

Widener University Delaware Law School

From the Selected Works of Alan E Garfield

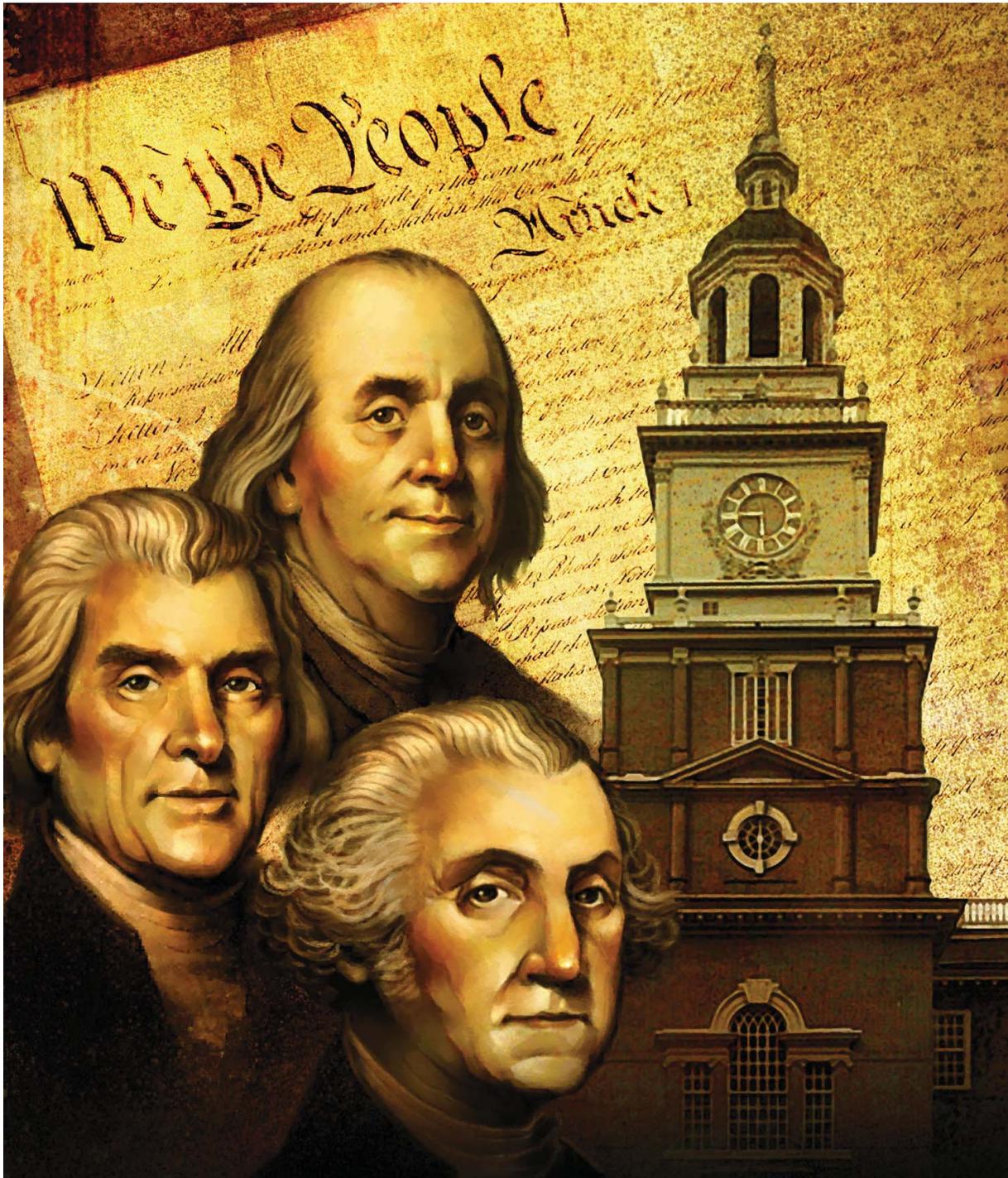
September 9, 2016

Constitutional Conundrums

Alan E Garfield



Available at: https://works.bepress.com/alan_garfield/116/



CONSTITUTIONAL CONUNDRUMS

This is the 11th year that Delaware Law School and The News Journal have teamed up to provide you with a collection of essays to celebrate Constitution Day, September 17, the national observance marking the date in 1787 when the Framers signed the Constitution in Philadelphia. This year's collection is a series of quizzes to test your knowledge of constitutional law. Of course, we realize that most of you are not judges or lawyers so don't feel badly if you get stumped by some or all of the questions. But we do hope you welcome this opportunity to expand your knowledge of constitutional law. After all, lawyers and judges did not "ordain and establish" the Constitution; "We the People" did. If our nation is to continue becoming an ever "more perfect Union," it needs citizens who are educated and engaged, and who are eager to participate in the democratic process with their voices and votes. That's why Justice Louis Brandeis said "the greatest menace to freedom is an inert people" and "public discussion is a political duty." **See QUIZ, Page 19A**

Pictured in front of the United States Constitution and Independence Hall in Philadelphia are Ben Franklin and former Presidents Thomas Jefferson and George Washington.

Quiz

Continued from Page 17A

THE BIG PICTURE

1. Before we had the Constitution, our nation was governed by an earlier document. Under this document, the federal government was given very little power. There was no strong executive branch as there is in the current Presidency. The legislative branch lacked the power to regulate commerce between the states and the power to tax. It was almost as if the document was a treaty between independent nations with each state being a separate country. Problems quickly arose from having such a weak federal government. These led to calls for a constitutional convention which was held in Philadelphia in 1787 and led to the current Constitution. What was the name of this national charter which preceded the Constitution?

- The League of Nations
 - The Articles of Confederation
 - The Emancipation Proclamation
 - The Universal Declaration of Human Rights
2. The Constitutional Convention convened at what is now called Independence Hall in Philadelphia. The document produced by that convention was signed by convention delegates on September 17, 1787. After it was signed, it was sent to the states to be ratified. (Bonus point for anyone who can name the first state to ratify the Constitution!)

The Constitution was a product of compromises and included some provisions you might find surprising. Below is a list of provisions that were included in the original Constitution, although some have been made obsolete by subsequent amendments. The list also includes one provision that was never in the Constitution. Can you figure out which one?

- A clause requiring states to return escaped slaves to their owners
- A clause forbidding Congress from banning the importation of slaves into the country before 1808
- A clause forbidding the use of any

religious test as a qualification for serving in a federal office

d. A clause declaring our country to be "one nation under God"

3. Ordinary laws can be easily repealed or amended by a legislature simply enacting a new law. But the Constitution is very difficult to change. Article V of the Constitution requires amendments to be passed by two-thirds of both houses of Congress and then ratified by three-fourths of the states.

The fact that the Constitution is difficult to amend is good in that it makes it difficult to take away rights that are already included in the Constitution. But it also makes it difficult to add new rights even when many Americans believe these new rights should be added. For example, in the 1970s, the Equal Rights Amendment, which guaranteed equal rights for women, was not added to the Constitution because only 35 states, and not the necessary 38, ratified it.

The difficulty of adding new rights might explain why Supreme Court justices have been tempted to imply rights into the Constitution even when there is no express provision for them.

In the following list, only one of the rights is explicitly spelled out in the Constitution. All of the other rights have been implied into the Constitution by the justices. Which is the right that is expressly mentioned in the Constitution's text?

- The right to procreate
- The right to freedom of speech
- The right to obtain and use contraceptives
- The right to the custody of one's child

4. The Supreme Court and lower federal and state courts have the power to declare laws unconstitutional. This is called the power of "judicial review." The Constitution does not expressly say that judges have this power, but an early Supreme Court decision by Chief Justice John Marshall declared that judges have this power.

Both lower federal and state courts can declare laws unconstitutional, but the decisions of these courts can be appealed to the Supreme Court. If the jus-

tics decide to take a case, they have the ultimate say on the Constitution's meaning.

In which of the following cases did John Marshall establish that judges have the power of judicial review?

- McCulloch v. Maryland
- Plessy v. Ferguson
- Marbury v. Madison
- Dred Scott v. Sandford

5. As noted in question #3, the Constitution is difficult to amend. There have been only 27 amendments in almost 230 years, and the first ten (the "Bill of Rights") were quickly added shortly after the Constitution was first ratified.

Which of the following is explicitly provided for in one of the amendments to the Constitution?

- The right to engage in any activity as long as it does not harm someone else
- There shall be no taxation without representation
- Private property cannot be taken by the government for public use
- Any changes to the compensation of United Senators or Representatives may not take effect until there has been an intervening election for members of the House of Representatives

ANSWERS

1. The answer is B. The Articles of Confederation was the national charter that preceded the Constitution. It referred to the states as entering into a "firm league of friendship with each other." The League of Nations was an international organization founded at the end of World War I to help maintain world peace (nice try). President Abraham Lincoln issued the Emancipation Proclamation to free the slaves living in the rebel states. The Universal Declaration of Human Rights was adopted by the United Nations General Assembly after World War II.

2. The answer is D. There is a fugitive slave clause in the Constitution as well as a clause forbidding Congress from banning the slave trade until 1808. There is also a provision counting non-voting slaves as three-fifths of a person for purposes of allocating seats in the House of Representatives. These provisions were effectively nullified by the 13th Amend-

ment, which prohibits slavery. There is also a provision that prohibits any religious test for federal public office, but there is no provision that refers to "one nation under God." That phrase was added to the Pledge of Allegiance in 1954 to help distinguish Americans from the atheist Communists. (Bonus point: Delaware was the first state to ratify the Constitution!)

3. The answer is B. The First Amendment expressly provides that "Congress shall make no law . . . abridging the freedom of speech." The other three rights are not expressly mentioned in the Constitution but have been implied into the Due Process Clause of the Fourteenth Amendment.

4. The answer is C. Marbury v. Madison established the power of judicial review. McCulloch v. Maryland held that Congress had the power to create a national bank. Plessy v. Ferguson upheld separate but equal train cars for blacks and whites. Dred Scott v. Sandford held that even freed slaves could never become citizens of the United States. Plessy was overruled by Brown v. Board of Education and Dred Scott was overridden by the Fourteenth Amendment.

5. The answer is D. The 27th Amendment provides that any changes in the compensation for Senators or Representatives cannot take effect until there has been an intervening election for the House of Representatives. And guess what? This amendment was sent to the states for ratification at the same time as the first ten amendments which are known as the Bill of Rights. The 27th Amendment was not ratified by a sufficient number of states until 200 years later! Sorry libertarians, there is no right to pursue any activity as long as it doesn't harm another. There is no clause about "no taxation without representation," but you'll find it on the license plates of District of Columbia residents. And, sorry to say, the government can take private property for public use, but it must compensate the owners. Otherwise, how would we ever build a highway like I-95?

Alan Garfield is a professor at Delaware Law School.