unconnected problems. With constitutional literacy comes recognition that certain underlying principles will be as applicable to discussions of welfare reform and land use as they are to school choice, public health, or gay rights.

The very term “public affairs” implies the existence of both public and private realms. Different constitutional systems define those spheres differently. In the United States, we have drawn a distinction between the public sector, by which we mean government and its agencies, and civil society, by which we mean the multitude of nongovernmental, voluntary communal and religious associations through which individuals may act and connect. That distinction is a crucial element of most policy decisions because the concept of state action is central to understanding our constitution. It grows out of the fact that the US Bill of Rights limits *only* the government; as a consequence, we must ask different questions when we are proposing government interventions than when we are contemplating other kinds of collective social action. It is arguably educational malpractice to confer degrees in public affairs on students who lack knowledge of and appreciation for the systemic underpinnings of the civic enterprise. By definition, public management not rooted in the US Constitution lacks legitimacy.

Another way of understanding this is to consider that, in important ways, America is more an *idea* than a place. Ours was the first nation to be based, not on geography or ethnicity or conquest but upon a theory of social organization. That theory, and the values that informed it, became the basis of our constitutive documents: the Declaration of Independence, the Constitution, and the Bill of Rights. The American idea is not monolithic, and it is constantly contested and evolving, but it has real content and rests upon considered normative judgments about the conduct of public affairs. Trying to teach public administration and ethics without constant reference to those foundational judgments would be like trying to teach reading without using the alphabet.

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## The Constitution in Changing Times

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Over the past decade, American arguments over the meaning and application of our Constitution have been particularly acrimonious. The administration of George W. Bush engaged in a number of activities that a great many people believed to be contrary to both the US Constitution and the rule of law. Bush, and especially Vice President Dick Cheney, defended those actions, especially rendition and “enhanced” interrogation of those they designated as “enemy



combatants.”<sup>2</sup> Critics of these actions were particularly alarmed by the lack of due process involved; individuals were arrested for a variety of reasons, some seemingly quite tenuous, and shipped to Guantanamo Bay in Cuba, where the administration had established a prison that lay conveniently outside the jurisdiction of American courts. Prisoners were denied even the opportunity to demonstrate innocence, such as if they had been wrongfully arrested or had been mistaken for someone else.

Most legal scholars have condemned these and similar actions, and have severely criticized those lawyers in the Bush Justice Department who issued memoranda purporting to find legal justification for the measures. That criticism illuminates two issues of critical importance to people in public service. First, what kinds of behavior are consistent with a constitutional ethic? And second, what do we do when someone has violated that ethic?

Brian Tamanaha is a scholar of the rule of law, who has written extensively about the meaning of that term, and his analysis of the ethical issue involved in the torture memos is cogent.

There is a large and critical difference between purely instrumental legal analyses designed to produce a desired result *versus* an even-handed effort to discern what the law requires. The former seeks to achieve an objective (shaping the legal analysis accordingly), whereas the latter attempts to figure out what the law *is*. (Tamanaha, 2008)

It seems clear that John Yoo, who served as White House Legal Counsel for President George W. Bush and who authored numerous memoranda authorizing the Bush administration’s response to the September 11, 2001 terrorist attacks and the War on Terror, breached his ethical duty by shaping the legal analysis to achieve a result desired by those in power. The more difficult question, however, is the second one.

After the Bush administration left office, the anger over these memoranda and the ethical lapse they represented created a thorny issue that continues to be debated. What, if anything, should be done to punish John Yoo and the administration that had violated US Constitutional norms and the rule of law (not to mention the Geneva Conventions to which America is a party)? One side argues that letting bygones be bygones makes a mockery of the rule of law and the principle of accountability. The other side argues that punishing those who made these decisions runs the risk of criminalizing political disagreements protected by the First Amendment.

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<sup>2</sup>Rendition refers to the practice of sending purported enemies to foreign countries, where US laws do not restrict the sorts of measures that can be used to extract information—countries, to be blunt, that torture prisoners.

The case of John Yoo has been particularly contentious because Yoo was responsible for the legal opinions authorizing enhanced interrogation (what many call, with much justification, torture). He was also the primary proponent of a theory called the unitary executive, a theory that gives the executive branch much greater powers than the legislative and judicial branches—far more extensive powers than most lawyers and scholars believe the Constitution confers. His legal opinions thus gave the administration “cover” to pursue activities that had previously been seen as inconsistent with constitutional norms. Whether these opinions should be considered professional misconduct (and thus grounds for disbarment) was the subject of an internal inquiry by the Department of Justice, which ultimately determined that they constituted “flawed legal reasoning.” That decision has been bitterly criticized.

While Yoo may have escaped disbarment, he has not escaped significant social and academic disapproval. After leaving the Justice Department, Yoo returned to San Francisco as a tenured professor at the Boalt Hall School of Law at Berkeley, to the consternation of many students and faculty members at that institution who felt that the association of Yoo with the law school tainted its reputation. They wanted Yoo’s employment terminated. In August 2009, a letter to members of the academic community from the president of the American Association of University Professors (AAUP), contained the following description of the issues complicating efforts to fire Professor Yoo:

The complex character of the Yoo case has made it exceptionally controversial on campus, but some clarity is possible. A tenured faculty member cannot be dismissed for his political views. One also hears the argument that Yoo has to be held harmless for extramural statements made, moreover, when he was on leave working for the Bush administration. But extramural statements that bear on a faculty member’s areas of professional competence are subject to review. If you write an article for a newspaper that shows you are ignorant about your academic field you are vulnerable, tenure or not. Of course in Yoo’s case, the arguments in his memos justifying torture, intellectually irresponsible or not, are not the entire issue. It is their purpose, their use and their effect that may put him at risk. Thus people have argued that the brutal impact of his memos on the lives of real people bear on his moral authority as a faculty member. His advocacy activities on behalf of the Bush administration, his participation in potential war crimes, are an affront to human decency. Yet had Yoo published his views in scholarly essays at a time when no US sponsored torture was taking place, his legal opinions might have been seen as more absurd than sinister. Yoo’s case is thus inescapably moral and political.

What is so challenging about Yoo's case is that it raises new—and potentially dangerous—grounds for determining what activities and contexts bear on defining and establishing professional fitness. (Nelson, 2009)

As difficult as the academic issues about scholarship and tenure undoubtedly are, the consequences of pursuing war crimes charges against administration officials who authorized behaviors inconsistent with the Geneva Conventions—as several individuals and organizations have urged—would be even more so. President Bush undoubtedly believed that what he was doing was necessary to protect the country. If we second-guess him, if we turn his lack of constitutional and managerial competence into a crime, will future presidents hesitate to take decisive action in a crisis for fear of later prosecution? On the other hand, if war crimes were indeed committed and we say, in effect, “boys will be boys” what message does *that* send to future presidents? What harm have we done to the rule of law?

Anyone who suggests that there are easy answers to such questions is missing the point.

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## What Comes Next?

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In this chapter, we have introduced (in an admittedly superficial manner) the themes that we will explore in much greater detail in the chapters that follow. Those explorations are intended to illuminate the central thesis of this book, and it is only fair to make that thesis as explicit as possible. It is our intention to *define a constitutional ethic for public service in a world that looks nothing at all like the world in which our Constitution was drafted*. We will explore how public administrators can maintain fidelity to core American values at a time when “the facts” have profoundly changed and can be expected to continue to change at an ever more accelerated pace.

In short, in what follows, we will attempt to answer the question: How do we define a Constitutionally faithful approach to administrative ethics and practices for the next century?

We have divided this book into three parts. Part One, “Defining the American Constitutional Ethic,” includes the chapter you are reading, a chapter on American political culture, and a chapter delving more deeply into our Constitutional foundations. It is impossible to understand the issues confronting public service today without a grounding in the roots of our contemporary American culture. The term “political culture” is shorthand for the attitudes and beliefs of the American people, attitudes and beliefs that are by no means stable across constituencies or regions. American pluralism takes many forms—racial, religious, ethnic, ideological and political, regional—and

it changes from generation to generation. While achieving a satisfactory description of that culture remains elusive, it will be important to at least set out its various manifestations and antecedents.

When we examine political culture in America, we sometimes fail to recognize the profound effect on that culture—or, more accurately, those cultures—of our Constitution and Bill of Rights. Particularly in a country as heterodox as ours, a country where no ethnicity or religion commands a majority, the importance of our legal and governmental system in forging a common citizenship is amplified. In Chapter 3, we will delve much more deeply into the history and philosophy of our constitutional system, the ethical norms it has established and the constitutional culture it has nourished.

In Part Two, “Applying the Constitutional Ethic,” we will deepen our exploration of the Constitution’s legal and ethical requirements of America’s public servants. In Chapter 4, we will look at the “Constitution at Work.” How does the language of the document translate to the everyday experience of public administrators who must make it work? What are the issues and practical dilemmas to which our constitutional ethic must be applied? In addressing these questions the chapter takes seriously the notion that public officials are to serve the public good. But what does that mean? The chapter explores this question by examining what it means to represent the people, to be neutral or unbiased, and perhaps most importantly, what the concept of the “public interest” means in the context of performing one’s duties while respecting the constitutional ethic. In Chapter 5, we take a particularly hard look at the constitutional meaning of equality. It is often said that a belief in equality is *the* salient characteristic of American society. What does that mean? Is it true? If it is true that Americans do hold the value of equality above many of our other values, how do we measure our performance against our devotion? What does a constitutional ethic of equality require? For that matter, how do we define “equality” for constitutional purposes? Some societies make an effort to provide citizens with equal, or roughly equal, outcomes. We refer to those societies as egalitarian. Our American notion of equality is different; our Founders explicitly limited the concept to “equality before the law.” In Chapter 5, we will explore that concept more fully, discussing what equal treatment before the law means for the purposes of the American constitutional ethic, and, perhaps just as importantly, what it does not mean.

In Chapter 6, we ask the obvious question: “What is the Right Thing to Do?” How do public servants, pledged to a particular constitutional regime, make ethical decisions? This chapter looks at a variety of issues affecting and influencing how government officials actually perform their duties. It discusses how administrative law and rules define the constitutional ethic, and it also explores how problems such as conflicts of interest and gifts compromise the

ability of public officials to act. Conversely, as supplements to the constitutional ethic, the chapter argues that personal ethics and whistle-blowing are important also in promoting and defining appropriate conduct for government officials.

The third and final section of this book is “The Constitutional Ethic in the 21st Century.” We can learn about our country’s historic and philosophic roots and antecedents, and we can explore and debate our contemporary understandings of the constitutional ethic. But in a rapidly changing world—a world that is globalizing at an exponential rate and facing pressing issues that are planetary in scale—the critical issue is how we translate the lessons of the past to cope with the crises of the present and near future. This is a country that depended for much of its history on the protection afforded by two oceans. Our entry into a networked, connected world is relatively recent, and our experience with global legal and financial challenges is still scant.

Of course, globalization is not the sole arena that is evolving. Much of the social landscape within the United States is also undergoing dramatic change. We explore one of the most constitutionally consequential of those changes in Chapter 7, “Public and Private.” As we have already seen in this introductory chapter, American constitutional law is heavily dependent upon our ability to identify government action. But over the past few decades, the boundaries between public and private—the lines between public organizations, nonprofit organizations, and private, for-profit organizations—have become blurred, as governments have contracted out for services, and corporations that might formerly have operated as for-profit entities have chosen instead to do business as nonprofits. What does this phenomenon, often referred to by the shorthand “sectoral blurring,” mean for a constitutional ethic of public service?

In Chapter 8, we take up yet another element of change: the morphing of the media and the implications of truly profound changes in the way Americans learn about the activities of their elected officials and public servants. The media, or the press, to use the constitutional language, has a time-honored and extremely important role to play in American governance. The Founders conferred a special constitutional status on the press, because they believed in the importance of its watchdog function; if citizens are to rule themselves, the theory goes, they need information about the way their government is performing. Allegations of media bias are probably as old as the Republic, but the role of the press has nevertheless been seen as critical, not just so that citizens can keep tabs on public officials, but so that public officials can communicate with those they serve. What happens to the time-honored role of the media in an era when traditional media outlets, newspapers, magazines, the evening broadcast news, face overwhelming competition from talk radio, broadcast

punditry, blogs, and Internet rumors? What happens when Americans can choose their news and insulate themselves from information that does not fit their preferred worldview? When we no longer inhabit the same reality,<sup>3</sup> how do public servants communicate? How do they make rational policy?

Finally, Chapter 9 asks and attempts to suggest answers to the question: “Where do we go from here?” This chapter examines many of the challenges that public administrators face in what we increasingly call a postmodern world. It is a world of blurred boundaries between public and private, and across economic sectors. It is a world that increasingly challenges traditional political and cultural categories. In effect, the chapter asks you to think about the viability of the constitutional ethic in a world that is increasingly multi-sectional, multicultural, and multinational. While the chapter concludes by arguing that we still need to respect the constitutional ethic of public service, it may need to be modified to reflect a world that is over 200 years removed from the world the Founding Fathers occupied in 1787.

In each chapter, we conclude with a case study, chosen in an effort to make the issues and themes more concrete. For this introductory chapter, we explore the controversial use of signing statements by the Bush administration.<sup>4</sup> This case study highlights many of the issues raised in this chapter and provides a basis of discussion for the remainder of the book.

### **CASE STUDY** Presidential Signing Statements

One of the Constitutional concerns raised by practices of the Bush administration was the president’s use of signing statements. In order to understand that issue and the reasons for concern, a bit of background is necessary.

As most high school students will attest, government class textbooks invariably include a section explaining how a bill becomes a law. The process, reduced to essentials, is as follows: Congress drafts legislation that is

<sup>3</sup>During the very contentious debate over healthcare reform, a woman at a town hall meeting demanded that Vermont Representative Barney Frank justify his support of “this Nazi proposal.” Rep. Frank’s response—“Madam, on what planet do you spend most of your time?” was widely quoted, undoubtedly because so many of us have had the impulse to say something similar. Increasingly, Americans are constructing and occupying their own alternate realities. To suggest that the situation is problematic for our ability to govern ourselves would be an understatement.

<sup>4</sup>Although it is too early for a definitive conclusion, at this point (8 months into the Obama administration) there are signs that President Obama will continue this constitutionally troubling practice.

then sent to the president. If the president vetoes it, it fails, unless Congress has enough votes to override the veto. If the president signs the legislation, a press release is issued and the bill becomes law. This process is required under our system of separation of powers; the legislature is vested with the authority to make the laws. The executive branch has only the veto power, which can be overridden, and the obligation to execute, or enforce, those laws that pass. The judicial branch can neither enact law nor enforce it, and judges are vested with the obligation to say what the law means in the context of a case or controversy. It is also the job of the judicial branch to examine statutes passed by legislatures to ensure that they are consistent with the Constitution and to invalidate those that are not. As noted previously in this chapter (and in every high school government textbook), this separation of powers is a critically important part of our Constitutional architecture and our system of checks and balances.

During the administration of President George W. Bush, that cornerstone of civics education became the center of a constitutional storm.

As the media often noted, during the first 7 years of his presidency, President Bush seldom used veto power. Instead, his administration avoided the risk that Congress might override such a veto by the creative use of signing statements. When Congress passed a bill over President Bush's objections, he signed it into law; however, along with the usual (publicly distributed) press release, he also (and with much less fanfare) issued his own "Constitutional interpretation" of the legislation, specifying areas he believed to be unconstitutional and thus unworthy of being enforced by the executive branch. Professor Phillip Cooper found that President Bush had used signing statements in this fashion over 500 times during his first term alone (2005); a later report by Charlie Savage in the *Boston Globe* put the number at over 750, more than all of his predecessors combined (2006).

The president takes an oath to uphold the Constitution, and if he or she believes legislation is unconstitutional, he or she is certainly entitled to say so. In the past, lacking a line-item veto, presidents have used signing statements in this way when a questionable measure has been attached to an otherwise important bill. More recently, particularly during the Reagan administration, such statements were used as a not-so-subtle signal to federal agencies about how their boss, the president, wanted the law to be interpreted and applied.

President Bush arguably took signing statements to a new level. He used them to signal and justify his intention not to enforce provisions of duly enacted laws with which he disagreed. Critics accused the president of turning the statements into functional equivalents of line-item vetoes, albeit with

*(continues)*



important differences: The tactic of using signing statements deprived Congress of its Constitutional right to override and kept most of the media (and most voters) from noticing.

One example of this use of the signing statement, and the one that brought the new tactic to public attention, was the high-profile McCain Amendment, outlawing torture of enemy combatants and others detained in the conduct of what the president called the War on Terror. Despite the fact that the bill had been strenuously opposed by his administration, President Bush signed it. However, he also issued a statement expressing his intent to construe the law in a manner consistent with his preferred interpretations of both presidential authority and limits on judicial power. In other words, he served notice that he would obey the law only when, in his sole opinion, he believed it constitutionally appropriate to do so. As Professor Neil Kinkopf wrote:

The assertion of a presidential power to refuse to enforce a law stands in deep tension with the Constitution. As the Supreme Court has repeatedly recognized, the Take Care Clause—which provides that the president “shall take care that the Laws be faithfully executed”—establishes that the president does not hold the royal prerogative of a dispensing power, which is the power to dispense with or suspend the execution of the laws. The Take Care Clause, then, makes plain that the president is duty-bound to enforce all the laws, whether he agrees with them or not. (2006)

Others in the legal community, including, but not limited to the American Bar Association, raised a number of issues in connection with this use of signing statements. Among those issues were:

- Whether such signing statements violate the constitutional separation of powers;
- Whether they amount to a line-item veto (the Supreme Court has ruled that line-item vetoes are unconstitutional);
- Whether a president is required to veto any bill containing any provision he or she considers unconstitutional, no matter how minor. If so, what part of the Constitution imposes such a requirement, and if not, how should we draw the line between provisions that may be handled administratively (i.e. by a decision not to enforce) and those that must be vetoed? And finally,
- Whether and when presidential discretion exercised in this way amounts to a violation of the rule of law.



Bush's aggressive use of signing statements thus raises several red flags. It seems clear that the president's authority—indeed, his mandate—to “faithfully execute” the laws of the United States does not include the authority to *refuse* to enforce certain aspects of those laws. It also seems obvious that presidential signing statements used in this fashion are inconsistent with our Constitutional culture and ethic.<sup>5</sup> What are the consequences of President Bush's extensive use of this strategy? If President Obama continues the practice, will the argument lose its constitutional resonance, and devolve into another partisan talking point? If so, what will we have lost? If, on the other hand, we take the principled position that *no* president should use signing statements in this manner, how do we enforce that constitutional ethic?

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<sup>5</sup>For further reading on the legal and constitutional arguments about signing statements, pro and con, students should consult *Symposium: The Last Word? The Constitutional Implications of Presidential Signing Statements*, in a special issue of the *William and Mary Bill of Rights Journal*, Vol. 16(1), October, 2007. In that Symposium, leading legal scholars argue these and other questions from multiple perspectives, both political and constitutional.

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## Discussion Questions

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1. What is the rule of law, and why is it important?
2. How is the concept of legitimacy in government related to adherence by public servants to our constitutional ethic?
3. In this chapter, we have highlighted the importance of checks and balances to our constitutional system. What do you think are the greatest challenges to a system of checks and balances today?
4. Politicians and officeholders have justified elements of the Patriot Act, various other government surveillance activities, and signing statements as necessary to “keep Americans safe.” Do you think the Founders would have agreed to these actions had they been faced with the challenge of global terrorism? If not, why not? If so, what limits do you think they might have placed on the exercise of such governmental powers?

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