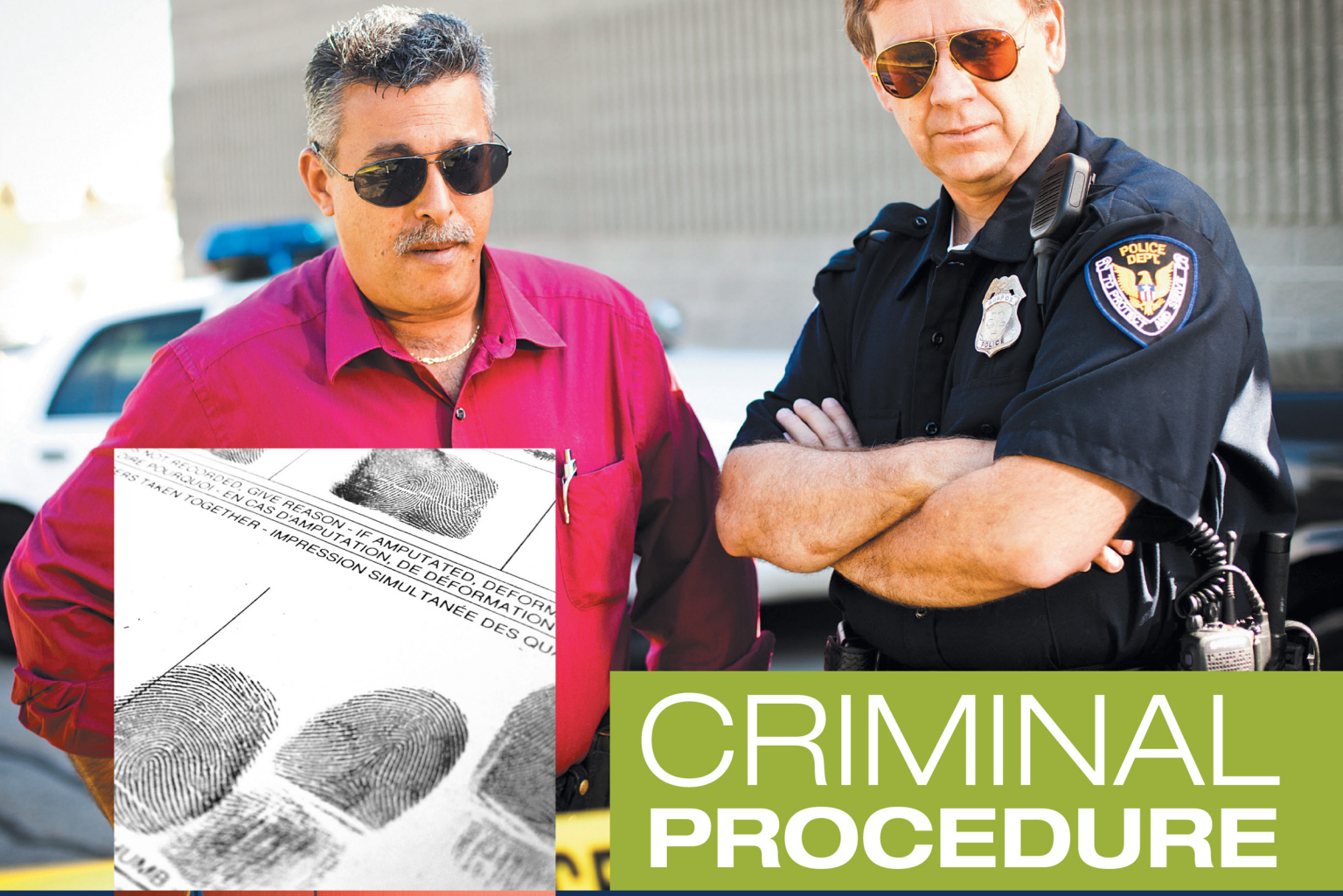

CRIMINAL PROCEDURE

FOR THE CRIMINAL JUSTICE PROFESSIONAL

Twelfth Edition

JOHN N. FERDICO | HENRY F. FRADELLA | CHRISTOPHER D. TOTTEN

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***Criminal Procedure for the Criminal Justice Professional*, Twelfth Edition**
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DEDICATION

For Cassia C. Spohn, Ph.D.,
for her support and friendship—H.F.F.

For Sebastian Christopher Totten, may he grow swift and strong—C.D.T.

About the Authors

John N. Ferdico holds a J.D. from Northwestern University School of Law and a B.A. in sociology from Dartmouth College. He is a former assistant attorney general and director of law enforcement education for the State of Maine. Other books he has published are *Ferdico's Criminal Law and Justice Dictionary* and the *Maine Law Enforcement Officer's Manual*. Mr. Ferdico currently writes and runs a legal publishing company in Bowdoinham, Maine.

Henry F. Fradella is a professor in and associate director of the School of Criminology and Criminal Justice at Arizona State University. He earned a B.A. in psychology from Clark University, both a master's in forensic science and J.D. from The George Washington University, and a Ph.D. in interdisciplinary justice studies from Arizona State University. In addition to having published more than seventy-five scholarly articles, comments, and reviews, Dr. Fradella is also the author of eight other books, including three published by Wadsworth: *America's Courts and the Criminal Justice System*; *Key Cases, Comments, and Questions on Substantive Criminal Law;* and *Forensic Psychology: The Use of Behavioral Science in Civil and Criminal Justice*. Dr. Fradella has twice served as a guest editor of the *Journal of Contemporary Criminal Justice* and as the Legal Literature editor of West's *Criminal Law Bulletin* for four terms (Volumes 41–44). A fellow of the Western Society of Criminology, he currently serves as the editor of the society's journal, *Criminology, Criminal Justice, Law & Society*. He teaches a variety of courses, including criminal law, criminal procedure, courts and judicial processes, and forensic psychology.

Christopher D. Totten has an A.B. from Princeton University and a J.D. and LL.M. (Master's in Law) from Georgetown University Law Center. He is a member of the State Bar of Maryland and has worked as an attorney and client advocate at a number of law firms. He is an associate professor of criminal justice (law) at Kennesaw State University, where he teaches numerous law and criminal justice courses to both undergraduate and graduate students. His scholarship spans criminal law and procedure, international crime (focus on adjudication), and interdisciplinary law and social science research (focus on courts/ jurisprudence and police attitudes). He has published in key journals such as the *Journal of Criminal Law and Criminology*, the *Criminal Law Bulletin*, the *New Criminal Law Review*, the *Berkeley Journal of International Law*, and the *Georgetown Journal of International Law*. Finally, he is the criminal law commentator for the *Criminal Law Bulletin* (Volumes 46–51).

Brief Contents

Contents

Criminal Procedure for the Criminal Justice Professional was originally published in 1975 as *Criminal Procedure for the Law Enforcement Officer*. Its primary emphasis was on providing practical guidelines for law enforcement officers with respect to the legal aspects of their daily duties. Although the main emphasis remains on the policing aspects of criminal procedure, additional materials have been added since then that are relevant to professionals who work in other areas of the justice system.

Because we believe that criminal justice professionals should not have to read and interpret lengthy and complicated court opinions in order to determine the powers, duties, limitations, and liabilities associated with performing their jobs, this book is written in a clear, concise, and coherent narrative to make it accessible and understandable. Sufficient detail is provided to enable the reader to operate competently and effectively within the criminal justice system. Actual case excerpts are used to provide authoritative statements of legal principles, explanations of the "reasons behind the rules," and examples of the application of the law to real-life scenarios.

As appellate courts continue to deal with significant numbers of complex criminal procedure cases, the design and approach of this book provide an enduring vehicle for imparting the knowledge necessary to properly comply with this ever-changing area of the law.

Criminal Procedure for the Criminal Justice Professional is intended for courses in criminal procedure or administration at both two- and four-year colleges for students preparing for careers in criminal justice, especially in law enforcement and corrections. Titles of courses that have used this book include "Criminal Procedure," "Constitutional Law in Criminal Justice," "Law of Arrest, Search, and Seizure," "Legal Aspects of Law Enforcement," "Constitutional Criminal Procedure," and "Court Systems and Practices." Because it is written in plain English rather than in technical legal jargon, this book is also suitable as a criminal procedure textbook at law enforcement training academies and for high school courses dealing with constitutional law or law enforcement. Over the years, in response to suggestions and comments from professors and students who have used it, many changes have been made to enhance the book's suitability for use as a classroom text.

What's New in the Twelfth Edition

The twelfth edition of the book has been revised such that most chapters have thirty or fewer key terms (a dramatic reduction for some chapters). All chapters in the book have also been updated with citations to (and often discussions of) the latest case law on each and every topic in the book. Textual changes have also been made to increase readability and students' mastery of the material (e.g., more tables and more bulleted and numbered lists). Key changes to individual chapters are as follows:

- **Chapter 1**, "Individual Rights Under the United States Constitution," has been revised to focus more on constitutional rights relevant to criminal procedure; the discussion of other constitutional rights and constitutional history has been

shortened significantly, especially those pertaining to the First Amendment. The following recent U.S. Supreme Court decisions have been added to the chapter: *Hall v. Florida*, *Hinton v. Alabama*, *Missouri v. Frye*, *Lafler v. Cooper*, and *Peugh v. United States*.

- **Chapter 2**, "Criminal Courts, Pretrial Processes, and the Exclusionary Rule," has been divided into two chapters. Chapter 2 contains expanded coverage of plea bargaining (including *Missouri v. Frye* and *Lafler v. Cooper*). A new Criminal Procedure in Action box on the movie theater shootings in Aurora, Colorado has been added.
- **Chapter 3**, "Basic Underlying Concepts: Property, Privacy, Probable Cause, and Reasonableness," has undergone a major restructuring to incorporate the dual property and privacy approaches to the Fourth Amendment in light of the U.S. Supreme Court's decision in *United States v. Jones*. In addition, a major "follow-up" case to *Jones* by the U.S. Supreme Court, *Florida v. Jardines*, has been added to this chapter.
- **Chapter 4**, "Criminal Investigatory Search Warrants," contains significant updates to state and lower federal court rulings on search warrants. A new section on the variable times it takes to obtain a search warrant has been added. The section on the use of force has been updated to better differentiate between force against premises and force against persons.
  Chapter 5, "Searches for Electronically Stored Information and Electronic Surveillance," has been significantly restructured with regard to how the materials on electronically stored information searches are presented. The U.S. Supreme Court decisions in *United States v. Jones* and *Riley v. California* have been integrated. New scholarship and case law has been infused throughout the chapter.
- **Chapter 6**, "Administrative and Special Needs Searches," now begins with an introductory section outlining the basic requirements of special needs searches. The following U.S. Supreme Court cases have been added: *City of Ontario v. Quon*, *Florence v. Board of Chosen Freeholders of County of Burlington*, and *Maryland v. King*.
- **Chapter 7**, "Arrests, Searches Incident to Arrest, and Protective Sweeps," has been updated to include the most recent U.S. Supreme Court cases, including *Florence v. Burlington*, *Maryland v. King*, *Missouri v. McNeely*, *Plumhoff v. Rickard, Stanton v. Sims,* and *Riley v. California*. The sections on hot pursuits and conducted energy devices (Tasers) have also been expanded with recent case law and scholarship.
- **Chapter 8**," Stops and Frisks," now includes *Navarette v. California* along with a Discussion Point addressing this recent U.S. Supreme Court case. The material dealing with racial profiling has been expanded to include recent scholarship as well as the U.S. Supreme Court decision of *Arizona v. United States* addressing the "show me your papers" laws. The section on detentions, the USA PATRIOT Act, and the war on terror has been updated with the latest case law,

legislation, and executive orders, including coverage of the National Defense Authorization Act (NDAA). Finally, a new Criminal Procedure in Action feature has been added concerning a recent lower court decision interpreting *United States v. Arvizu*.

- **Part III**, "Exceptions to the Search Warrant Requirement," has been significantly updated with recent lower federal and state case law, including **Chapter 9**, "Consent Searches"; **Chapter 10**, "The Plain View Doctrine"; **Chapter 11**, "Search and Seizure of Vehicles and Containers"; and **Chapter 12**, "Open Fields and Abandoned Property." Key leading cases decided since the eleventh edition have been added, including *Fernandez v. California*, *Florida v. Jardines*, *Florida v. Harris*, and *United States v. Jones*. Finally, new or revised Criminal Procedure in Action features have been integrated into each of the chapters in Part III.
- **Chapter 13**, "Interrogations, Admissions, and Confessions," now incorporates key leading cases decided since the eleventh edition, including *Salinas v. Texas* and *Howes v. Fields*. In addition, we have expanded coverage of purposeful attempts to avoid *Miranda* by exploiting *Elstad* in the wake of *Missouri v. Seibert*.
- **Chapter 14**, "Pretrial Visual Identification Procedures," has been updated to include more recent information on wrongful convictions. A new section has been added on the latest approaches to suggestive identifications, comparing new state law approaches with the latest Supreme Court pronouncement on the matter in *Perry v. New Hampshire*.
- **Chapter 15**, "Criminal Trials, Appeals, and Postconviction Remedies," has been updated to include *Melendez-Diaz v. Massachusetts*, *Bullcoming v. New Mexico*, *Williams v. Illinois*, and *McQuiggin v. Perkins*. A new table has been included that summarizes some of the major shortcomings of various forensic scientific evidence. The section on sentencing has been expanded to include more material on discrimination and sentencing disparities.

Learning Tools

In recent years, several learning tools and pedagogical devices have been added to the book to enhance understanding of the law of criminal procedure.

Learning Objectives (LO)—Student learning goals appear at the beginning of each chapter and are designed to provide purpose and context. All learning objectives have been revised to use the measurable verbs associated with Bloom's Taxonomy. Corresponding end-of-chapter summaries have been revised so that they provide concise statements that are responsive to the learning objectives at the start of each chapter. Learning Objectives are also indicated in the Key Points sections to assist students in finding the sections where each objective is discussed.

Key Points—Concise, clear statements of the essential principles of criminal procedure appear at the end of major sections of chapters and serve as mini-summaries of those sections. Their purpose is to aid the student in "separating the wheat from

the chaff" and to expedite review by boiling down complexities into simple statements of fundamentals. These Key Point sections also correlate to the Learning Objectives.

"Supreme Court Nuggets"—Essential quotations from U.S. Supreme Court opinions appear in **boldface** throughout the text. Their purpose is to familiarize students with judicial language as well as to highlight authoritative definitions of terms, clear statements of important legal principles, and the rationales behind those principles.

Discussion Points—Fact patterns and holdings from recent controversial opinions are summarized in a concise manner in these boxed features so that students can see how the "black letter law" was applied in a case related to the main points in a chapter. These summaries are then followed by discussion questions that instructors can use to stimulate class discussion on the law and related public policy issues.

Criminal Procedure in Action—A feature found in every chapter helps students relate what they are learning to the real world by providing in-depth coverage of a case illustrating an important or controversial area of criminal procedure law, as well as probing critical thinking questions designed to engage student debate and reflection.

Review and Discussion Questions—New review and discussion questions have been included to stimulate discussion and to expand students' understanding beyond the principles and examples used in the text.

Glossary—Definitions of major terms used in criminal procedure law have been streamlined for easier use by students.

References—Citations to statutes and case law appear in the actual text. This twelfth edition also adds a formal bibliography to reflect the many new interdisciplinary sources that have been integrated into the textual pedagogy.

Supplements

A number of supplements are provided by Cengage Learning to help instructors use *Criminal Procedure for the Criminal Justice Professional* in their courses and to aid students in preparing for exams. Supplements are available to qualified adopters. Please consult your local sales representative for details.

To access additional course materials, please visit **www.cengagebrain.com.** At the CengageBrain.com home page, search for the ISBN of your title (from the back cover of your book), using the search box at the top of the page. This will take you to the product page where these resources can be found.

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Instructor's Resource Manual with Lesson Plans and Test Bank includes learning objectives, key terms, a detailed chapter outline, a chapter summary, lesson plans, discussion topics, student activities, "What If" scenarios, media tools, a sample syllabus, and an expanded test bank with 30 percent more questions than the prior edition. The learning objectives are correlated with the discussion topics, student activities, and media tools.

Each chapter of the test bank contains questions in multiple-choice, true/false, completion, essay, and new critical thinking formats, with a full answer key. The test bank is coded to the learning objectives that appear in the main text, and includes the section in the main text where the answers can be found. Finally, each question in the test bank has been carefully reviewed by experienced criminal justice instructors for quality, accuracy, and content coverage so instructors can be sure they are working with an assessment and grading resource of the highest caliber.

Cengage Learning Testing Powered by Cognero This assessment software is a flexible, online system that allows you to import, edit, and manipulate test bank content from the *Corrections Today* test bank or elsewhere, including your own favorite test questions; create multiple test versions in an instant; and deliver tests from your LMS, your classroom, or wherever you want.

Online PowerPoint® Lectures Helping you make your lectures more engaging while effectively reaching your visually oriented students, these handy Microsoft PowerPoint® slides outline the chapters of the main text in a classroom-ready presentation. The PowerPoint slides are updated to reflect the content and organization of the new edition of the text, are tagged by chapter learning objective, and feature some additional examples and real-world cases for application and discussion.

Acknowledgments

We are grateful to the following criminal justice instructors for their time and effort in reviewing this edition of the book and their helpful comments and suggestions for its improvement: Mark Brown, University of South Carolina; Joel Weinstein, George Mason University; Nancy Dempsey, Cape Cod Community College; Cheryl Furdge, North Central Texas College; Andrew Kozal, Northwest State Community College; Tosha Wilson-Davis, Bainbridge College.

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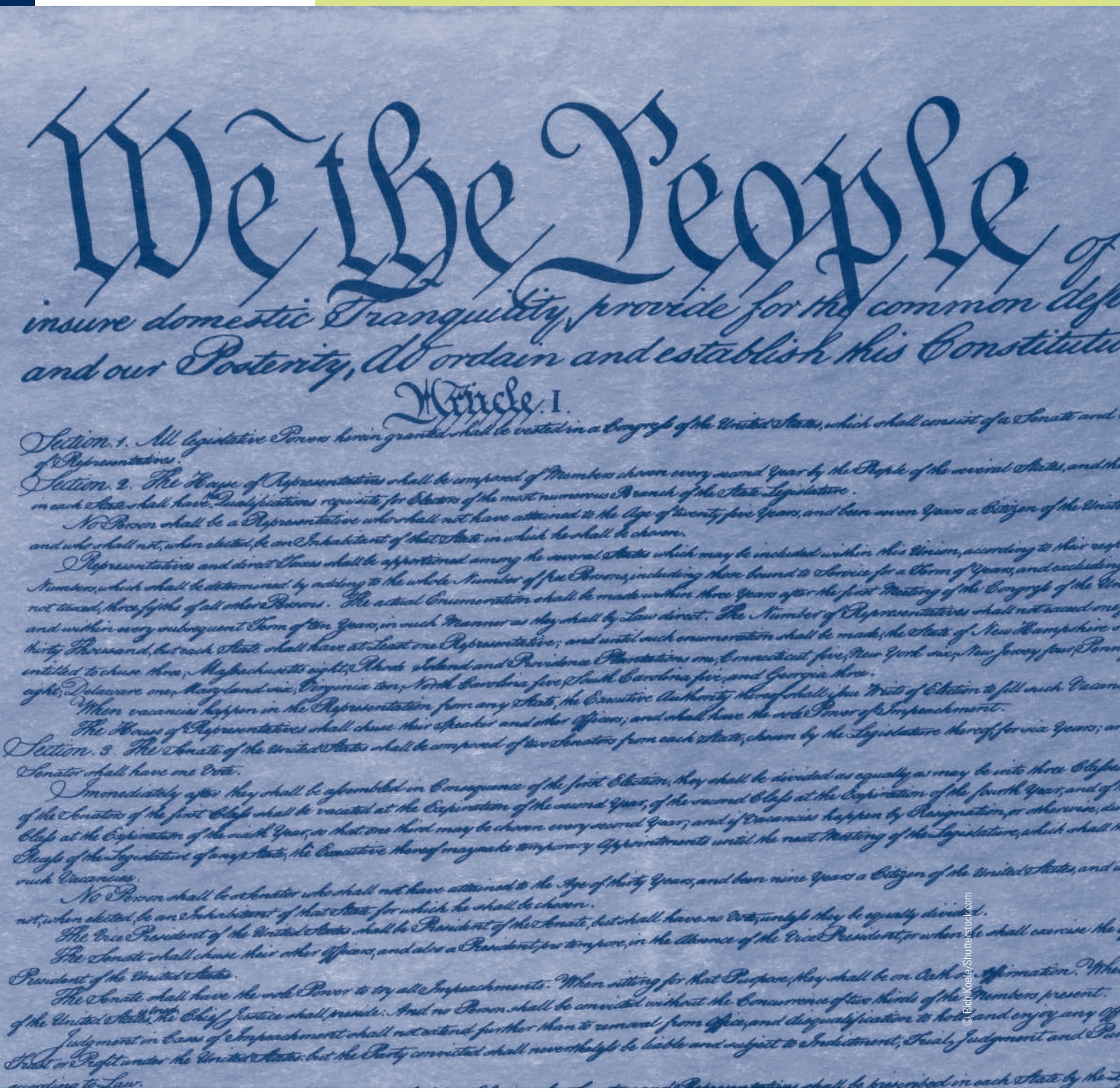
Frame, Stephen Lagos, Sarah Shainwald, and Carolyn Henderson-Meier. And Chris and Hank remain deeply indebted to Julie Martinez, who assisted us with reconceptualizing the book for its eleventh edition three years ago. Her influence remains evident in the twelfth edition. Finally, we owe a special debt to John Ferdico, who first created this book in the mid-1970s and then shepherded its evolution over eight more editions spanning thirty years.

Finally, we thank our families—most especially our spouses—for their support and understanding while we went "MIA" from daily life during the preparation of this edition.

Henry F. Fradella
Christopher D. Totten

1 Individual Rights Under the United States Constitution



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LEARNING OBJECTIVES

LO1 EXPLAIN how criminal law and criminal procedure are often in conflict as courts try to balance the need for crime control with constitutional guarantees of due process.

LO2 SUMMARIZE the historical context that gave birth to the concern for the individual rights embodied in the United States Constitution.

LO3 EXPLAIN how the legislative, judicial, and executive branches of government are involved in the protection of the constitutional rights of citizens.

LO4 DEFINE the individual rights protected by the original Constitution of 1788, and the terms *habeas corpus*, *bill of attainder*, *ex post facto law*, and *treason*.

LO5 EXPLAIN the general nature and limits of the rights embodied in the Bill of Rights, especially the First Amendment freedoms of religion, speech, press, assembly, and petition; the Fourth Amendment prohibition against unreasonable searches and seizures; the Fifth Amendment protections against double jeopardy and self-incrimination; the Sixth Amendment rights to a speedy and public trial, notice of charges, confrontation with adverse witnesses, compulsory process for favorable witnesses, and assistance of counsel; and the Eighth Amendment rights against excessive bail and fines and against cruel and unusual punishment.

LO6 DIFFERENTIATE the concepts of due process and equal protection as guaranteed by the Fifth and Fourteenth Amendments.

Defining law is no easy task. One of the most influential definitions comes from sociologist Max Weber. Weber (1954: 5) viewed **law** as a rule of conduct that is "externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a staff of people holding themselves specially ready for that purpose." Weber's definition of law has been modified into three distinct elements:

- Explicit rules of conduct
- Planned use of sanctions to support the rules
- Designated officials to interpret and enforce the rules, and often to make them

Law can be categorized in many ways. One of the most common ways to categorize it is to use the distinction between civil and criminal law. *Criminal law*, also referred to as *penal law*, is that body of law that defines conduct that is criminally punishable by the government as a wrong committed against the people in society as a whole. In contrast, wrongs committed against an individual, such as defamation, are the realm of torts, a branch of *civil law*. Civil law also encompasses business law (e.g., corporate and contract law), family law (e.g., marriage, divorce, and child custody), and property law (e.g., the law of real estate; wills, trusts, estates, and inheritance; and landlord–tenant relations).

Criminal law is often studied from two perspectives: substantive and procedural.

Substantive criminal law sets forth legal prescriptions and proscriptions—the "rules" of what one must do, may do, and may not do. **Procedural criminal law** sets forth the mechanisms through which substantive criminal laws are administered. Homicide statutes are examples of a substantive law. The rules regulating how police investigate a homicide, such as searching for and seizing evidence and interrogating suspects, are examples of criminal procedure. Table 1.1 summarizes the major sources of procedural criminal law in the United States.

TABLE 1.1 | Sources of Criminal Procedure

The United States Constitution	As the supreme law of the land, the U.S. Constitution is the ultimate authority for regulating criminal procedure.
State Constitutions	Each state constitution contains provisions that govern criminal procedure within that state. These constitutions may provide greater protections than those found in the U.S. Constitution, but they may not reduce the protections contained in the federal Constitution as interpreted by the U.S. Supreme Court.
Decisions of the Federal Courts of the United States	These decisions interpret and apply the U.S. Constitution and various federal laws.
Decisions of the various state courts within the United States	These decisions also interpret and apply the U.S. Constitution and various federal laws.
Rules of Criminal Procedure	Both the federal and state court systems have promulgated rules that govern the nonconstitutional aspects of criminal procedure.

Criminal Procedure as the Balance Between Due Process and Crime Control

The law of criminal procedure can be described as rules designed to balance the important governmental functions of maintaining law and order and protecting the rights of citizens. These functions are common to every government that is not totally authoritarian or anarchistic, yet they conflict because an increased emphasis on maintaining law and order will necessarily involve greater intrusions on individual rights. Conversely, an increased emphasis on protecting individual rights will impede the efficient maintenance of law and order. The justice system in the United States, like those in most constitutional democracies, continually experiences a tension between the need to respect individual rights, on one hand, and the need to maintain public order, on the other. Herbert L. Packer summarized this tension in his classic text, *The Limits of the Criminal Sanction* (1968). As Table 1.2 illustrates, Packer

TABLE 1.2 | Herbert Packer's Crime Control Versus Due Process Models

Crime Control Model	Due Process Model
Primary goal: Apprehension, conviction, and punishment of offenders	Primary goal: Protection of the innocent; limiting governmental power
Focus: Crime control; repression of criminal conduct	Focus: Due process; respect for individual rights
Mood: Certainty	Mood: Skepticism
"Assembly-line justice": Processes cases quickly and efficiently to promote finality of convictions	"Obstacle-course justice": Presents numerous obstacles to prevent errors and wrongful convictions
Concerned with factual guilt: Assumes that someone arrested and charged is probably guilty. Relies on informal, nonadjudicative fact finding—primarily by police and prosecutors	Concerned with legal guilt: Assumes that someone is innocent until proven guilty beyond a reasonable doubt; relies on formal, adjudicative, adversary fact-finding processes
Expeditious processing of offenders to achieve justice for victims and society as a whole	Dignity and autonomy of both the accused and the system are to be preserved

viewed this tension as being embodied in two competing value systems: the **crime control model** and the **due process model**.

Shifting the Balance over Time

In practice, we do not choose between one model and the other. Rather, we strive to control crime while simultaneously honoring the constitutional rights of the accused. At different stages in our nation's history, we have clearly focused more on the underlying values of one model over the other—put simply, the criminal justice system has had different emphases at different times. Consider the following examples of how the pendulum can swing from a societal emphasis on crime control to due process and then back to crime control.

In the first half of the twentieth century, increased urbanization, immigration, and industrialization "transformed America from a rural agrarian, Anglo-Protestant society" into a more racially, ethnically, and religiously diverse one (Feld 2003: 1453). These changes produced great uncertainty in the minds of those whose more traditional ways of life were being challenged by the changes that accompanied this more diverse and industrial society. One of the by-products of these changes was an increase in criminal activity, probably partly because of an ever-increasing population density. The increase in crime combined with fears of people from different races and cultures led to great increases in police power (Walker 1980) with a focus on "law and order" crime control (Monkkonen 1981).

In the civil rights era, social consciousness began to focus on social equality and equal justice under law. Part of this new consciousness brought to light abuses of police power, which disproportionately affected poor and uneducated minorities (Kamisar 1965; Neely 1996). Led by Chief Justice Earl Warren, a former public defender, the Supreme Court began to "constitutionalize" criminal procedure with a focus on the individual rights and liberties. "Tired of the steady stream of abuses that continued to filter up from the states, the Supreme Court of the 1960s made policing the police, as well as state courts, a distinctly federal concern" (Barrett-Lain 2004: 1372). Today, we refer to this shift in policy as the **due process revolution** of the 1960s.

Many critics felt as if the due process revolution went too far, allowing criminals to escape punishment due to the technicalities of constitutional criminal procedures

(e.g., Bradley 1993; Friendly 1968). During the Nixon administration, such feelings led to a renewed focus on "law and order." As part of his "tough on crime" agenda, Nixon appointed conservative jurist Warren Burger as Chief Justice Earl Warren's successor on the U.S. Supreme Court. In the last twenty-five years of the twentieth century, the "war on drugs" led to an even greater shift away from many of the Warren Court's due process protections toward a renewed emphasis on crime control. In the early twenty-first century, as the United States fights the "war on terror," the nation once again finds itself seeking to balance the need for social order and security with due process rights.

A Brief History of the U.S. Constitution

The Law of England

Early procedural protections for the criminally accused can be traced back to the English common law tradition to the thirteenth century. In 1215, the Magna Carta was formally adopted in England. Clause 30 of the original text (later numbered Chapter 29 of the statutory version of the Magna Carta) provided:

> No free man shall be taken, imprisoned, or disseised of his free hold, or liberties or free customs, or outlawed, exiled or in any way destroyed, nor will we proceed against him, save by the lawful judgment of his peers or by the law of the land. We shall not sell, deny or delay to any man right or justice.

For centuries, these provisions were interpreted as guaranteeing certain pillars of criminal procedure, including the right to have adequate notice of what is prohibited by law before being punished for violating law, the right to a fair trial, and the protection of property or possessions (Baker 2004). Yet these guarantees were not always honored. For example, a number of procedural safeguards were commonly disregarded by the Star Chamber, a royal court whose abuses became so infamous that the very term *star chamber* is still synonymous with injustices perpetuated by a court (Riebli 2002). Although the Star Chamber was abolished by the Long Parliament in 1641, the English crown still wielded considerable influence over courts. This influence often led courts to issue decisions favorable to the crown as well as to those of the British aristocracy (Berman 2000).

Ultimately, dissatisfaction with a life that favored a select few in England was partially responsible for both the founding of the American colonies and the Glorious Revolution in Great Britain (Berman 2000). The latter event forever changed English common law, granting a new level of judicial independence to judges and focusing trials on proof, the independent decisions of juries, and rules of evidence.

Drafting a New Constitution

In light of their experience with governmental tyranny, when the United States was born as a nation, the Founders had a strong commitment to the protection of individual rights from governmental abuse. This commitment was embodied in the original Constitution of 1788 and in the Bill of Rights that was adopted shortly thereafter.

On September 17, 1787, a convention of delegates representing twelve of the original thirteen states (Rhode Island was not represented) proposed a new constitution to the Continental Congress and the states for ratification. The rights expressed and protected by this constitution, and by the amendments adopted four years later, were not new. Some had roots in the societies of ancient Rome and Greece, and all were nurtured during the almost six hundred years of English history since the signing of the Magna Carta.

As colonists under English rule, Americans before the Revolution were familiar with the ideas that government should be limited in power and that the law was superior to any government, even the king. As the Declaration of Independence shows, the colonists

rebelled because the English king and Parliament refused to allow them their historic rights as free English citizens. In September 1774, delegates from twelve colonies met in the First Continental Congress to petition England for their rights "to life, liberty, and property" and to trial by jury; "for a right peaceably to assemble, consideration of their grievances, and petition the King"; and for other rights they had been denied. The petition was ignored, and soon afterward fighting broke out at Lexington and Concord, Massachusetts.

Meanwhile, citizens in Mecklenburg County, North Carolina, declared the laws of Parliament to be null and void and instituted their own form of local government with the adoption of the Mecklenburg Resolves in May 1775. In June 1776, a resolution was introduced in the Continental Congress. Just one month later, on July 4, 1776, the thirteen united colonies declared themselves free and independent. Their announcement was truly revolutionary. They listed a large number of abuses they had suffered and justified their independence in these historic words: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain Inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

Two years later, in July 1778, the newly independent states joined in a united government under the Articles of Confederation, which was our nation's first constitution. It soon became evident, however, that the Articles of Confederation did not adequately provide for a workable, efficient government. Among other weaknesses, the articles gave Congress no authority to levy taxes or regulate foreign or interstate commerce. In May 1787, a convention of delegates, meeting in Philadelphia with Congress's approval, began to consider amendments to the Articles. Soon, however, they realized that a new system of government was necessary. After much debate and several heated arguments, a compromise constitution was negotiated.

Although we now honor their wisdom, the delegates had a different opinion of their work. Many were dissatisfied, and a few even thought an even newer constitution should be written. No delegate from Rhode Island attended the convention or signed the document on September 17, 1787, when the proposed constitution was announced. Delaware was the first state to accept the Constitution, ratifying it on December 7, 1787, by a unanimous vote. Not all states were as enthusiastic as Delaware, and in some states the vote was extremely close. For a while, it was uncertain whether a sufficient number of states would ratify. A major argument against ratification was the absence of a Bill of Rights. Many feared that a failure to limit the federal government's power would diminish individual rights. Only after a general agreement that the first order of business of the new government would be to propose amendments for a Bill of Rights did a sufficient number of states accept the Constitution. On June 21, 1788, New Hampshire became the ninth state to sign on, and ratification of the new Constitution was completed. By the end of July 1788, the important states of Virginia and New York had also ratified the Constitution.

On September 25, 1789, Congress proposed the first ten amendments to the new Constitution—the **Bill of Rights**. With this proposal, North Carolina and Rhode Island, the last of the thirteen original colonies, ratified the Constitution. Ratification of the Bill of Rights was completed on December 15, 1791. Since that date, the Bill of Rights has served as our nation's testimony to its belief in the basic and inalienable rights of the people and in limitations on the power of government. Together with provisions of the original Constitution, it protects the great body of liberties that belongs to every citizen.

For ease of discussion, the remainder of this chapter treats the original Constitution separately from the Bill of Rights and later amendments.

The Original Constitution

The Constitution of 1789 has served as the fundamental instrument of our government for almost all of our country's history as an independent nation. Drawn at a time when there were only thirteen states, each dotted with small towns, small farms, and small industry,

the Constitution has provided a durable and viable instrument of government—despite enormous changes in technology and in the political, social, and economic environments.

The Constitution was originally designed to serve a weak country on the Atlantic seaboard. Today, it serves a continental nation of fifty states, a federal district, and numerous territorial possessions, with more than 311 million people producing goods and services at a rate thousands of times faster than in 1789. Nevertheless, the framework for democratic government set out in the Constitution has remained workable and progressive. Similarly, the rights of individuals listed in the Constitution and its twenty-seven amendments have retained an extraordinary vitality despite being tested in situations that could not have been envisioned by the Framers. Freedom of the press, for example, was originally understood only in the context of the small, primitive printing presses of the late eighteenth century. Today, that freedom applies not only to modern presses but also to radio, television, motion pictures, and computers—all products of the twentieth century.

Structure of the Original Constitution The original Constitution of the United States is divided into seven parts: a preamble and six articles. Although the preamble is technically not a part of the Constitution, it sets forth important principles. The articles that follow it each address a different topic relevant to the structure and operations of government.

- The preamble states both the purpose of the Constitution and specifies that it is the people who are the source of the document's authority:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

- **Article I** establishes the U.S. Congress as the legislative branch of the United States and sets forth both the structure of Congress and its major powers.
- **Article II** establishes the president as the head of the executive branch of government and sets forth some of the major powers of the presidency.
- **Article III** establishes the U.S. Supreme Court as the highest judicial body in the United States and specifies the Court's original and appellate jurisdiction.
- **Article IV** defines the relationship between the states.
- **Article V** prescribes the method for amending the Constitution.
- **Article VI** declares that the Constitution and treaties made by the U.S. government under its authority are "the supreme Law of the Land." Given the supremacy of the Constitution, this article requires that all state and federal judges and elected officials must swear an oath to support, uphold, and defend the Constitution.

The Constitution governs the government. This means that constitutional law establishes the structure of government and limits the power of government. Although the Constitution does not govern the day-to-day lives of the people, as statutory and administrative law does, people within the jurisdictional boundaries of the country possess rights that the Constitution grants to them. It is important to understand that these rights exist because the drafters of the Constitution wanted to limit the power of the government in ways that would maximize liberty for the citizens of the country.

The Impact of Article VI on the Courts: The Power of Judicial Review Article VI, Section 2 of the U.S. Constitution is known as the *Supremacy Clause*. As previously stated, it declares that the Constitution is the "supreme law of the land." As the highest

form of law in the nation, *constitutional law* trumps all other forms of law, including *statutory law* (laws enacted by a legislative body), *common law* (the law as set forth by judges in published judicial decisions), and *administrative law* (rules and regulations promulgated by a governmental agency that is empowered through statutory law to make such rules).

Each branch of the government—legislative, judicial, and executive—is charged by the Constitution with the protection of individual liberties. Within this framework, the judicial branch has assumed perhaps the largest and arguably most important role. Chief Justice John Marshall, speaking for the Supreme Court in the early case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), declared that it was the duty of the judiciary to say what the law is and that this duty included expounding and interpreting the law. Marshall stated that the law contained in the Constitution was paramount and that other laws that were repugnant to its provisions must fall. It was the province of the courts, he concluded, to decide when other laws were in violation of the basic law of the Constitution and, where this was found to occur, to declare those laws null and void and thus unconstitutional. This doctrine, known as **judicial review**, became the basis for the application of constitutional guarantees by courts in cases brought before them:

> *Judicial review is the exercise by courts of their responsibility to determine whether acts of the other two branches are illegal and void because those acts violate the constitution. The doctrine authorizes courts to determine whether a law is constitutional, not whether it is necessary or useful. In other words, judicial review is the power to say what the constitution means and not whether such a law reflects a wise policy*. Adherence to the doctrine of judicial review is essential to achieving balance in our government. . . . Judicial review, coupled with the specified constitutional provisions which keep the judicial branch separate and independent of the other branches of government and with those articles of the constitution that protect the impartiality of the judiciary from public and political pressure, enables the courts to ensure that the constitutional rights of each citizen will not be encroached upon by either the legislative or the executive branch of the government. *State v. LaFrance*, 471 A.2d 340, 343–44 (N.H. 1983) (italics added).

The judicial branch is not the only protector of constitutional rights. Congress has played an important role in the protection of constitutional rights by enacting legislation designed to guarantee and apply those rights in specific contexts. Laws that guarantee the rights of Native Americans, afford due process to military service personnel, and give effective right to counsel to poor defendants are examples of this legislative role.

Finally, the executive branch, which is charged with implementing the laws Congress enacts, contributes to the protection of individual rights by devising its own regulations and procedures for administering the law without intruding on constitutional guarantees.

To properly understand the scope of constitutional rights, one must recognize that our government is a *federal republic*, which means that an American lives under two governments: the federal government and the government of the state in which the person lives. The Constitution limits the authority of the federal government to the powers specified in the Constitution; all remaining governmental power is reserved to the states. The federal government is authorized, for example, to settle disputes among states, to conduct relations with foreign governments, and to act in certain matters of common national concern. The states hold the remainder of governmental power, which is to be exercised within their respective boundaries.

The Bill of Rights

Only a few individual rights were specified in the Constitution when it was adopted in 1788. The principal design of the original Constitution was not to specify individual rights, but to state the division of power between the new central federal government