

LAW & BIOETHICS

LESSON 1

Constitutional Foundations

- **Core Concepts:**
 - **Separation of Powers**
 - **Federalism**
 - **Judicial Review**

This first lesson introduces the founding national document, The Declaration of Independence, and the Constitution that emerged from the Constitutional Convention of 1787 and was subsequently ratified by the states. By reading the text of the documents themselves and a selection of the enormously influential Federalist Papers, attention will be focused on the limited powers granted to the national government, the separation of powers written into the Constitution, and the nature of judicial review.

Lesson 1 Readings:

- *Declaration of Independence*
- *Constitution of the United States*
- *Federalist Paper No. 39*
- *Federalist Paper No. 51*
- *Federalist Paper No. 78*

Lesson 1 Notes

The Declaration of Independence is the fundamental founding document of the American Republic. A careful reading of its philosophical and practical reasoning is useful in understanding legal developments related to bioethical issues. Together with the Constitution they form an organic unity to which we will return in subsequent lessons.

On November 15, 1777, during the course of the War of Independence, the Continental Congress adopted the Articles of Confederation, which was the first constitution of the United States. Ratification of the Articles of Confederation by all thirteen states did not occur until March 1, 1781. The Articles created a confederation of sovereign states and a weak central government, leaving most of the political and governmental power with the states. The constant difficulties experienced during the war by Washington in securing adequate funds, supplies, and other resources from the Continental Congress with which to conduct the conflict was a kind of preview of the problems that plagued the emerging nation-state. Dependent on the cooperation of individual states and lacking a strong central government with sufficient authority to direct national and international affairs, the new nation risked floundering by division, inconstancy, and regional rivalries. This need for a stronger federal government led to the Constitutional Convention in 1787. The present United States Constitution was proposed to the states by the Convention and it replaced the Articles of Confederation upon its ratification on March 4, 1789.

There was a lively and at times acrimonious debate over the nature of the federal government. Exactly how a republic would function, how power would be centralized or fragmented, how individual liberties would be safeguarded, and how states would relate to one another and the national government were central questions of the day. In order to answer those questions, Alexander Hamilton, James Madison, and John Jay wrote a series of eighty-five essays now known as the Federalist Papers. Written between October 1787 and April 1788, they were a powerful voice urging ratification of the Constitution proposed by the Continental Convention. For our purposes Federalist Papers 39, 51, and 78 are most relevant. They address the issues of federalism, separation of powers, and judicial review, topics we will address more intensively in Lesson 2.

- Federalist Paper 39 addresses the republican form of government.
- Federalist Paper 51 addresses the checks and balances written into the Constitution.
- Federalist paper 78 addresses the judiciary and the concept of judicial review.

The reading of the Federalist papers is essential to a firm grasp of constitutional structure and the role of the separate branches of the new national government, a description of which follows.

Constitutional Structure

The new national government was structured into the three branches so familiar to us today: Legislative, Executive, and Judicial. Each was granted certain powers independent of the other branches and by that separation both liberty and majority rule was more firmly secured. In addition to creating a more powerful, though still limited, national government, the Constitution also included both reserved and concurrent powers of the individual states.

Article I established the Congress of the United States. All legislative powers granted by the Constitution to the new national government were vested in the Congress, consisting of two chambers: the Senate and the House of Representatives. The President may veto bills passed by both chambers in the ten-day period following passage and such veto may be overturned by a two-thirds vote of both chambers. Each state was allocated two senators, originally to be elected by the legislature of each state, a provision subsequently amended to provide for direct popular election of senators. Each senator serves a six-year term. The House of Representatives was established on the basis of population density and direct popular election, thus assuring the more populous states had a greater number of representatives, and each state, regardless of population, was guaranteed at least one representative. Each representative serves a two-year term. Various provisions govern the internal actions of the chamber, the role and power of the President of the Senate and the Speaker of the House, the manner in which some laws must be proposed, and the power to remove Federal office holders, including the President, from office by impeachment. Other provisions limit certain powers of Congress and the states.

An essential part of Article I is contained Section 8, which is a limited grant of legislative authority to Congress over certain topics and subject matter. It grants Congress the power to tax, pay debts, provide for the common defense of the states and the nation, borrow and coin money, regulate commerce between states and foreign nations, establish bankruptcy, patent, and copyright laws, raise and support armed forces, and various other specific matters. It also provides that Congress may make all laws that are “necessary and proper” to give effect to the other powers set forth in the ‘constitution. As we shall see in later lessons, the necessary and proper clause was destined to play a vital role in constitutional interpretation and the articulation of the basic standard by which courts review the validity of legislation.

Article II vests all executive power in the President who holds office for a term of four years. Subsequent amendment limits any person to two terms as president. The president is elected by a body of electors from each state appointed in a manner to be determined by each state’s legislature. The number of each state’s presidential electors is equal to the combined total of senators and representatives to which it is entitled in the Congress.

The power of the president is considerable. She or he is the commander in chief of the armed forces of the nation and the state militias when called into service of the Federal government. The president may grant pardons for Federal crimes (except in cases of impeachment), make treaties (provided two thirds of the Senators present concur), nominate ambassadors, public ministers and consuls, the justices of the Supreme Court, and all other officers of the United States, and such appointments must be approved by the Senate. The President may fill all vacancies in Federal offices that may arise during recess of the Senate, but such commissions expire at the end of the next session. On “extraordinary occasions” the President may convene one or both houses of Congress.

The President is charged with the duty to “take care that the laws of the United States be faithfully executed.” The President may veto any law passed by Congress and Congress may only override such veto by a two-thirds majority vote in each house, as provided in Article I.

Article III established the Judicial Branch, consisting to the Supreme Court and such inferior courts as Congress may create. Federal judges and the justices of the Supreme Court serve lifetime terms subject to removal by impeachment by Congress. The judicial power extends to all cases arising under the Constitution, the laws of the United States, and treaties as well as all cases affecting various categories of person and subject matter. Original jurisdiction over a particular matter is vested in the Supreme Court in certain specified matters, such as cases affecting ambassadors, and in all the other cases the Supreme Court has appellate jurisdiction. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the crime is alleged to have been committed. Article III also defines “Treason against the United States” as, and only as, “levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.” It specifies that no person shall be convicted of treason “unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”

The limited nature of the Federal government reserved many powers to the states and created the system of federalism, a topic we will explore in greater depth in subsequent lessons. The separation of powers within the Federal government is a critical guarantor of liberty. By dividing power between branches, the framers dispersed power and prevented the consolidation of excessive authority in one person or one branch. The Bill of Rights, adopted two years after the Constitution, spells out various individual liberties, and is rightly seen as a great testament of individual rights. However, absent the separation of powers the liberties subsequently articulated in the Bill of Rights could have been imperiled. Absent the independence of the judiciary and the other branches, a political faction controlling power could effectively dictate all outcomes by adopting laws, determining their manner of enforcement, and marshal the police power to its predetermined ends. The insight of the framers into these issues was truly remarkable.