CHAPTER - 4

SEPARATION OF POWERS: POSITION IN U.S.A.

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INTRODUCTION

The United States Constitution established America’s national government and fundamental laws, and guaranteed certain basic rights for its citizens. It was signed on September 17, 1787, by 38 of 41 delegates to the Constitutional Convention in Philadelphia, presided over by George Washington.\(^{289}\) As dictated by Article VII, the document would not become binding until it was ratified by nine of the 13 states. Beginning on December 7, five states—Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut—ratified it in quick succession. However, other states, especially Massachusetts, opposed the document, as it failed to reserve non-delegated powers to the states and lacked constitutional protection of basic political rights, such as freedom of speech, religion, and the press. In February 1788, a compromise was reached under which Massachusetts and other states would agree to ratify the document with the assurance that amendments would be immediately proposed. The Constitution was thus narrowly ratified in Massachusetts, followed by Maryland and South Carolina. On June 21, 1788, New Hampshire became the ninth state to ratify the document, and it was subsequently agreed that government under the U.S. Constitution would begin on March 4, 1789. In June, Virginia ratified the Constitution, followed by New York in July.\(^{290}\)

The American Constitution implicitly provides for the doctrine of separation of powers. The declaration is referred in the first three Articles of the Constitution.

**Article I, Section 1:** All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representativcs.

\(^{289}\) The U.S. Constitution.  
Available at: www.history.com/topics/constitution (last visited on November 02, 2015)

\(^{290}\) "This day in History 1787: U.S. Constitution signed".  
Available at: www.history.com/this-day-in-history/u-s-constitution-signed (last visited on November 20, 2015)
**Article II, Section. 1:** The executive Power shall be vested in a President of the United States of America.

**Article III, Section. 1:** The judicial Power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish.

**Article I, Section. 7:** All Bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law....If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

The US Constitution is the briefest Constitution which any modern state has today. That is due to the fact that the framers of the American Constitution merely laid down the fundamentals and did not enter into the detail. It is based on the principle of separation of powers and is implemented by an elaborate system of 'checks and balances'\(^{291}\). The American Constitution provides a Presidential form of Government. The President is the head of the State. He has a fixed term. He is neither a member of the Congress nor responsible to it. He does not attend the meeting of the Congress and answer the questions of the members. He cannot be removed by his post by a simple no-confidence motion passed in the Congress. He cannot dissolve the Lower House of the

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Congress before the expiry of his term. Thus the legislature and the executive are independent of each other. The President is at liberty within his jurisdiction. He is not controlled by the Congress. On the other side, the Congress is at liberty within its jurisdiction. It is not controlled by the President. The judiciary is also independent. The judges are appointed by the President, but they cannot be removed either by him or by the Congress. They can be removed only by impeachment. Hence in U.S.A., the three branches are separated from each other.\(^{292}\)

**Provision for doctrine of Separation of Powers**

At the 1787 convention, delegates devised a plan for a stronger federal government with three branches—executive, legislative and judicial—along with a system of checks and balances to ensure no single branch would have too much power.\(^{293}\) Being desperate towards surplus centralized powers, the framers of the American constitution adopted the doctrine of separation of powers. The doctrine of separation finds its domicile in United States. It develops the basis for the formation of the U.S. constitution. The doctrine implies the separation of three branches of government and their powers. The doctrine had a great impact upon the founding fathers of U.S. constitution. Accordingly, the *legislative branch* is composed of two houses, i.e., the House of Representatives and the Senate that has been witnessed by *Article I* of the U.S. constitution and has power of making laws; the *executive branch* is composed of the President, Vice-President, and numerous Departments viz., the Treasury and the State that has been witnessed by *Article II* and has power of enforcing the laws; and the *judicial branch* is composed of the federal courts and the Supreme Court that has been witnessed by *Article III* and has power of interpreting the laws. This is acknowledge by the lines of James Madison that,

> “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

\(^{292}\) Ibid pg. 23

\(^{293}\) The U.S. Constitution.  
Available at: [www.history.com/topics/constitution](http://www.history.com/topics/constitution) (last visited on November 02, 2015)
The three branches of the United States have certain powers and each of these powers is limited or checked by another branch. For instance, the President appoints judges and departmental secretaries. These appointments will be approved by the Senate. The Congress passes a law, but the President has the power to veto it. The Supreme Court can rule a law to be unconstitutional, but the Congress can amend the Constitution. The U.S. constitution makes all the three branches to be accountable to the other and no one branch can usurp enough power to become dominant. Henceforth, each of the three branches of government has "checks and balances" over the other two.
4.2 INSTITUTIONS OF GOVERNANCE AND SEPARATION OF POWERS UNDER THE US CONSTITUTION

The doctrine of separation of powers forms the basis of the American constitutional structure. Despite the safeguards, the doctrine of separation of powers guards against tyranny. The US Constitution finds separation of powers at its foundation on which the whole structure of the Constitution is based. No doubt, the doctrine has been absolutely adopted by the American Government. The doctrine of Separation of powers divides the power among the three institutional organs i.e., the legislative, the executive and the judicial branches as distinct departments of American national government. The legislative branch is endowed by the Congress; the executive branch is exercised by the President and the judicial branch is functioned by the Supreme Court. This is witnessed by glimpsing towards the US Constitution.

- Article I; Section 1 vests all legislative powers in the Congress;
- Article II; Section 1 vest all executive powers in the President; and
- Article III; Section 1 vest all judicial powers in the Supreme Court.

The U.S. Constitution outlined a compound governmental structure. Congress was considered as the central political institution, but the constitution also provided for the strongest possible executive under the state of affairs. Even though the executive was subordinate to the legislature in principle, it was to operate independently and with a wide range of powers, functions and duties.

The Legislative Branch

The legislature of the U.S.A. is the Congress. It is bicameral. The legislature is divided between two chambers in the national legislature-- the Senate and the House of Representatives.

The Senate: The Senate is the Upper House of American Congress. The American Constitution is federal in nature, so it needs a powerful Upper House to represent the
States. In accordance with federal principle all states are equally represented in the Senate. Each State elects two senators. To elect the senator each state is divided into two senatorial constituencies. As there are 50 states there are 100 members in the Senate. The Senate members are directly elected by the people on the basis of Universal Adult Franchise. Each member has six years of term. One-third of the members of the Senate retire every two years. In fact, it was not until the passage of the Seventeenth Amendment to the Constitution in 1913 (almost 125 years after the government was founded) that this arrangement was changed, and senators came to be elected by popular vote. So the House enjoys permanent tenure.\textsuperscript{294}

**The Powers and Functions of the Senate:** The Vice-President of the U.S.A. presides over the meetings of the Senate. In the field of legislation the Senate possesses equal powers with the House of Representatives. Any bill may be introduced in the Senate except Money bills. But the Senate has the right to amend any Money bill or budget. No bill can be passed without the consent of the Senate. If there arise a disagreement between the Lower House and the Senate, the bill is taken for discussion in a joint session. If no agreement is reached, the bill is dropped. To that extent, the Senate has equality of powers with the Lower House. The Senate is the more powerful second chamber in the world. The Senate has the executive powers also. The American President makes thousands of appointments to federal offices. These offices must be approved by the Senate. Without the consent of the Senate, any one appointed by the President cannot assume office. The constitution empowers the President to appoint ambassadors and other diplomatic officers to represent the U.S.A. in foreign countries. He can also make treaties with foreign countries. But the appointment and treaties made by the President are to be approved by the Senate. The Senate possesses some judicial powers also. The Senate conducts the trial of impeachment of the President and the judges of the Supreme Court. Apart from these, the Senate enjoy equal powers with the House of Representatives in amending the constitution. In fact, the Senate is more powerful, it is a compact House with 100 members. Its members have six years of term of office. Each member represents half of his state. The Lower House is comparative

\textsuperscript{294} N. Jayapalan, *Modern Governments*, pg. 60 (1999)
bigger in size. Moreover, its term of office is only two years. The office of the Senator is considered to be prestigious.

**The House of Representatives:** The House of Representatives is the Lower House of the American Legislature. There are more than 400 members in the House. Each member represents about 30,000 people. The term of office of the House is two years. The House elects the Speaker to preside over its meetings. The U.S. House of Representatives makes and passes federal laws. It shares equal responsibility for lawmaking with the U.S. Senate. Its members are directly elected by the people. Each state is guaranteed at least one member of the House of Representatives.

**The Powers and Functions of the House:** Any bill can be introduced in this House. The Money bill can be introduced only in this House. But the American Lower House cannot override the Upper House. The executive powers of the House are also comparatively limited. The Senate has to approve the appointments and treaties made by the President. But the Lower House has no such power. The President has to get consent from the Lower House before the declaration of war. The Lower House has some judicial powers. It can initiate impeachment against the President, Vice-President and other high officers.\(^{295}\)

The Congress has the sole power to legislate for the United States. Under the non-delegation doctrine, Congress may not delegate its lawmaking responsibilities to any other agency. In this vein, the Supreme Court held in the *Clinton’s case*\(^{296}\) that Congress could not delegate a "line-item veto" to the President, by which he was empowered to selectively nullify certain provisions of a bill before signing it. The Constitution Article I, Section 8; says to give all the power to Congress. Congress has the exclusive power to legislate, to make laws and in addition to the enumerated powers it has all other powers vested in the government by the Constitution. Where Congress does not make great and sweeping delegations of its authority, the Supreme Court has

\(^{295}\) ibid pg. 61  
been less stringent. One of the earliest cases involving the exact limits of non-delegation was *Wayman v. Southard*.\(^{297}\)

**The Executive Branch**

The Executive power is vested in the President by virtue of Article II, Section 1, of the Constitution, with exceptions and qualifications. According to the Constitution, the President of the United States is to be selected by a group of wise leaders, a national council of elders in the form of an Electoral College. By law, the president becomes the Commander-in-Chief of the Army and Navy, and has power to make treaties and appointments to office. With the Advice and Consent of the Senate, the President receives Ambassadors and Public Ministers, and takes care of the laws and to see to it that they are faithfully executed (Section 3.) The Constitution empowers the president to ensure the faithful execution of the laws made by Congress. Congress may itself terminate such appointments, by impeachment, and restrict the president. The president's responsibility is to execute whatever instructions he is given by the Congress. Congress often writes legislation to restrain executive officials to the performance of their duties, as authorized by the laws Congress passes. In *INS v. Chadha*.\(^{298}\), the Supreme Court decided:

"The prescription for legislative action in Article I, Section 1, requiring all legislative powers to be vested in a Congress consisting of a Senate and a House of Representatives and Section 7 requiring every bill passed by the House and Senate, before becoming law, to be presented to the president, and, if he disapproves, to be re-passed by two-thirds of the Senate and House, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure. This procedure is an integral part of the constitutional design for the separation of powers. Further rulings clarified the case; even both Houses acting

\(^{297}\) 23 U.S. 1 (1825)
\(^{298}\) 462 U.S. 919 (1983)
together cannot override Executive veto’s without a 2/3 majority. Legislation may always prescribe regulations governing executive officers”.

The Powers and Functions of the President

**Legislative Powers:** The President is not the member of the Congress. However, he has certain legislative functions. The President may send messages to the Congress. The messages may be declaration of certain policies, or the President may request the Congress to pass certain bills. The Congress has to give proper attention to the message sent by the President. Any bill passed by the Congress could become law only after being signed by the President.\(^{299}\)

**Executive Powers:** Article I of the constitution vests all the executive powers in the hands of the President. He is the head of the executive. He has the powers to enforce the laws passed by the Congress. He organizes the whole administrative system. The President appoints the members of the cabinet, the judges of the Supreme Court, ambassadors, and diplomatic representatives. These appointments are to be approved by the Senate. He receives the ambassadors and other foreign delegates. He decides the foreign policy of the U.S.A. He enters into the treaties. He is the supreme commander of the armed forces. He may send the forces to any place. The annual budget is prepared under his supervision.

**Judicial Powers:** The President has some judicial powers too. He has power to appoint judges to the Supreme Court. He can grant pardon and reprieve. He can abolish the punishment awarded on any person by the court or he may reduce or postpone the punishment.\(^{300}\)

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\(^{300}\) Ibid
The Judicial Branch

The judiciary is more powerful. The U.S.A. is federal government, so there are two sets of courts known as Federal court and the State courts. Thus there is dual judicial system. The courts in the states are not subordinate to the federal court. The Supreme Court is the highest federal court. Article III of the U.S. Constitution describes the powers and duties of the judicial branch. The judiciary has the power to decide cases and controversies.

The Powers and Functions of the Supreme Court: The Supreme Court has original jurisdiction in all cases affecting ambassadors, other public ministers and consuls and cases in which a state is a party. It has appellate jurisdiction in two types of cases. It may hear appeals in cases in which state courts deliver judgements against Federal Acts. In such cases appeals may be made in the Supreme Court. The court hears appeal only cases in which the federal law is involved. It acts as a guardian of the fundamental rights. It protects the rights of the citizens from the encroachment of the legislature and the executive. Judicial review is an important power of the Supreme Court. In exercise of judicial review, it declares a law passed by the Congress invalid. It has advisory function too. The President may seek its advice on legal matters. It interprets the constitution. Accordingly, the Supreme Court powers are very wide. The supremacy of the constitution is kept alive by the Supreme Court. 301

Significant Supreme Court Cases

- 1803 - Marbury v. Madison302: This was the first landmark case where a law passed by Congress was declared unconstitutional by the Supreme Court.

- 1857 - Dred Scott v. Sanford303: The Supreme Court declared that a slave was not a citizen, and that Congress could not outlaw slavery in U.S. territories.

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301 ibid pg. 65
302 5 U.S. 137 (1803)
303 60 U.S. 393 (1857)
• **1896 - Plessy v. Ferguson**\(^{304}\): The Court’s decision ushered an era of legally sanctioned racial segregation by adopting the "separate but equal" doctrine.

• **1954 - Brown v. Board of Education**\(^{305}\): A case in which the Court decided that the "separate but equal" doctrine of racial segregation were unconstitutional and made racial segregation in schools illegal.

• **1963 - New York Times v. Sullivan**\(^{306}\): The Supreme Court ruled that the First Amendment of the U.S. Constitution protects publications from statements (both true and false) unless the publication knowingly published false information. This decision increased the degree to which publications freely reported on the civil rights movement.

• **1966 - Miranda v. Arizona**\(^{307}\): The Supreme Court ruled that detained criminal suspects, prior to police questioning, must be informed of their constitutional right to an attorney and against self-incrimination.

• **1973 - Roe v. Wade**\(^{308}\): A landmark decision by the Supreme Court on the issue of abortion.

• **2003 - Grutter v. Bollinger and Gratz v. Bollinger**\(^{309}\): The Supreme Court reaffirmed the constitutionality of the consideration of race and ethnicity in university and law. Ruled that colleges can, under certain conditions, consider race and ethnicity in admissions and school admissions.

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\(^{304}\) 163 U.S. 537 (1896)

\(^{305}\) 347 U.S. 483.

\(^{306}\) 376 U.S. 254 (1964)

\(^{307}\) 384 U.S. 436 (1966)

\(^{308}\) 410 U.S. 113 (1973)

• **2007 - District of Columbia v. Heller**[^310]: The Supreme Court declared Washington, District of Columbia's (D.C.) tough gun laws were in violation of the Second Amendment of the U.S. Constitution (The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home). Although the D.C. council insisted such provisions were in the public interest, the court deemed them unlawful as the Constitution gives Americans the right to bear arms for self defense.

• **2010 - Citizens United v. Federal Election Commission**[^311]: The Supreme Court ruled, 5–4, that the government cannot restrict the spending of corporations on political campaigns, maintaining that it's their First Amendment right to support candidates as they choose.

• **2013 - Shelby County v. Holder**[^312]: The Supreme Court struck down Section 4 of the Voting Rights Act, which established a formula for Congress to use when determining if a state or voting jurisdiction requires prior approval before changing its voting laws.

**Other Federal Courts:** Below the Supreme Court, there are Circuit Courts of Appeal. They hear appeals from the lower courts. Below the Circuit Courts, there are District courts. The cases related to federal laws would be heard by these courts.

**Courts of the States:** Each State has its own judicial system. Each State has a Supreme Court. It is the highest Court in the State. Below the Supreme Court, there are Intermediary Courts of Appeals. These courts hear both civil and criminal cases. Below the Intermediary Courts, there are District Courts. Each State is divided into many counties. There is one court at each county. Besides, there are some small courts. These courts decide local problems and disputes.

[^311]: 558 U.S. 310 (2010)
[^312]: 557 U. S. 193 (2013)
The judges must be appointed by the president with the advice and consent of the Senate, hold office for life and receive compensations that may not be diminished during their continuance in office. If a court's judges do not have such attributes, the court may not exercise the judicial power of the United States. Courts exercising the judicial power are called "constitutional courts." Congress may establish "legislative courts," which do not take the form of judicial agencies or commissions, whose members do not have the same security of tenure or compensation as the constitutional court judges. Legislative courts may not exercise the judicial power of the United States. Just as the Supreme Court has served as a referee in the evolution of the federal balance of power by asserting "judicial review," it also mediates separation of powers disputes between the Congress and the president.\(^{313}\) In *Murray's Lessee v. Hoboken Land & Improvement Co.*\(^{314}\), the Supreme Court held that a legislative court may not decide "a suit at the common law, or in equity, or admiralty," as such a suit is inherently judicial. Legislative courts may only adjudicate "public rights.\(^{314}\). The Supreme Court established the concept of judicial review by declaring the part of the Act as "unconstitutional" in *Marbury v. Madison*\(^{315}\), a landmark case, in the United States. This case resulted from a petition to the Supreme Court by William Marbury, who had been appointed by President John Adams as Justice of the Peace in the District of Columbia but whose commission was not subsequently delivered. Marbury petitioned the Supreme Court to force Secretary of State James Madison to deliver the documents, but the court, with John Marshall as Chief Justice, denied Marbury's petition, holding that the part of the statute upon which he based his claim, the Judiciary Act of 1789, was unconstitutional.

The American Constitution also incorporates the system of ‘checks and balances’ to prevent one branch from becoming supreme and induces the branches to cooperate with each other. It bestows to the Congress the power to alter the composition

\(^{313}\) "Federalism And The Separation Of Powers.” Available at: wwnorton.com/college/polisci/american-government12/brief/ch/03/outline.aspx (last visited on November 25, 2015)

\(^{314}\) 18 How (59 U.S.) 272 (1856)

\(^{315}\) 5 U.S. 137 (1803)
and jurisdiction of the federal courts; it allows the President to interfere with the exercise of powers by the Congress through his veto power; it also permits the President to carry out the law-making power in exercising the power of treaty-making; the President is also provided to interfere in the functioning of the Supreme Court by appointing judges; and the judiciary, through the exercise of its power of judicial review, interferes with the powers of the Congress and the President; and also, the Supreme Court has paved way more amendments to the American Constitution than the Congress. *Marbury v. Madison*\(^{316}\) is a landmark decision that helped to define the “checks and balances” of the American form of government. The separation of powers’ system of checks and balances relies on the goal-seeking behavior of politicians acting within the various institutions of the national government. Exemplifying the *Rationality Principle*, the give-and-take between the legislative and executive branches is fueled by the ambitions of the politicians working within those institutions.\(^{317}\)

The framers of the US constitution wanted a strong and fair national government. They also wanted to protect individual freedoms and prevent the government from abusing its power. Hence, they believed that they could do this by having the three separate branches of government, the legislative, the executive and the judiciary. Accordingly, they included the separation of powers in the first three Articles of the Constitution. To ensure the government to be effective, each branch has given its own powers and responsibilities by the US constitution.

\(^{316}\) *U.S.* 137 (1803)

4.3 CHECKS AND BALANCE WHILE APPLYING THEORY OF SEPARATION OF POWERS DOCTRINE IN U.S.A

The framers of the U.S. Constitution designed Montesquieu’s ‘tripartite system’ of separation of powers and checks and balances to achieve equilibrium between the executive and the legislative branches. This was necessary to control the political power of the United States. Accordingly, followed by the Montesquieu’s doctrine of separation of powers, the Constitution establishes three separate branches of government: the legislative branch, the executive branch, and the judicial branch. However, absolute separation would lead to troubles and deadlocks. Hence the U.S. Constitution provides certain checks and balances. The founding fathers of the U.S. Constitution intended that the balance of power should be attained by checks and balances between separate branches of the government and this is possible only through applying the principles of separation of powers that prevents any sphere of the State to become supreme. Checks and balances allow for a system based regulation that allows one branch to limit another. Henceforth, the principle of separation of powers gives each branch its own sphere of authority, but the system of checks and balances allows each branch to intrude into the area of the other branches.

Madison felt that checks and balances are necessary to maintain the desired separation because a mere demarcation on document of the constitutional limits of the several departments is not a sufficient guard against those encroachments that produce a tyrannical concentration of government power. By means of checks and balances, he sought, however, not only to prevent one governmental department from acquiring authority properly exercised only by another.

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318 N. Jayapalan, Modern Governments And Constitution, pg. 26 (2002)
The Judicial check on the Congress and the Executive

The judiciary interferes with the powers of the Congress and the President through the exercise of its power of judicial review. The Supreme Court can check the Congress to some extent by this power. It can be said that the Supreme Court has made more amendments to the American Constitution than the Congress. Exercising the power of judicial review, the Supreme Court can declare any law as unconstitutional. In Marbury v. Madison\(^{320}\), the Supreme Court for the first time declared the law as "unconstitutional", and established the concept of judicial review in the U.S. This is said to be a landmark decision that helped to define the "checks and balances" of the American form of government. The Chief Justice presides in the Senate during a president's impeachment trial.\(^{321}\)

Alexander Hamilton (1757–1804) wrote in No. 78 of The Federalist Papers in 1788:

"Limitations [on Congress] . . . can be preserved in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. ..."\(^{322}\)

The Congress check on the Judiciary

The Congress can create lower courts. The Senate approves the federal judges. It can reject nominees to the federal court/Supreme Court. The judges may be impeached by the Congress. The Congress has the power to alter the composition and jurisdiction of the federal courts. The Congress can amend the Constitution to overturn decisions of

\(^{320}\) 5 U.S. 137 (1803)
\(^{321}\) "Checks and Balances". U.S. Constitution Online. Available at: www.usconstitution.net/consttop_cnbl.html (last visited on December 10, 2015)
\(^{322}\) "Legislative-Judicial Checks and Balances". Available at: www.encyclopedia.com/article-1G2-3441900034/legislative-judicial-checks-and.html (last visited on December 10, 2015)
The Supreme Court. The Chief Justice presides in the Senate during a president's impeachment trial. However, the rules of the Senate generally do not grant much authority to the presiding officer. Thus, the Chief Justice's role in this regard is limited by the Congress.

**The Congress check on the Executive**

The President has the power to make treaties, but these treaties must be ratified by the Senate. The Congress can impeach the President on grave offences. The president has a power to veto bills, but the Congress may override any veto (excluding the so-called "pocket veto") by a two-thirds majority in each house. Though, the President has the authority to command to take appropriate military action in the event of a sudden crisis, only the Congress is explicitly granted the power to declare war. *Barack Obama*, the 44th and current President of the United States, said that, he had the authority to take military action without specific congressional authorization. But the formal approval of Congress, he said, would provide a stronger basis for action and was "the right thing to do for our democracy." At the same time, the Congress has the duty and authority to prescribe the rules and regulations, under which the armed forces operate. The Senate has power to approve departmental appointments. Congress can amend and reject legislation supported by the President. Congress has the ‘power of the purse’ which means it must vote to approve spending on policies approved by the President. Withholding approval of a president’s financial requirements is a major check. The Senate has power over the confirmation of the president’s appointments to the senior posts in the executive branch of government such as ambassadors, the Cabinet and heads of the Central Intelligence Agency (CIA) and Federal Bureau of Investigation (FBI).

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The Executive check on the Congress

The chief point of checks and balances is to check the legislature. If the executive power does not check the office of the legislative body, the later will be authoritarian, because it will wipe out all the other powers, as it give itself all the power it can imagine. The Congress is separated from the President and the President from the Congress. Though the President is not a member of the Congress, he can send messages on important bills. His messages are seriously considered by the Congress. Moreover no bill could become law without his assent. He has veto power. So he can control the Congress to some extent. A bill passed by the Congress may be vetoed by the President in the exercise of his legislative power. The President can summon the emergency session of the Congress. The Vice-President is President of the Senate.

The Executive check on the Judiciary

The President appoints Supreme Court and other federal judges. He has power to grant pardons to convicted persons. President can grant amnesty, forgiving a class of crime.  

The United States of America provides a system of checks and balances to ensure that no one branch holds to have a complete power. The system does not make any organ to hold the powers absolutely. It imparts the organs to check each other so that no organ can abuse the power.

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325 “Checks and Balances in Government, U.S. History: Government”
4.3.1 JUDICIAL REVIEW

One of the most crucial features of the judiciary is the power of judicial review. The judicial review is the power of the judiciary to examine the laws passed by the legislature and orders issued by the executive and determine whether they are in accordance with the provisions or not. If the judiciary feels that any law or executive order under dispute contravenes any provision of the constitution, it can declare the same ultra vires and unconstitutional. This power to declare a law null and void is called judicial review. The power of 'judicial review' is not granted to the Supreme Court by the Constitution. Judicial review makes the Judiciary master of both the Legislature and Executive, revealing them both what to do and not do. The Constitution says "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." The Constitution defines the kinds of cases to which the "judicial power" applies, including cases arising under the Constitution, laws, and treaties of the United States. Beyond hearing and deciding such cases, however, the Constitution does not define what the "judicial power" is.326

Article III of the Constitution provides for the establishment of a Judicial branch of the federal government and Section 2 of that Article enumerates the powers of the Supreme Court. Here is Section 2, in part:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

- to all Cases affecting Ambassadors, other public Ministers and Consuls;
- to all Cases of admiralty and maritime Jurisdiction;
- to Controversies to which the United States shall be a Party;
- to Controversies between two or more States;

326 "Legislative-Judicial Checks and Balances". Available at: www.encyclopedia.com/article-1G2-3441900034/legislative-judicial-checks-and.html (last visited on December 16, 2015)
• between a State and Citizens of another State;
• between Citizens of different States;
• between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

**Origin of Judicial Review**

The basis for judicial review is found in the writings of *Alexander Hamilton*, one of the framers of the Constitution in 1789, in the ‘Federalist’. He wrote, “The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning and meaning of an act passed by the legislature.” He further said that if there was any conflict between the two, that is the constitution and the law, the judges should prefer the constitution as it is supreme. This became the basis of judicial review.\(^{327}\)

The constitution did not specify the power of judicial review, when it came into operation. While the authors of the U.S. Constitution were unsure whether the federal courts should have the power to review and overturn executive and congressional acts, the Supreme Court itself established its power of judicial review in the early 1800s with the case of *Marbury v. Madison*\(^{328}\). In 1803, Chief Justice Marshall delivered the

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\(^{328}\) 5 U.S. 137 (1803)
historic judgement in the instant case and he mentioned the assumed or implied power of the judiciary. The case arose out of the political wrangling that occurred in the weeks before President John Adams left office for Thomas Jefferson. The new President and Congress overturned the many judiciary appointments Adams had made at the end of his term, and overturned the Congressional act that had increased the number of Presidential judicial appointments. For the first time in the history of the new republic, the Supreme Court ruled that an act of Congress was unconstitutional. By asserting that it is emphatically the judicial branch’s province to state and clarify what the law actually is, the court assured its position and power over judicial review.  

This was the first occasion when a law of the Congress was declared null and void by the Supreme Court. Since then the power of judicial review has been used by the judiciary on many occasions. The constitution has a clear division of the powers. If the centre tries to encroach on State subject by passing a law or executive order, any of the States may go to the Supreme Court and stop the encroachment by the centre. Thus the judiciary helps in preserving the federal structure by using the power of judicial review.

Subject Matter on which the Power of Judicial Review is Exercised by the Supreme Court

The judicial review process exists to help ensure no law enacted, or action taken, by the other branches of government, or by lower courts, contradicts the U.S. Constitution. In this, the U.S. Supreme Court is the “supreme law of the land.” Individual State Supreme Courts have the power of judicial review over state laws and actions, charged with making rulings consistent with their state constitutions. The subject that may be brought before the Supreme Court may include:

- Executive actions or orders made by the President

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329 “Judicial Review”. Available at: legaldictionary.net/judicial-review/ (last visited on December 16, 2015)
330 Ibid
- Regulations issued by a government agency
- Legislative actions or laws made by Congress
- State and local laws
- Judicial error

**Supreme Court cases on Exercising the Power of Judicial Review**

As a result of the Courts decision in Marbury’s case, the power of *judicial review* was created. All over the time, the Supreme Court has made many important decisions on issues of civil rights, rights of persons accused of crimes, censorship, freedom of religion, and other basic human rights.

**Federalism**

*Gibbons v Ogden*[^331] was one of the most important decisions of the early Supreme Court. The Court struck down a New York law granting a Monopoly to a steamboat company, saying that the state law conflicted with a federal law granting a license to another company. Ogden held a New York State license allowing him to operate a ferry across the Hudson between New York and New Jersey. Gibbons received a Federal license and claimed that his license superseded that of Ogden. The court ruled that Gibbon's federal license took precedence over that of Ogden because the federal government was given the power to regulate interstate trade.

*McCulloch v Maryland*[^332] is a keynote case. The Supreme Court ruled that Congress had implied powers under the Neccessary and Proper Clause of Article I, Section 8 of the Constitution to create the Second Bank of the United States and that the state of Maryland lacked the power to tax the Bank. At issue in the case was the constitutionality of the act of Congress chartering the Second Bank of the United States.

[^331]: 22 U.S. 1 (1824)
[^332]: 17 U.S. 316 (1819)
(BUS) in 1816. Angered by the existence of the new Federal bank, the state of Maryland decided to tax the bank. McCulloch, a cashier for the bank refused to pay the tax claiming that a state had no power or right to tax the federal government. The Court affirmed McCulloch's position. This precedent determined the superiority of the federal government.

*In Schenck v United States*[^333], the Supreme Court formulated the famous "clear and present danger" test to determine when a state could constitutionally limit an individual's free speech rights under the First Amendment. Charles Schenck was arrested for violating the Espionage Act, passed by Congress in 1917. The Espionage Act made it illegal to defame the government or do anything that might retard the war effort. Schenck, a member of the Socialist Party, opposed the war and printed and distributed pamphlets urging citizens to oppose the draft which he likened to slavery. Schenck claimed his first amendment rights were violated. The court ruled against Schenck saying that the Espionage Act did not violate the first amendment and that in times of war the government may place reasonable limitations on freedom of speech. Justice Oliver Wendell Holmes outlined the courts opinion by explaining that when a "clear and present danger" existed such as shouting fire in a crowded theater, freedom of speech may be limited.

*In Debs v. United States*[^334], the court affirmed conviction of the socialist party leader Eugene V. Debs, who had been sentenced to jail for ten years for violating the Espionage Act of 1917. Debs was a national political figure, having run for President in 1900, 1904, 1908, and 1912.[^335] Debs was arrested for giving a public speech to an assembly of people in Canton, Ohio. The speech was about the growth of socialism and contained statements which were intended to interfere with recruiting and advocated insubordination, disloyalty, and mutiny in the armed forces. Debs was arrested and charged with violating the Espionage Act of 1917. At issue was whether the United

[^333]: 249 U.S. 47 (1919)
[^334]: 249 U.S. 211 (1919)
States violated the right of freedom of speech given to Debs in the First Amendment of the United States Constitution. The Supreme Court of the United States upheld the lower court's decision in favor of the United States. The Court said that Debs had actually planned to discourage people from enlisting in the Armed Forces. The Court refused to grant him protection under the First Amendment freedom of speech clause, stating that Debs "used words [in his speech] with the purpose of obstructing the recruiting service." Debs' conviction under the Espionage Act would stand, because his speech represented a "clear and present danger" to the safety of the United States.

In Dennis v. United States\textsuperscript{336}, the Supreme Court upheld the constitutionality of the Smith Act (1940), which made it a criminal offense to advocate the violent overthrow of the government or to organize or be a member of any group or society committed to such advocacy. Eugene Dennis was a leader of the Communist Party in the United States between 1945 and 1948. He was arrested in New York for violation of Section 3 of the "Smith Act." The government felt that the speeches made by Dennis presented a threat to national security. Dennis appealed his conviction to the Supreme Court of the United States, claiming that the Smith Act violated his First Amendment right to Free Speech. At issue was whether the Smith Act violated the First Amendment provision for freedom of speech or the Fifth Amendment due process clause. The Court found that the Smith Act did not violate Dennis' First Amendment right to free speech. Although free speech is a guaranteed right, it is not unlimited. The right to free speech may be lifted if the speech presents a clear and present danger to overthrow any government in the United States by force or violence. Since the speech made by Dennis advocated his position that the government should be overthrown, it represented a clear and present danger to the national security of the United States.

Yates v. United States\textsuperscript{337} was a case decided by the Supreme Court of the United States involving free speech and congressional power. The court observed that the First Amendment protected radical and reactionary speech, unless it cause a \textit{clear and}

\begin{footnotesize}
\textsuperscript{336} 241 U.S. 494 (1914)
\textsuperscript{337} 354 U.S. 298 (1957)
\end{footnotesize}
present danger. In 1951, fourteen persons were charged with violating the Smith Act for being members of the Communist Party in California. The Smith Act made it unlawful to advocate or organize the destruction or overthrow of any government in the United States by force. Yates claimed that his party was engaged in passive actions and that any violation of the Smith Act must involve active attempts to overthrow the government. At issue was whether Yates' First Amendment right to freedom of speech protected his advocating the forceful overthrow of the government. The Supreme Court of the United States said that for the Smith Act to be violated, people must be encouraged to do something, rather than merely to believe in something. The Court drew a distinction between a statement of an idea and the advocacy that a certain action be taken. The Court ruled that the Smith Act did not prohibit "advocacy of forcible overthrow of the government as an abstract doctrine." The convictions of the indicted members were reversed.

_Tinker v. Des Moines_\(^{338}\) describes how this court precedent began in 1963 with the suspension of three high school students - who objected to the war in Vietnam - after they wore black armbands to school against school rules. Christopher Eckhardt and John Tinker were high school students in 1963; John's sister Mary Beth was in junior high. But they were not too young to feel strongly about the Vietnam War, so strongly that they disobeyed school rules and wore black armbands to protest the war, resulting in their suspension. Believing that they had a right to free expression, the three young people took their case all the way to the Supreme Court. The school claimed that the armbands were disruptive. The court ruled against the school district saying that "students do not shed their constitutional rights at the school house gates. In doing so the court protected what has come to be known as "symbolic speech."

_In Board of Education, Island Trees Union Free School District v. Pico_\(^{339}\), the Supreme Court found the school board's removal of library books to have been based on clearly religious motivation and therefore unconstitutional. The Board of Education

\(^{338}\) 393 U.S.503 (1969)  
directed the removal of nine books from the libraries of the Island Trees senior and junior high schools because in the Board's opinion the books were "anti-American, anti-Christian, anti-Semitic" material. Four students from the high school and one from the junior high school sued the school district, claiming that the removal of the books was a violation of the First Amendment's guarantee of freedom of speech. The Supreme Court of the United States ruled in favor of the students, saying that the books were not required reading. According to Justice Brennan, who cited West Virginia Board of Education v. Barnette, "Local school boards may not remove books from school library shelves simply because they dislike the ideas contained in these books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." He also cited Tinker v. Des Moines School District, saying that high school students have First Amendment rights in the classroom. Although the schools have a right to determine the content of their libraries, they may not interfere with a student's right to learn. Therefore, the schools may not control their libraries in a manner that results in a narrow, partisan view of certain matters of opinion. The Court stood against the removal or suppression of ideas in schools.

In Bethel School District v. Fraser, the court ruled that not all expressions are protected by the First Amendment. Matthew Fraser, a high school student in Bethel, Washington, delivered a speech nominating a fellow student for a student elective office. The speech was made during school hours as a part of a school-sponsored educational program in self-government. The voluntary assembly was attended by about 600 students, many of whom were 14 year old. Throughout the speech, the student deliberately referred to his candidate in terms of an elaborate and explicit sexual metaphor. The reactions of the students varied from enthusiastic hooting and yelling to embarrassment and bewilderment. Before the speech, the student had discussed it with several teachers, and two teachers told him they thought it was not appropriate. The school responded by suspending the student for three days for having violated the

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341 319 U.S.624 (1943)
342 293 U.S.503 (1969)
343 478 U.S. 675 (1986)
school's "disruptive conduct" rule, which prohibited conduct that substantially interfered with the educational process, including the use of obscene, profane language or gestures. The U.S. Supreme Court held that the school board acted entirely within its permissible authority in punishing Fraser for "his offensively lewd and indecent speech." This was not a situation where Fraser was sanctioned for expressing a political viewpoint as in the Tinker "armband" case; the sexual innuendo was incidental to the merits of the candidate who was being nominated. Moreover, the court maintained that schools have an interest in “teaching students the boundaries of socially appropriate behavior” and therefore must play a role in restricting behavior and speech that is considered “highly offensive or highly threatening to others”.

In *Texas v. Johnson*\(^{345}\), the issue was whether flag burning is an activity protected by the Bill of Rights. The Supreme Court observed that the Constitution protects even the most unpopular and offensive type of speech in a case involving flag burning. Outside the Republican National Convention in Dallas, a protest of Ronald Reagan's policies had been organized, during which a United States flag was burned. Johnson was responsible for the flag burning and was arrested under Texas law, which made the violation of the United States or Texas flags crimes. Johnson was convicted and sentenced to one year in jail and was fined with two thousand dollars. Texas preserving the integrity of the flag as a symbol of national unity, reasoned that the police were preventing the breach of peace that would be erupt due to the flag burning. On appeal from the Texas State Courts, the Supreme Court held that the law was unconstitutionally used against the flag burner. The court observed that offensiveness was protected speech, unlike the unprotected categories of incitement to criminality or fighting words. The court affirmed that the government many not ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provide violence. It held that, patriotic burnings of worn flags that conveyed respect for the national symbol would not be punished.

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\(^{344}\) Sameer Hinduja, Justin W. Patchin, *Bullying Beyond the Schoolyard: Preventing and Responding to Cyber Bullying*, pg. 109 (2009).

\(^{345}\) 491 U.S. 397 (1989)
Presidential Privilege/Separation of powers

*United States v. Nixon*\(^{346}\) considers the extent to which "presidential powers" can be applied to the leader of our country. In the late 1970's, the Democratic National Headquarters at the Watergate Office Building in Washington, D.C., was broken into. The investigation that followed centered on staff members of then Republican President Richard M. Nixon. The court granted that there was a limited executive privilege in areas of military or diplomatic affairs, but gave preference to "the fundamental demands of due process of law in the fair administration of justice." Therefore, the president must obey the subpoena and produce the tapes and documents. Presidential power is not above the law. It cannot protect evidence that may be used in a criminal trial.

*In NY Times v United States*\(^{347}\), the court ruled that the government’s attempt to suppress the information was an attempt at censorship and a violation of first amendment rights to freedom of the press. In June 1971, the New York (NY) Times began publishing top-secret documents from a secret official history of the Vietnam War. The President Richard M. Nixon asserted that the stories threatened the national security. The NY Times sued claiming that the government was infringing upon their first amendment right of freedom of speech. Justice Black opined that,

> "the press was protected (in the First Amendment) so that it could bear the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in the government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington post and the other newspapers should be commended for serving the purpose that the founding fathers saw so clearly. In revealing the working of the government that

\(^{346}\) 418 U.S. 683 (1974)  
\(^{347}\) 403 U.S. 713 (1971)
led to the Vietnam War, the newspapers nobly did precisely that which the founders hoped and trusted they would do.” 348

In Hazelwood School District v. Kuhlmeier349, the Supreme Court dealt with the question of whether the censorship of student newspapers by school administrators violated the students' First Amendment rights to freedom of speech and freedom of the press. Kathy Kuhimeier and two other journalism students wrote articles on pregnancy and divorce for their school newspaper. Their teacher submitted page proofs to the principal for approval. The principal objected to the articles because he felt that the students described in the article on pregnancy, although not named, could be identified, and the father discussed in the article on divorce was not allowed to respond to the derogatory article. The principal also said that the language used was not appropriate for younger students. When the newspaper was printed, two pages containing the articles in question as well as four other articles approved by the principal were deleted.

The U.S. Supreme Court held that the principal's actions did not violate the students' free speech rights. The Court noted that the paper was sponsored by the school and, as such, the school had a legitimate interest in preventing the publication of articles that it deemed inappropriate and that might appear to have the imprimatur of the school. Specifically, the Court noted that the paper was not intended as a public forum in which everyone could share views; rather, it was a limited forum for journalism students to write articles pursuant to the requirements of their Journalism II class, and subject to appropriate editing by the school.350

In Weeks v. United States351, the U.S. Supreme Court issued two important holdings. Firstly, the Court observed that the Fourth Amendment guarantees against

348 “Supreme Court, 6-3, Upholds Newspapers on Publication of Pentagon Report” Available at: www.nytimes.com/books/97/04/13/reviews/papers-final.html (last visited on December 16, 2015)
349 484 U.S. 260 (1988)
351 232 U.S. 383 (1914)
unreasonable searches and seizures prohibited the use at trial of evidence seized by federal officials in violation of the fourth amendment to the constitution. The decision gave rise to the Exclusionary Rule- a judicially created doctrine prohibiting the use of evidence obtained in violation of the Fourth Amendment against individual at trial. Secondly, the court observed that, the limitation on the governmental action provided by the Fourth Amendment did not apply to State and local officials.

Fremont Weeks was suspected of using the mail system to distribute chances in a lottery, which was considered gambling and was illegal in Missouri. Federal agents entered his house, searched his room, and obtained papers belonging to him. Later, the federal agents returned to the house in order to collect more evidence and took letters and envelopes from Weeks' drawers. In both instances, the police did not have a search warrant. The materials were used against Weeks at his trial and he was convicted. At issue was whether the retention of Weeks' property and its admission in evidence against him violated his Fourth Amendment right to be secure from unreasonable search and seizure and his Fifth Amendment right not to be a witness against himself.

The Supreme Court of the United States unanimously decided that as a defendant in a criminal case, Weeks had a right to be free from unreasonable search and seizure and that the police unlawfully searched for, seized, and retained Weeks' letters. The Court praised the police officials for trying to bring guilty people to punishment but said that the police could not be aided by sacrificing the fundamental rights secured and guaranteed by the Constitution.

Mapp v. Ohio\textsuperscript{352} is the landmark Supreme Court case that dealt with drawing the line between legal and illegal searches of private residences and what evidence obtained from such searches is admissible in court.

Dorlee Mapp was suspected of having information in her home that would implicate a suspected bomber. The police came to her home and asked if they might

\textsuperscript{352} 367 U.S. 643 (1961)
search the residence. Ms. Mapp called her lawyer and was advised to ask for a warrant. They police did not have a warrant and were asked to leave. Hours later the police returned and forcibly entered the residence. Mrs. Mapp demanded to see the warrant and a piece of paper was waved in her face. Mrs. Mapp grabbed the paper and tucked it in her blouse. A struggle ensued where Ms. Mapp was knocked to the ground as police retrieved the supposed warrant. Outside Ms. Mapp's attorney arrived on the scene but was prevented from entering the residence. The police found pornographic materials in the house and Ms. Mapp was arrested for possession of lewd materials. Ms. Mapp was convicted of this crime. Ms. Mapp appealed her conviction on the grounds that the search of her home was in violation of her rights.

The U.S. Supreme Court on June 19, 1961, ruled (6-3) that evidence obtained in violation of the Fourth Amendment to the U.S. Constitution, which prohibits unreasonable searches and seizures, is prohibited in state courts. In so doing, it held that the federal exclusionary rule, which forbade the use of unconstitutionally obtained evidence in federal courts, was also applicable to the states through the incorporation doctrine, the theory that most protections of the federal Bill of Rights are guaranteed against the states through the due process clause of the Fourteenth Amendment.

**Right to Counsel:** In *Betts v. Brady*\(^{333}\), the court observed that an indigent defendant did not have due-process right to appoint counsel in a non-capital case unless he could show that, under the special circumstances of his case, he could not obtain a *fair trial* without a lawyer. Betts was indicted for robbery and detained in a Maryland jail. Prior to his trial, he asked for counsel to represent him. This request was denied and he was soon convicted. While imprisoned, Betts filed a habeas corpus petition in the lower courts. After they rejected his petitions, he filed a certiorari petition with the Supreme Court, which agreed to hear his case. Betts argued that his 6th Amendment that is right to a fair trial was violated because of his lack of counsel. The State of Maryland held that most states did not require the appointment of counsel in non-capital cases and the circumstances of this particular case did not require it.

\(^{333}\) 316 U.S. 455 (1942)
Although the Court found in favor of Betts, it decided that the right to counsel must be decided on a case-by-case basis. This ruling was upheld for 20 years until it was overturned by *Gideon v. Wainwright* in 1963.

*Gideon v. Wainwright*\(^{354}\) focused on a bright fault in the U.S. criminal justice system. State courts did not have to appoint lawyers free of charge for indigent defendants in criminal trials. So if the court denied him a lawyer, a defendant without means such as Gideon was virtually helpless. This ruling promised to correct that flaw by guaranteeing a defendant’s right to counsel. No indigent defendant would ever again be tried in a criminal court without the right to a lawyer to defend him.

Gideon was accused of breaking into a poolroom. Gideon, an ex con, was too poor to pay for a lawyer and asked the court to appoint one for him. The court refused to grant his request stating that lawyers were only provided for those accused of committing capital crimes like murder, rape, etc. Gideon was tried and was forced to defend himself. While in Prison Gideon hand wrote a plea to the Supreme Court and was granted a hearing. At this point he received representation from lawyers who were attracted to his case. Gideon argued that his right to a fair trial was violated. Gideon’s position was upheld. The Court ruled that all citizens must be provided a lawyer if they cannot afford one. This is regardless of the type of crime.

*Miranda v. Arizona*\(^{355}\) was a landmark decision which ruled that suspects must be informed of their rights, including the right to remain silent and the right to counsel, before they are questioned by the police and examines the results and repercussions of the case. Ernesto Miranda was arrested for the kidnapping and rape of a young woman. Upon arrest Miranda was questioned for two hours. He never asked for a lawyer and eventually confessed to the crime. Later, however, a lawyer representing Miranda appealed the case to the Supreme Court claiming that Miranda’s rights had been

\(^{354}\) 372 U.S. 335 (1963)
\(^{355}\) 384 U.S. 436 (1966)
violated. Miranda was acquitted. The Court ruled that citizens must be informed of their rights prior to questioning. Any evidence or statement obtained prior to a suspect being read his/her rights is inadmissible. This has led to what is commonly referred to as one’s "Miranda Rights" having to be read upon questioning or arrest.

In *Bowsher v. Synar*\(^{356}\), the Supreme Court struck down the *Gramm-Rudman-Hollings Act* passed by the Congress, officially known as the the Balanced Budget and Emergency Control Act. The intention of the Act was to reduce the federal budget deficit to zero in the fiscal year 1991. Part of the process of achieving this aim was to give to the Comptroller General, an official appointed by the President with the approval of the Senate but removable only by a joint resolution of Congress or impeachment, the duty of reporting to the President his conclusions on the measures necessary to give effect to the legislation. The Supreme Court, in considering the validity of this legislation, based its decision on the doctrine of the separation of powers. “That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.” The Court found that the Act charged the Comptroller General, an officer subject to removal by Congress, with making “executive” decisions, and that therefore the Congress “in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.”\(^{357}\)

*Plessey v. Ferguson*\(^{358}\) is one of the Supreme Court's landmark and controversial decisions, that offered legal cover for the practice of segregation for nearly six decades.

Homer Plessey, a member of a citizens group protesting the Jim Crow laws that created segregation in the south, was arrested for violating the law that forced Blacks to

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\(^{356}\) 478 U.S. 714 (1986)  
\(^{357}\) M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967)  
\(^{358}\) 163 U.S. 537 (1896)
ride in separate train cars. Plessey claimed that the laws violated the 14th amendment to the Constitution that said that all citizens were to receive "equal protection under the law." The state argued that Plessey and other Blacks did receive equal treatment, just separate. Plessey's conviction of a violation of Jim Crow laws has upheld by the Court. The Court ruled that the 14th amendment did say that Blacks had the right to the same facilities, just equal facilities. From this judgement, the court created the doctrine of "separate but equal."

In 1978, the Supreme Court rendered its landmark decision in the University of California Board of Regents v. Bakke\textsuperscript{359}, a test of existing federal and state government affirmative action plans. Alan Bakke, an engineer with high grades, applied to several medical schools in the hopes of one day becoming a doctor. Bakke was rejected by all of the schools he applied to but the University of California at Davis encouraged him to apply again. The next year Bakke again applied and was again rejected. Bakke then found out that the University's affirmative action program reserved 17 places for minority candidates regardless of qualifications. Bakke sued the University claiming that he was the victim of "reverse discrimination." The university argued that the creation of quotas was needed to ensure minority admission to college under their affirmative action program.

In a two part ruling the court ordered Bakke to be admitted to medical school. The court ruled that Bakke had, in fact, been discriminated against. The court did, however, uphold the legality of affirmative action programs. The court cited Harvard Universities affirmative action program that created guidelines for admission rather than strict quotas.

\textit{In Engle v. Vitale}\textsuperscript{360}, the majority, via Justice Black, held that school-sponsored prayer violates the Establishment Clause of the First Amendment. The majority stated that the provision allowing students to absent themselves from this activity did not

\textsuperscript{359} 438 U.S. 265 (1978)
\textsuperscript{360} 370 U.S. 421 (1962)
make the law constitutional because the purpose of the First Amendment was to prevent
government interference with religion. The majority noted that religion is very
important to a vast majority of the American people. Since Americans adhere to a wide
variety of beliefs, it is not appropriate for the government to endorse any particular
belief system. The majority opined that wars, persecutions, and other destructive
measures often arose in the past when the government involved itself in religious
affairs.

In Wallace v. Jaffree, the U.S. Supreme Court ruled that an Alabama statute
that authorized a one-minute period of silence in all public schools “for meditation or
voluntary prayer” violated the First Amendment’s establishment clause. The parents of
three children attending public school in Alabama challenged the constitutionality of an
Alabama law which authorized a one minute period of silence in all public schools for
meditation or voluntary prayer. At issue was whether the Alabama law requiring a one
minute silence period encouraged a religious activity in violation of the First
Amendment establishment clause.

The Supreme Court of the United States held that the Alabama law was a law
respecting the establishment of religion and thus violated the First Amendment. The
Court said that the First Amendment was adopted to limit the power of Congress to
interfere with a person's freedom to believe, worship, and express himself as his
conscience tells him. The Amendment gives an individual the right to choose a religion
without having to accept a religion established by the majority or by government.

The Court said that government must be completely neutral toward religion and
not endorse any religion. Therefore, statutes like the Alabama law requiring one minute
for silence in the schools must have a secular or nonreligious purpose to be within the
Constitution. Since Senator Holmes, who was the primary sponsor of the bill, testified
"that the bill was an effort to return voluntary prayer to our public schools," the Court
decided that the purpose of the Alabama law was to endorse religion and was solely an

\[361\] 472 U.S. 38 (1985)
effort to return voluntary prayer to the public schools. It was, therefore, struck down as being inconsistent with the Constitution.

_In Roe v. Wade_362, the Supreme Court held that litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the general rule that an actual controversy must exist at each stage of judicial review, and not merely when the action is initiated. Roe (P), a pregnant single woman, brought a class action suit challenging the constitutionality of the Texas abortion laws. These laws made it a crime to obtain or attempt an abortion except on medical advice to save the life of the mother. The Court held that, in regard to abortions during the first trimester, the decision must be left to the judgment of the pregnant woman’s doctor. In regard to second trimester pregnancies, states may promote their interests in the mother’s health by regulating abortion procedures related to the health of the mother. Regarding third trimester pregnancies, states may promote their interests in the potentiality of human life by regulating or even prohibiting abortion, except when necessary to preserve the life or health of the mother.

_In Katz v. United States_363, Katz was arrested for illegal gambling after using a public phone to transmit "gambling information." The FBI had attached an electronic listening/recording device onto the outside of the public phone booth that Katz habitually used. They argued that this constituted a legal action since they never actually entered the phone booth. The Courts decision written by now justice Louis D. Brandeis, ruled in favor of Katz, stating the Fourth Amendment allowed for the protection of a person and not just a person's property against illegal searches. Whatever a citizen "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

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362 410 U.S. 113 (1973)
363 389 U.S. 347 (1967)
In *Sackett v. U.S. Environmental Protection Agency*[^364], the Supreme Court Expands Judicial Review of Clean Water Act Enforcement Orders. On March 21, 2012, the U.S. Supreme Court issued an important ruling addressing the enforcement authority of the U.S. Environmental Protection Agency ("EPA") under the federal Clean Water Act. In unanimous opinion, the Supreme Court rules that landowners have a right to direct, meaningful judicial review if the EPA effectively seizes control of their property by declaring it to be "wetlands." The Court rules in favor of PLF (Pacific Legal Foundation) clients Mike and Chantell Sackett, of Priest Lake, Idaho, who were told by EPA - and by the Ninth Circuit - that they could not get direct court review of EPA's claim that their two-thirds of an acre parcel is "wetlands" and that they must obey a detailed and intrusive EPA "compliance" order, or be hit with fines of up to $75,000 per day.^[365]

In *Mach Mining v. Equal Employment Opportunity Commission*[^366], the Supreme Court held that, a court may review whether the Equal Employment Opportunity Commission satisfied its statutory obligation to attempt conciliation before filing suit. But, because the EEOC has extensive discretion to determine what kind and amount of communication with an employer is appropriate in any given case, the scope of that review is narrow.

No doubt, judicial review is one of the main characteristics of government in the United States. In every case (and countless others), the Court used its power of judicial review to declare that an act by a federal or state government was null and void because it contradicted a constitutional provision. It is this power that truly makes the courts a co-equal branch of government with the executive and legislative branches and allows it to defend the rights of the people against potential intrusions by those other branches.^[367]

[^364]: 2012 WL 932018.
[^365]: M. Reed Hopper, “PLF and the Sackets: an important win at the Supreme Court”. Available at: www.pacificlegal.org/Sackett (last visited on December 18, 2015)
[^366]: No. 13-1019 (April 29, 2015)
[^367]: Stephen Haas, “Judicial Review”. Available at: nationalparalegal.edu/Judicial-Review (last visited on December 18, 2015)
4.3.2 PRESIDENTIAL VETO

The most important of all the checks and balances is, of course, the presidential veto. The veto is a power that transcends the American Experience. 368 A presidential veto is a constitutional rule that enables a president to refuse assent to a bill that has been passed by the legislature, and thereby to stop the bill from becoming law. The grounds on which the veto power may exercise and the difficulty of overturning the veto varies between jurisdictions. According to the doctrine of the separation of powers, the power of enacting laws (legislative power) should be separated from the power of administering the state (executive power) and the power of interpreting and applying the laws to particular cases (judicial power). However, constitutions adhering to this doctrine do not typically keep the branches of government entirely separate. As James Madison argued, the doctrine allows for each of the three branches of government to have some involvement in, or control over, the acts of the other two. This partial mixture of mutually controlling powers is known as a system of checks and balances. Madison regarded the executive’s power to veto legislation as one of the most important of these checks and balances. The veto power is only one of the ways in which the three main branches of government interact and restrain one another. 369

The Framers of the U.S. Constitution gave the President the power to veto acts of Congress to prevent the legislative branch from becoming too powerful. This is an illustration of the separation of powers integral to the U.S. Constitution. The power of the President to refuse or to sign legislation is clearly outlined in the Constitution370:

“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the

369 "Presidential Veto Powers". Available at: www.idea.int/cbp/loader.cfm?csModule=security/getfile&pgsid=69562 (last visited on December 18, 2015)
370 U.S. Constitution, Article I, Section 7, clause 2
Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.”

The object of conferring veto

(a) To prevent hasty and ill-considered legislation by the Parliament; and
(b) To prevent legislation which may be unconstitutional.

Classification of the veto power

1. Absolute veto that is, withholding of assent to the bill passed by the legislature.
2. Qualified veto, which can be overridden by the legislature with a higher majority.
3. Suspensive veto, which can be overridden by the legislature with an ordinary majority.
4. Pocket veto that is, taking no action on the bill passed by the legislature.

Absolute Veto: It refers to the power of the President to withhold his assent to a bill passed by the Parliament. The bill then ends and does not become an act. Usually, this veto is exercised in the following two cases: (a) With respect to private members’ bills (i.e., bills introduced by any member of Parliament who is not a minister); and (b) With respect to the government bills when the cabinet resigns (after the passage of the bills but before the assent by the President).

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373 Ibid.
Qualified veto: A veto that can be overridden by a subsequent decision of the legislature is sometimes known as a ‘qualified’ veto. Most constitutions that provide for presidential vetoes on policy grounds also allow the legislature to override the president’s veto by means of a supermajority vote. The rationale behind the requirement for a supermajority is that the president’s veto is deployed in order to prevent the passage of partisan legislation or of legislation that is divisive or controversial or of legislation that does not promote the common good. The re-passage of a bill by a supermajority indicates that these objections have been met and overcome. It is evidence that the bill - far from being partisan, divisive or controversial - enjoys a broad consensus of support in the legislature.

Suspensive Veto: The President exercises this veto when he returns a bill for reconsideration of the Parliament. However, if the bill is passed again by the Parliament with or without amendments and again presented to the President, it is obligatory for the President to give his assent to the bill.374

Pocket Veto: In this case, the President neither ratifies nor rejects nor returns the bill, but simply keeps the bill pending for an indefinite period. This power of the President is not to take any action (either positive or negative) on the bill is-known as the pocket veto. The President has to return the bill for reconsideration within 10 days.375

Significance of the Veto Power

Veto Power Protects the Constitution: One of the traditional functions of the presidential veto power is to protect against the legislature. The president’s role is essentially that of a constitutional guardian, whose function is to conduct an executive review of proposed legislation. This understanding of the veto power necessarily assumes that the primary centre of political leadership lies elsewhere besides the presidency. According to many scholars, the protection of the constitution was the

374 Vajiram and Ravi, “Veto Power of The President”.
375 Ibid.
original purpose of the veto as envisaged by the authors of the Constitution of the United States. The veto power, by this account, was initially conceived as a reactive and quite exceptional instrument.\textsuperscript{376}

**Veto Power protects against harmful policies and corruption:** In many jurisdictions, the veto power can be used by presidents to prevent the passage of legislation that the president finds objectionable on policy or substantive grounds, without having to make any complaint against the constitutional or procedural propriety of the bill in question. In addition to being deployed against legislation to which the president is ideologically opposed, the veto power is often relied upon as a means of preventing the enactment of so-called pork-barrel bills (where legislators vote for public funds to be spent on projects in their own districts) or special-interest legislation (where lobbyists attempt to influence legislators to enact laws that privilege a certain section of society against the common good). This understanding of the veto power, in contrast to the veto exercised solely on constitutional or procedural grounds, widens the scope of presidential discretion. It calls on the president, as a figure representing a national constituency, to consider the merits, wisdom and necessity of a bill, and to act as the guardian of general interests. Yet it is still essentially a reactive and negative power that asks the president to review, and to approve or reject, legislative proposals that are initiated by others. It envisages the president as an autonomous policy actor, but not necessarily as the sole or primary policy initiator.\textsuperscript{377}

**Prevention of the Arbitrary or Capricious use of the Veto Power**

Firstly, the Constitution may require the president to consult with other institutions or officials, for example, with the speaker or presiding officer of the legislature, or of each house thereof, with the chief justice or with a special council of state established to advise the president—before exercising the veto power. The need to consult may help prevent a president from acting in a capricious or arbitrary manner,

\textsuperscript{376} “Presidential Veto Powers”.

\textsuperscript{377} Ibid.
and may enable other political and institutional actors to influence or restrain presidential decisions—thereby, perhaps, forcing the president to think more clearly about the consequences of his or her decision. Another way in which a constitution can prevent the arbitrary or capricious use of the veto power, while keeping responsibility in the hands of the president, is to require any veto to be accompanied by a statement of the president’s objections, giving a reasoned justification for the exercise of the veto power. The accompanying veto statement also gives the president an opportunity to lay out precisely what is wrong with the bill and to specify how the bill could be improved. In this way, the veto power also becomes - albeit indirectly - an agenda setting power through which the president is able to exercise political leadership, to define policy stances to the electorate and to put political pressure on legislators.\textsuperscript{378}

Article I, section 7 of the Constitution grants the President the authority to veto legislation passed by Congress. This authority is one of the most significant tools the President can employ to prevent the passage of legislation.\textsuperscript{379} The President is not the member of the Congress. However, he has certain legislative functions. The President may send messages to the Congress. The messages may be declaration of certain policies, or the President may request the Congress to pass certain bills. The Congress has to give proper attention to the message sent by the President. Any bill passed by the Congress could become law only after being signed by the President. The President may refuse his signature. This is called veto power. He may return the bill to the House of its origin with or without proposals for changes. The House may consider the bill. It may or may not accept the changes suggested by the President. However, the bill has to be passed with the support of 2/3 majority in both the Houses to become law. Generally, the bills rejected by the President do not pass through difficult process. The President has another type of veto known as ‘Pocket Veto’. He has to either sign or return a bill within ten days from the date of receipt. If no action is taken by the President within the time limit, the bill is deemed to have signed by the President and it would become law. But if the session of the Congress ends before the expiry of the time limit, the bill

\textsuperscript{378} ibid
\textsuperscript{379} Ibid
dies in the Pocket of the President. Hence it is called Pocket Veto. The President’s power of veto is considered as the most potent weapon in the hands of the President.  

The establishment of colonies in America occurred primarily through the prerogative of the British Crown, which sanctioned early colonial constitutions. As mentioned, colonial governors were appointed by the king, except for those of Connecticut and Rhode Island, which elected their governors to one-year terms. All governors possessed absolute veto powers over colonial legislation, either through charter, royal instruction, or proprietary grant, but in Maryland, the burgesses refused to recognize the gubernatorial veto. The King’s absolute veto could be applied to colonial acts in any of the colonies except Connecticut and Rhode Island and Maryland. Yet even in these states, royal disapproval could be transmitted through crown-appointed officials. The king not only had veto, but used it with relative frequency, as the veto was considered a vital tool for protecting British interests. During the Federal Constitutional Convention deliberations, Benjamin Franklin described how the colonial governor extracted private requisites in exchange for assent: “the negative of the Governor was constantly made use of to extort money. No good law whatsoever could be passed without a private bargain with him”.  

Once the colonies broke free of British control, their initial response to the onerous veto was to make it unavailable to their own executives. In fact, with the exception of New York, most state constitutions were careful to subordinate the executive to the legislature. South Carolina experimented first with the veto in its temporary constitution of 1776. It gave to its governor an absolute veto. In South Carolina’s 1778 constitution, the veto power was eliminated.  

New York was the first state to permanently bestow an executive veto power. This fact, combined with the greater independence given to the governor, is explained by the larger fact that, unlike the other states, it established a strong governor in its  

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380 N. Jayapalan, Modern Governments, pg. 62 (1999)  
382 Ibid pg. 8-9
constitution of 1777. New York did this for several reasons: the state’s relative conservatism; the influence of such leaders as Jay, Livingston, and Morris; and the fact that the New York delayed in finalizing its constitution, which allowed time for observation of the adverse consequences of weak executives in other states. According the New York Constitution, the governor would join with judges of the State Supreme Court and the Chancellor of the court of chancery in a council of revision to assess all bills passed by the State Legislature: “All bills which have passed the senate or assembly shall before they become laws be presented to the said council for the revisal and consideration.” If the majority of the council shared reservations, the bill was to be returned to the chamber of origin, with the inclusion of written objections, for reconsideration. A two-thirds vote in both chambers would override the veto. If the council did not return the bill to the legislature within ten days, it automatically become law, unless the legislature adjourned for more than ten days, in which case the bill would be returned on the first day of the new session.  

Later in 1777, the Vermont Constitution incorporated what was, in effect, a non-binding veto. It is said that “all bills of public nature shall be first laid before the governor and council for their perusal and proposals of amendment”. In 1780, the Massachusetts Constitution gave to the governor for the first time sole “power of revision” over legislation. The provisions of the Constitution pertaining to the veto, adopted in Massachusetts with little debate, were nearly identical in wording and concept to the New York Constitution, with the exceptions that the governor had only five days to consider the bill and that he could act alone. The previously proposed Massachusetts Constitution, defeated in a state referendum in 1778, made no provision for the veto. It was clear that the utility and desirability of “power of revision” had been demonstrated by New York. Alexander Hamilton observed in 1780 that the council of revision’s “utility has become so apparent that persons who in compiling the constitution were violent opposers of it, have from experience become its declare admirers”. In the Massachusetts convention, the rationale for adopting the veto was “to preserve the laws from being unsystematical and inaccurate” and so that “due balance

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383 Ibid pg. 9
may be preserved in the three capital powers of government". In the succeeding ten years, the Massachusetts’ governor returned a total of one bill and two resolves to the legislature.\textsuperscript{384}

When the founders convened in Philadelphia in May of 1787, they faced a multiple problems, not the least of which was the matter of executive power. Was there to be an executive, and if so, would the executive power be held in the hands of an individual or a group? And what would be the scope of the executive’s power? Central to all these questions was the matter of the veto power. The initial resolution of these issues was embodied in the Virginia plan, offered by Edmund Randolph, but written mostly by James Madison. It called for a singly President, to be elected by the Congress for a singly term. The President was to have a qualified veto - that is, subject to override - but it was to exercised in concert with a council of revision, composed of “a convenient number of the National Judiciary".\textsuperscript{385}

Further, arguments were made at various junctures to grant an absolute veto, based on the sense that the President would need such a tool to maintain his independence and strength. Wilson argued for the necessity of an absolute veto. Hamilton pointed out that the little danger of overuse of the veto. Franklin also spoke against an absolute veto. Ultimately, Madison spoke in favour of the efficacy of a qualified veto, arguing that the president would rarely use a veto unless he already had at least some political support in Congress. Later, Hamilton adopted a similar tack in the Federalist Papers, when he wrote that the qualified veto “would be less apt to offend” and “more apt to be exercised” and therefore would be “more effectual.”\textsuperscript{386} The veto occupied a central place in Madison’s plan for extending the sphere of republican government.\textsuperscript{387}

\textsuperscript{384} ibid pg. 9-10
\textsuperscript{385} ibid pg. 10-11
\textsuperscript{386} ibid pg. 12
\textsuperscript{387} ibid pg. 15
Exercise of Veto Power

The first President to use the veto with vigor was James Madison. Of the seven bills he vetoed in office, he relied on a constitutional justification for five. The other two bills, relating to naturalization and bank incorporation, were vetoed on policy grounds. Madison was also the first President to employ the pocket veto. The first two occurred in July, 1812 and the second pocket veto occurred in 1816. Madison’s successor, James Monroe, employed the veto but once, in 1822. Monroe’s successor, John Quincy Adams, exercised no vetoes. Further in the course of the administration, John Tyler vetoed a total of ten bills, including four pocket vetoes. James K. Polk, followed by Tyler, used the veto on three occasions.

After the civil war, the item veto was adopted by Georgia in 1865 and Texas in 1866. Thereafter the idea spread over to most of the other states by about 1915. Today, forty-three of the fifty state constitutions include some kind of gubernatorial item veto.\footnote{ibid pg. 126}

Table 1: The following table shows the list of the Presidents and their exercise of veto powers.\footnote{“Presidential Vetoes”. Available at: history.house.gov/Institution/Presidential-Vetoes/Presidential-Vetoes/ (last visited on December 20, 2015)}

<table>
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<tr>
<th>Congresses</th>
<th>President</th>
<th>Regular Vetoes</th>
<th>Pocket Vetoes</th>
<th>Total Vetoes</th>
<th>Vetoes Overridden</th>
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<td>Congresses</td>
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<td>1504</td>
<td>1066</td>
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</table>

The President of the United States is the most powerful person in the free world, but his legislative powers are strictly defined by the Constitution and by a system of checks and balances among the executive, legislative and judicial branches of the
government. The presidential veto power has emerged as a tool of influence, or a bargaining chip, that the president can use strategically and proactively in order to pursue their policy agenda. The veto power ‘guarantees the President a place at the legislative bargaining table’, which enables the president to ‘kill legislation he opposes or, more frequently, wrest policy concessions from majorities loathe to relinquish them’. The increased use of the veto as a ‘political weapon’ has ‘allowed the president to become more involved in legislative matters, and has changed the presidential-congressional dynamic so that Congress is no longer the dominant force in government – as it was until the end of the nineteenth century’. 390

390 “Presidential Veto Powers”.
4.3.3 CONGRESSIONAL POWER TO REVISE/MODIFY FINAL JUDGEMENT OF COURTS

The separation of powers provides a more absolute protection to final judgments than it does to decisional independence in the pending case scenario. It may be, even if the legislation affecting the final judgment can be regarded as a change in the law, that there are nevertheless limits to its applicability to finally decided cases. The term ‘final judgment’ is one from which there is no further avenue for appeal because a matter has been decided by the highest court in the judicial hierarchy or the time for an appeal has elapsed. As fundamental and distinctive outcome of the exercise of judicial power a final judgment is the judiciary’s last word on the rights and obligations of the particular parties in a particular suit. The extent to which a legislature may second-guess this outcome is the issue to be considered here.\(^{391}\)

Constitutional limitations on legislative competence over final judgments have clear civil liberties implications, in particular, the objective that legal disputes be resolved by adjudication according to law by independent judges ‘free from potential domination by the legislative and executive branches of government,’\(^{392}\) and that the fruits of litigation are not denied a successful litigant. The Rule of Law implications are also obvious in these circumstances. Prima facie, the protection of final judgments must constitute a basic minimum protection afforded by the separation of powers, even if it were to protect nothing else.\(^{393}\)

Commencing with the most obvious limitation, it would clearly be a breach of the separation of powers if the legislature were to constitute itself a tribunal or to set up another non-court tribunal, to decide cases a first instance or to review, in the way of an appellate court, the final decisions of the court, with power to substitute and enforce its


\(^{392}\) *Harris v. Caladine* (1991) 172 CLR 84

\(^{393}\) Peter Gerangelos, pg. 193 (2010)
own orders. This was described by Kirby J in *Nicholas v. The Queen*  as the ‘most obvious derogation’ from the principle founded in the separation of judicial powers that ‘Parliament may not enter into the activities properly belonging to the judicial power in a way inconsistent with its exercise by the court. Such egregious institutional breaches of the separation of powers are generally rare and unlikely to occur except in extreme situations. However, this was the experience of the United States in its colonial and Pre- Constitution period where such interferences were common and which convinced the American Framers of the need for an entrenched separation of powers. More likely, although also rare, would be an attempt by a legislature to revise a final judgment under the guise of otherwise properly enacted legislation; that is, as a purported exercise of legislative power. This would also constitute a breach of the separation of powers.  

Alexander Hamilton wrote in *The Federalist*, by way of exegesis of Article III, Section 1, of the United States Constitution, that a ‘legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases’. Thus, the separation of powers would not prohibit legislation amending the law as applied or declared by the court, so long as it did not act retrospectively to revise or annul the final judgment as between the parties. In a further refinement, Winterton correctly observed that the legislature ‘can effectively reverse the outcome of particular litigation by enacting retrospective general legislation which effectively renders the decision irrelevant by altering the legal rights and obligations upon which it is based’. It must do this, however, without expressly overruling the actual decision it thereby renders redundant.

The framers of the United States Constitution were urgently concerned with the practice of legislative revision of final judgments, concluding this practice could most surely be defeated by the entrenchment of the separation of powers. It is therefore unremarkable that the issue received almost immediate judicial attention in the fledgling

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394 [1998] 193 CLR 173
398 Peter Gerangelos (2010), pg. 194
United States in *Hayburn’s Case* in 1792. The statute in issue purported to give jurisdiction to the federal courts to make determinations of eligibility for war pensions, and the quantum thereof, in individual cases. This, however, was made subject to review by the Secretary of War. Congress also reserved to itself a right of review. The circuit Court for the New York District held it to be unconstitutional. It breached the separation of powers because an administrative, and therefore non-judicial, function was being imposed on the federal courts. The court was required to make a determination on the basis of uncontested applications and not by way of the hearing of disputed claims in an adjudicative judicial setting. The offending aspects of the statute were repealed before the Supreme Court could rule finally on the constitutional issue. However, the Supreme Court noted the decision of the New York court on these particular issues in the margins of its own judgment, together with a letter from the justices of the Circuit Court of Pennsylvania to the President of the United States concerning the constitutional issues. In particular, that letter set out the reasons why they regarded the statute to be a breach of the separation of powers.

The judges were relying on the constitutional prohibition of the review or amendment of the judgment of the court by the non-judicial branches that were not permissible under any circumstances. There was a clear constitutional limitation on Congress from rendering final judgments mere advisory opinions—the consequence of making them subject to legislative or executive review. Thus, while it is clear that the principle which emerged cannot be said to be exclusively concerned with the inviolability of final judgments. In *Calder v. Bull*, the Supreme Court considered a statute passed by the Legislature of Connecticut setting aside the judgment of a State court in a civil case. Although the case was decided on other issues, viz., and the interpretation of the express constitutional prohibition on retrospective legislation by federal and State legislatures, Justice Iredell noted that,

“the Legislature of (Connecticut) has been in the uniform, uninterrupted, habit of exercising a general superintending power over its courts of law, by granting

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399 US (2 Dall) 408 (1792)
400 Peter Gerangelos, pg. 218 (2010)
401 5 Dall 386 (1798)
new trials. It may, indeed, appear strange to some of us, that in any form, there should exist a power to grant, with respect to suits pending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institution.... The power.... Is judicial in its nature; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative authority.”  

Accordingly, under the separation of powers, it must be unconstitutional.

Judicial sensitivities relating to the protection of final judgments extended to the State courts of the immediate Post-Constitution era. One example amongst many is Bates v. Kimball, where a special Act of the Vermont Legislature authorized a party to appeal from the judgment of a court, even though, under the general law, the time form appeal had expired. The court, noting that the unappealed judgment had become final, addressed the question: ‘Have the Legislature power to vacate or annul an existing judgment between party and party?’ the reply was unequivocal. To annul the final judgment of a court was ‘an assumption of judicial power’ and therefore forbidden. The court observed that,

“The necessity of a distinct and separate existence of the three great departments of government.... had been proclaimed and enforced by .... Blackstone, Jefferson and Madison and sanctioned by the people of the United States, by being adopted in terms more or less explicit, into all their written constitutions.”

The position on final judgments was certainly well understood and appreciated by the time Thomas Cooley wrote his influential Constitutional Limitations in the second half of the nineteenth century. Cooley found a wealth of authority, both federal and State, to support this proposition.  

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402 Peter Gerangelos, pg. 219 (2010)
403 Chipman 77 (vt 1821)
404 Cooley T M, Constitutional Limitations (1890)
In *Plaut v. Spendthrift Farm Inc.*, the Supreme Court invalidated legislation on the precise ground that it purported to revise the final judgment of a federal court, doing so unequivocally on the basis of a breach of the separation of powers. The decision clearly established in United States jurisprudence the inviolable quality of final judgments. The separation of powers prohibited the retrospective application of new law to finally decided judgments which had the effect of revising those judgments.

As an indication of the subtleties involved in what otherwise appears to be a straightforward final judgments issue, the decisions of the various federal courts did not produce consistent results. The court of Appeals for the Fifth Circuit in *Pacific Mutual Life Insurance Co. v. First Republic Bank Corp.* upheld the constitutionality of section 27A with respect to final judgments based on that court’s reading of the authorities which were held ‘to support the constitutional proposition that Congress and the judiciary share authority to decide when the judiciary’s word on a controversy is its last.’

In *Miller v. French*, the legislation considered was in certain aspects more offensive to separation of powers sensibilities and, accordingly, it was quite open for the Supreme Court simply and uncontroversially to follow *Plaut* and declare the legislation unconstitutional.

The revision or modify of a final judgment by the Congress would clearly and unambiguously amount to a usurpation of judicial power. It was therefore clearly settled by the United States authorities, with the concurrence of its constitutional scholars, that final judgments were inviolable even from legislative revision where there was an entrenched separation of powers. Members of Congress take an oath to uphold the Constitution, but when there is a dispute over the constitutionality of a law, only judges

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405 154 US 211 (1995)
406 Peter Gerangelos, pg. 225 (2010)
407 997 F 2d 39 (5th Cir 1993)
408 Peter Gerangelos, pg. 227 (2010)
409 530 US 327 (2000)
410 Peter Gerangelos, pg. 236 (2010)
get to decide what the Constitution and the laws mean, and the Supreme Court gets the final word.
4.3.4 LEGISLATIVE VETO

The legislative veto simply refers to various congressional oversight procedures. It is a procedure that enables Congress to review rules promulgated by various administrative agencies and executive departments before they become effective. From 1932, the U.S. Congress exercised a so-called legislative veto. Clauses in certain laws qualified the authority of the executive branch to act by making specified acts subject to disapproval by the majority vote of one or both houses.411

The legislative vetoes may be characterized as one of three types.

- Many legislative veto provisions specify that an administrative rule may be disapproved by a simple resolution or approved by a concurrent resolution. Although the procedures by which these actions are taken differ, they involve similar constitutional considerations. A simple resolution for disapproval enables one House of Congress to defeat an administrative rule without the agreement of the other House. A concurrent resolution for approval requires the approval of both Houses in order for the administrative rule to become effective— if one House fails to approve the rule, it is defeated. Thus, both the simple resolution for disapproval and the concurrent resolution for approval allow action taken by one House to determine whether a rule promulgated by an agency becomes effective.

- Other provisions delegate authority to congressional committees or subcommittees to oversee administrative agencies through the veto procedure; this oversight provision has been termed the "committee veto." Although the specific language of the enabling legislation may vary, committee vetoes

\[\text{411} \quad \text{“Checks and balances”}\.\]
\[\text{Available at: www.britannica.com/topic/legislative-veto. (last visited on September 29, 2015)}\]
generally require agreement between the agency and the committee on the provisions of the rule before they become effective.

- The third type of legislative veto provision, the concurrent resolution for disapproval, requires that action be taken by both Houses in order to defeat a proposed administrative rule. This procedural variation is significant, since it is the only type of legislative veto that requires action by both Houses—the form of action prescribed in the Constitution for the exercise of the legislative power.\textsuperscript{412}

The constitutional arguments focus on whether Congress' use of the legislative veto encroaches on the powers of its coequal branches or permits lawmaking through a constitutionally unauthorized procedure. Notwithstanding the constitutional implications of the legislative veto, its potential impact on the effectiveness of the administrative process is significant.

1. **The requirement of a bicameral legislature:** The framers of the Constitution, by creating a bicameral legislature, sought to control the inherent tendency of the legislature to dominate the other branches. In order to check the legislative power, the framers created two Houses elected from different constituencies. One body of the legislature would be unable to enact an "unwise" bill into law; approval of the second house would prove the merit of the bill. The bicameral principle can be inferred from the grant of only a limited number of powers to one House which do not require action by the other. By inference, then, congressional actions must be taken by both Houses unless the Constitution provides otherwise. When legislative veto provisions permit action by one House of Congress to determine whether an administrative rule may become effective, the bicameral legislative formula is circumvented. As administrative rules are laws made pursuant to enabling legislation, it can be argued that the

Available at: www.wcl.american.edu/journal/lawrev26/ivanhoe.pdf (last visited on December 30, 2015)
bicameral formula must be followed. Congressional action to determine whether the rule may become effective must be taken by the entire legislature. The one-House and committee vetoes are vulnerable to a constitutional attack from this standpoint, because neither procedure requires action by both Houses. Even if the enabling act were adopted according to constitutional prescription, Congress cannot delegate legislative power to one House or to one committee. The power must be exercised by both Houses. If executive power can be exercised by the legislature, it also must be exercised by the entire Congress. Although the framers' fear that the legislature would dominate the political system has not been proven historically, this cannot justify circumventing the Constitution. It is only permissible for one House of Congress to exercise power when the Constitution specifically provides for it, or when the action taken is necessary for the exercise of the legislative power.

2. **Executive veto:** The role of the executive in the lawmaking process reflects a constitutional policy favoring inter-branch action. Historically, presidential approval has been required for all congressional action, with the exception of the congressional power to propose constitutional amendments. When a two-thirds majority of each House passes an amendment, no presidential approval is required, as the amendment is not enacted until it is ratified by the state. When Congress attempted to circumvent the executive veto by passing a resolution to cede land to a state, the Supreme Court held that such action required presidential affirmation, as all acts which in effect make law must be in accordance with the lawmaking process prescribed by the Constitution. The framers considered the executive veto the most effective check on congressional power. It enables the President to defeat congressional legislative action unless a two-thirds vote to override the veto can be obtained. When congressional action has the effect of lawmaking, the President is constitutionally entitled to exercise the veto power. Proponents of the legislative veto argue that although an administrative agency's promulgation of rules under the authority of enabling legislation has the effect of establishing law, constitutional problems are
avoided, as the rules are promulgated pursuant to legislation passed by Congress and presumably signed by the President. Opponents of the veto argue that once an administrative rule is proposed by an agency, congressional action that determines whether the rule becomes effective has the effect of lawmaking. According to the constitutional framework, such congressional action should provide the President with the opportunity to exercise the veto power after the rule has been reviewed by Congress. As the legislative veto process does not require subsequent executive action, it is in derogation of the executive veto power. It can be argued, however, that the President had the opportunity to veto the enabling act. The President's acquiescence to a specific legislative veto provision would make a subsequent exercise of that veto by both houses constitutional. By signing the bill, the President indicates in advance that he approves the congressional action that completes the legislative process; he has, in effect, waived his veto power concerning the specific bill enacted. It must be emphasized that presidential acquiescence to a particular legislative veto provision must not preclude the exercise of his constitutional powers in all similar instances. Thus, when the President signs a bill containing a legislative veto provision, he has only waived his right to veto Congress' oversight of administrative rulemaking pursuant to the particular enabling legislation. Any prospective forfeiture of the presidential veto for all administrative rules, it can be argued, is constitutionally impermissible.

3. **Encroachment on the executive power:** The Constitution grants the President the power to execute the laws. 81 Congress has the power to pass bills and to perform other enumerated functions under Article 1. Under a strict interpretation of the separation of powers doctrine, any congressional encroachment on the President's power to execute the laws is unconstitutional. It has been suggested that the legislative veto is such an encroachment. Under this theory, once Congress has passed a bill, its constitutional function is complete; it is the President's task to administer the legislation. Subsequent congressional action can only be taken through the legislative process. Contrary to this principle, the
legislative veto permits Congress to execute federal legislation by determining which administrative rules are required to administer the law. The boundaries of congressional power have been unclear for many years. The separation of powers doctrine does not require the complete compartmentalization of the branches. The Supreme Court supported this view in *Buckley v. Valeo*[^413] and stated that "the hermetic sealing off of the three branches of government from one another will preclude the establishment of a Nation capable of governing itself effectively." The difficulty lies in determining the extent to which Congress may exercise executive power in the name of effective government. The Supreme Court has seldom addressed this issue; *Springer v. The Philippine Islands*[^414] is virtually the only case in which the Court discussed congressional encroachment on executive power. The Philippine legislature created nationally owned corporations whose directors were selected by the Philippine President of the Senate, the Speaker of the House of Representatives and the Governor-General. The Supreme Court held that the selection procedure vested executive power in legislative representatives. The Court emphasized that, due to the "exclusive character of the powers conferred upon each of the three departments," each branch was authorized to exercise only those powers specifically enumerated in the Constitution. Thus, unless a power was expressly conferred upon it, a branch of government could not exercise the type of power given to another branch. The legislative power was defined as the authority to pass laws; the power to enforce laws and to appoint administrators to enforce them belonged to the executive. The Court held that the selection of public agents charged with executive functions was beyond the scope of the legislative power. Springer can be read broadly to hold that after a statute is enacted, any legislative intrusion into the administration of the law violates the executive prerogative and is therefore unconstitutional. On the other hand, since there is an important distinction between the nature of the actions of the Philippine legislature and the actions of Congress in the exercise of the legislative veto, the

[^413]: 421 US 1 (1976)  
[^414]: 277 U.S. 189 (1928)
case may be limited in its application. The value of Springer may be questioned further because it involved the legislature's participation in the selection of administrative officials—a power reserved specifically for the executive. Arguably, the legislative veto is within the permissible scope of congressional concerns. Oversight of administrative agencies and the executive is necessary for the exercise of the legislative power, because it insures the proper interpretation and implementation of congressional intent.

4. **Congressional delegation of the legislative power:** The constitutional analysis of the legislative veto has been limited thus far to issues primarily concerning the separation of powers doctrine. The discussion has centered around arguments that the legislative veto permits Congress to encroach on powers reserved explicitly for another branch or to avoid the constitutionally prescribed internal checks on the legislative branch. On the other hand, the legislative veto can, arguably, improve the balance between the coequal branches by requiring additional inter-branch checks. Congressional review of administrative and executive action is authorized by statute; therefore, it can be argued that even if this review allows one branch to exercise a power enumerated specifically for another branch, the review is permissible as a voluntary delegation of the enumerated power. If Congress can delegate legislative power to promulgate rules to the executive or to the bureaucracy, then, arguably, that delegation can be made with the stipulation that Congress subsequently may review the administrative rules promulgated under the authority of the statute. If Congress delegates part of its legislative power to the executive, or does so conditionally—that is, reserving part of the power for itself—the legislative veto is the constitutionally permissible exercise of the remaining legislative power. Thus, the presidential affirmation is supplanted by the legislative veto as the final act in the legislative process. Alternatively, the legislative veto may be viewed as a voluntary delegation of executive power to Congress by the President, evidenced by his approval of a bill containing a legislative veto provision. The issue then is whether the legislative power or the executive power was delegated
properly according to judicially shaped standards. The delegation doctrine developed in a line of cases that tested the constitutionality of the congressional delegation of legislative power to the executive. In early cases involving the delegation of legislative power, the Supreme Court held that such delegation to the executive was permissible, provided that Congress had already enacted the legislation, the execution of the act depended on future conditions, and Congress included clear guidelines to indicate when the legislation should be implemented. The Court thus relied on a fiction that the President or the administrative agency merely executed the law. They ostensibly exercised discretion only in deciding when the legislation should be put into effect; the substance of the legislation was unaffected. 415

Proponents of the legislative veto argue that although it increases congressional control over the administration of legislation, it is simply a valid exercise of congressional oversight power. The legislative veto was not a frequently employed oversight mechanism until the late 1960's. By 1976, however, Congress had adopted more than 300 separate veto provisions in over 200 different acts. In the ninety-fourth Congress, a bill was introduced which would have extended the legislative veto power to all administrative rules issued by every agency. 416 The legislation would have affected agencies created both before and after the enactment of the bill.

JUDICIAL RESPONSES TO LEGISLATIVE VETO

In Atkins v. United States, 416 the court upheld the legislative veto as a means of improving inter-branch cooperation and checks and balances. 417 In finding the legislative veto provision constitutional, the court in Atkins relied on the broad power granted Congress by the necessary and proper clause of the Constitution. Further, the court noted unique aspects of the Federal Salary Act that made the legislative veto provision constitutional. First, Article I, section 1 of the Constitution that places

415 Robert J. Ivanhoe (1977)
416 556 F.2d 1028, 1070 (Ct. Cl. 1977)
417 Robert J. Ivanhoe (1977)
legislative power in Congress, does not require affirmative bicameral action every time when a legislative power is exercised. Because the matter of salaries is traditionally within the province of the legislative branch, and because the presidential recommendations affect only those whose salaries are established by Congress, the court reasoned the legislative action did not require the affirmative concurrence of both houses. Second, the President's recommendations have no force of law. Therefore, the one-house veto merely rejects a proposal; the veto does not alter existing law, but merely preserves the status quo. In its determination, however, the court explicitly limited its ruling to the question of the constitutionality of the legislative veto provision involved in the case and did not address the broader question of the constitutionality of legislative vetoes in general.\textsuperscript{418}

The Court invalidated the use of the “legislative veto,” a device which had been developed to enable Congress to control the way in which the Administration carried out the laws which the Congress had enacted. By 1983 Congress had inserted nearly two hundred legislative vetoes into statutes, making it possible to strike down specific actions of the executive branch. When legislation was passed delegating power to the executive, provisions were included in the legislation which allowed vetoes by one House of Congress, by both Houses, by a congressional committee, or even by a committee chair of decisions made by executive departments or independent agencies. In this way Congress could intervene in the administrative process to reverse decisions of which Congress, or in reality some congressmen or senators, disapproved. In \textit{INS v. Chadha}\textsuperscript{419}, the Supreme Court struck down. Congress's use of the “legislative veto,” a device used for half a century to control certain activities in the executive branch. In the \textit{Chadha Case}, in 1983, the Court considered the constitutionality of a legislative veto exercised by the House of Representatives reversing a decision of the Attorney General, which would have allowed Chadha, a student whose visa had expired, to remain in the United States. The Chief Justice, delivering the opinion of the Court

\textsuperscript{418} Douglas B. Habig, “The Constitutionality of the Legislative Veto” (1981). Available at: scholarship.law.wm.edu/cgi/viewcontent.article=2262 (last visited on December 30, 2015)

\textsuperscript{419} \textit{Immigration and Naturalization Service v. Chadha}, 462 U.S. 919 (1983)
declaring the legislative veto unconstitutional, argued that the Constitution had erected checks to the exercise of power by each branch of government, and that “to preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.”

In *Bowscher v. Synar*, the court invalidated a provision of the Balanced Budget Act that authorized Charles Bowscher, as Comptroller General of the U.S., to order the impoundment of funds appropriated for domestic or military use when he determined the federal budget was in a deficit situation. The court concluded that allowing the exercise of this executive power by the Comptroller General, an officer-in-the Court’s view- in the legislative branch, would be “in essence, to permit a legislative veto.”

**Practical Problems of the Legislative Veto**

The legislative veto places a tremendous burden and responsibility on Congress. Although it is imperative that Congress develop a system to achieve effective oversight, under a provision similar to House Report (H.R. 12048), Congress not only would have the burden of reviewing all rules upon promulgation, but it also would have to direct any reconsideration of all rules already in effect. If Congress did not attempt to review all administrative rules, it would have to decide which ones deserve its attention. Lobbying and political pressure on individual Congressmen might be used to influence review. Yet, if Congress attempted careful scrutiny of all administrative rules, the effect on legislative efficiency would be a costly one. Additional staff would be required, and the result would be a congressional bureaucracy engaged to oversee the federal

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420 M.J.C. Vile, pg. 388-389 (1967)
421 478 U.S. 714 (1986)
422 “Separation of powers-The Issue: When do the actions of one branch of the federal government unconstitutionally intrude upon the powers of another branch? Exploring Constitutional Conflicts”. Available at: law2.unm.edu/faculty/projects/flirials/conlaw/separationofpowers.html (last visited on December 30, 2015)
423 H.R.12048 - 94th Congress (1975-1976): Introduced in House- Administrative Rule Making Reform Act that requires a federal agency preparing to hold a rule making session to make a reasonable effort to inform those likely to be affected by the proposed rule making. Requires that if the affected group is large, representatives of such group must be notified. Available at: www.congress.gov/bill/94th-congress/house-bill/12048 (last visited on December 30, 2016)
bureaucracy. The fundamental question underlying the administrative problem is whether Congress should devote such a large amount of time, energy, and appropriations to the oversight of the bureaucracy. Although congressional oversight is of vital importance, more cost-effective oversight mechanisms would be a desirable alternative. The administrative process could be severely impaired if the legislative veto became a permanent oversight mechanism. Agencies are frequently criticized for being unresponsive to the public they are intended to serve and for ineffectively dealing with national problems. Legislative review of all administrative rules would serve to increase public discontent by lengthening administrative delay. Under House Report (H.R.) 12048, it would have taken up to ninety legislative days for administrative rules to become effective. The additional bureaucratic delay and fear of congressional disapproval could induce agencies to favor adjudication over rulemaking in policy formulation. Congress' ability to disapprove all agency rules would be harmful to those whom the rules are designed to serve-the public. The American legal system requires predictability to allow society to conform to legislative and judicial norms. The contemporary political climate would influence congressional oversight and, if agencies had to rely on Congress for their policy formulations, the ultimate mandate would be difficult to predict and subject to frequent change.424

Henceforth, the legislative veto has become an increasingly popular form of congressional oversight of administrative discretion. Although the final decision regarding the constitutional issue remains uncertain, the political and practical problems of the veto suggest that it is a mechanism that should be employed cautiously and judiciously. Legislators should question whether the legislative veto is the most effective method of improving administrative accountability and defining the public interest. When agency independence is not essential and other means of oversight prove to be inadequate, the veto should be a last resort to further the public interest and maintain the balance between congressional and executive power. With the advent of numerous proposals for improving administrative responsiveness and effectiveness, the legislative veto may fall into further disrepute. Public participation in formulating

424 Robert J. Ivanhoe (1977)
regulatory policy represents the most direct and effective means of achieving administrative accountability. Implementing a workable program requiring public participation in the administrative process may ultimately result in the obsolescence of the legislative veto.\footnote{Ibid.}

Supreme Court Justice William Rehnquist referred to legislative vetoes as “clearly . . . a violation of the separation of powers.” Because the term “legislative veto” has been used to describe a wide range of congressional oversight techniques, it is analytically useful to provide a definition of the term. It is a statutory provision under which Congress, or a unit of Congress, is purportedly authorized to adopt a resolution that will impose on the Executive Branch a specific requirement to take or refrain from taking an action. A key characteristic of all legislative veto provisions is that a resolution pursuant to such a provision is not presented to the President for his approval or veto. Such a provision contemplates a procedure under which one or both Houses of Congress and a committee of one House may act contrary to the constitutional procedure for enacting laws to overrule, reverse, revise, modify, suspend, prevent, or delay an action by the President or some other part of the Executive Branch.\footnote{The Legislative Veto and Congressional Review of Agency Rules”} \footnote{Available at: www.justice.gov/sites/default/files/olc/opinions/1981/10/31/op-olc-v005-p0294.pdf (last visited on December 30, 2015)}

\textit{Chadha} case put an end to one-house and two-house legislative vetoes but it has had little effect on the legislative vetoes that operate at the committee and subcommittee level. Although the court in \textit{Chadha}, held that the one-house veto provision of the INA (Immigration and Nationality Act) unconstitutional, it did not hold that all such legislative vetoes were invalid.\footnote{Douglas B. Habig (1981)} Executive agencies and congressional committees have developed a variety of voluntary accommodation procedures over the years that result in a standard quid pro quo; Congress agrees to delegate substantial discretion to executive agencies if they accept a system of review and control by the committees of jurisdiction. These provisions remain an important mechanism for reconciling
legislative and executive interests.\textsuperscript{428} The courts in \textit{Chadha} and \textit{Atkins} reached the merits of the constitutionality of the legislative veto provisions, the factors that distinguish the cases serve as important indications for future determinations of the constitutionality of legislative vetoes.\textsuperscript{429} Legislative vetoes are neither absolutely constitutional nor finally unconstitutional. Moreover, the constitutionality of legislative vetoes depends upon which governmental function the law to which the veto is attached assumes. Finality of the administrative decision involved and the deprivation of a liberty right also are important determining factors.

\textsuperscript{429} Douglas B. Habig (1981)