

DO ORDAIN AND ESTABLISH THIS CONSTITUTION
FOR THE UNITED STATES OF AMERICA

*The people made the Constitution and they can unmake it.
It is the Creature of their will, and lives only by their will.*

Chief Justice John Marshall, 1821



Chapter 4

The United States Constitution

How and why did the framers distribute power in the Constitution?

■ 4.1 Introduction

One February morning in 1971, Dwight Lopez headed off to his classes at Central High School in Columbus, Ohio. Things had been tense at school lately. Students were in shock over the recent shooting of two African American students by whites. Many were also upset about the school's cancellation of Black History Week celebrations. These events would help to provoke a major disturbance at school that day.

Like many American cities in the early 1970s, Columbus was experiencing social upheaval. Growing opposition to the Vietnam War was fueling large anti-war demonstrations. At the same time, racial tensions were high. Despite the gains made by the civil rights movement in the 1960s, most African Americans had yet to experience any real social or economic progress. Many blacks blamed racism for their lack of advancement. In the Columbus public schools, racial conflict was increasing.

On that day in February, tensions boiled over and violence erupted in the school cafeteria. School property was destroyed, and 75 students were given ten-day suspensions from school. One of those students was Dwight Lopez. He claimed that he was an innocent bystander who just happened to be in the cafeteria when the incident occurred. But the school refused to hear his appeal.

Bronze statues of the Founding Fathers at the National Constitution Center in Philadelphia, Pennsylvania

Speaking of Politics

due process

The principle that no person can be deprived of life, liberty, or property without fair legal procedures and safeguards.

republican government

A representative political system in which authority comes from the people and is exercised by elected officials.

checks and balances

A system in which each branch of government can limit the power of the other branches.

federalism

A system of government in which power is divided between a central government and smaller regional governments.

independent judiciary

A system of judges and courts that is separate from other branches of government. Such a judiciary is not controlled by politicians and can exercise independent judgment.

strict construction

A literal approach to interpreting the Constitution, using the exact words of the document.

loose construction

A flexible approach to interpreting the Constitution, taking into account current conditions in society.

judicial review

The power of the courts to declare laws and executive acts unconstitutional. The Supreme Court is the ultimate judge of whether a government action conforms to the Constitution.

The Constitution guarantees Americans accused of a crime due process of law, or a fair trial. Most trials take place before a judge and jury in courtrooms like the one pictured here.



In response, Lopez took the school district to court, claiming his constitutional right to due process of law had been violated. **Due process**, guaranteed by the Fifth and Fourteenth amendments to the Constitution, requires that those accused of a crime be given a fair hearing and the chance to defend themselves. But this right had never been applied in schools.

The Ohio courts decided in favor of Lopez and eight other students who joined in the case. But the school district appealed the decision to the U.S. Supreme Court. This case, now called *Goss v. Lopez*, would help to define the rights of students—and therefore *your* rights—under the Constitution.

■ 4.2 Elements of the Constitution

The Constitution provides the basic framework for American government. It also guarantees the rights and freedoms that we, as Americans, sometimes take for granted. Cases like *Goss v. Lopez* help to clarify those rights. They also underscore the role played by the Constitution in our democratic system.

The Constitution is a three-part document, consisting of the Preamble, the articles, and the amendments. Although it may seem complicated, the Constitution is actually a relatively brief and

straightforward document. It consists of just over 7,000 words, making it shorter than the sports section in most newspapers. Adopted as the “law of the land” in 1788, it is the oldest written constitution still in use anywhere in the world.

For more than two centuries, we have relied on the Constitution as the basis for our political system. It serves as both a practical outline for government and a symbol of our national way of life. Learning about the Constitution not only helps us understand the rights and freedoms we enjoy as Americans, but also gives us tools to defend those freedoms.

The Preamble Sets the Purpose

The opening paragraph, the Preamble, is a single, long sentence that defines the broad purposes of the **republican government** created by the Constitution. It begins with the phrase “We the people,” signifying that power and authority in our system of government come from the people, not the states.

The Preamble goes on to set various goals for the nation under the Constitution. These goals are expressed in a series of key phrases.

Form a more perfect union. The framers of the Constitution wanted to ensure cooperation among the states, and between the states and the national government.

Establish justice. The framers hoped to create a system of government based on fair laws that apply equally to all people.

Ensure domestic tranquility. The framers wanted government to ensure peace and order.

Provide for the common defense. The framers wanted the government to protect the nation against foreign enemies.

Promote the general welfare. The framers hoped the government would ensure the well-being of the citizens.

Secure the blessings of liberty to ourselves and our posterity. The framers hoped to guarantee freedom for Americans, then and in the future.

The Articles Establish Our National Government

The main body of the Constitution consists of seven articles. These seven articles are further divided into sections and clauses. The first three articles establish the three branches of government—legislative, executive, and judicial—and define their powers. These articles lay out the basic structure of the national government.

The four remaining articles of the Constitution cover various subjects, including relations among the states, the supremacy of national law, and the amendment process.

Article I Establishes the Legislative Branch

The first article sets up Congress as the lawmaking body in government. It describes the two chambers of Congress, the Senate and the House of Representatives, as well as the election, terms, and qualifications of their members. It also sets guidelines for rules and procedures in each chamber. This is the longest article in the Constitution, reflecting the founders' belief in the importance of the legislature in a representative democracy.

Section 8 of Article I lays out some of the main powers granted to Congress. These powers are both enumerated and implied. **Enumerated powers** are those that are specifically listed in the Constitution, such as the power to collect taxes, coin money, and declare war.

Implied powers are those that the legislature can claim as part of its lawmaking responsibility. This claim to implied power stems from Clause 18 of Section 8, which says that Congress can “make all laws which shall be necessary and proper” for carrying out its duties. This **Necessary and Proper Clause** is also known as the **Elastic Clause**, since it can be “stretched” to cover a variety of issues and circumstances.

Section 9 of Article I lists powers denied to Congress. Among these denied powers are the suspension of **habeas corpus** and the granting of titles of nobility.

The Structure of the Constitution

The Constitution has a three-part structure. The Preamble is the introduction to the document. The articles make up the body. The amendments are additions and changes made over time.

Preamble

Purpose of government

Articles

- I: Legislative branch
- II: Executive branch
- III: Judicial branch
- IV: Relations among the states
- V: Amendment process
- VI: Payment of debts; Supremacy Clause; oaths of office
- VII: Ratification

Amendments

Formal changes to the Constitution

Habeas corpus is the right of accused persons to be brought before a judge to hear the charges against them. The ban on titles of nobility reflects the principle that “all men are created equal,” as expressed in the Declaration of Independence.

Article II Establishes the Executive Branch

The executive branch is led by the president and vice president. As it does for members of Congress, the Constitution describes the election, terms of office, and qualifications of these executive officers. It also defines the powers of the president, which include the power to command the armed forces, to make treaties, and to appoint other executive officials.

Article III Establishes the Judicial Branch

Article III creates the Supreme Court, the highest court in the land, while leaving Congress to create the lower courts. It defines the **jurisdiction** of the federal courts, specifying the types of cases that can be tried. It also guarantees the right to trial by jury in criminal cases and defines the crime of treason.

Article IV Concerns Relations Among the States

Article IV has four sections, which make the following key points:

Full faith and credit. Each state must honor the laws and court decisions of other states.

Treatment of citizens. No state may discriminate against the residents of another state. It must treat them as it treats its own residents. States must return suspected criminals to the states in which they are wanted.

New states and territories. Only Congress can authorize the creation of new states. It also has power over territories and other jurisdictions of the United States.

Protection of states. The national government guarantees each state a republican form of government. It also promises to protect states from outside attack and, if requested, to help states put down internal rebellions.

Article V Describes the Amendment Process

The framers understood that it might be necessary to make changes to the Constitution from time to time. Article V spells out the ways such amendments can be proposed and ratified.

Article VI Makes the Constitution the Supreme Law of the Land

Article VI covers several topics. It states that the national government agrees to repay all of the debts that were incurred under the Articles of Confederation. This was critical to ensure support for the new government.

Powers of the Three Branches of Government

The Constitution establishes a government of three branches, with separate powers for each branch. By dividing power, the framers hoped to ensure that no single branch would become too powerful.



Legislative

- Makes the laws
- Appropriates funds for laws and programs
- Approves treaties and executive appointments
- Establishes federal courts



Executive

- Enforces the laws
- Acts as commander in chief of military
- Negotiates treaties
- Appoints federal judges and other top officials

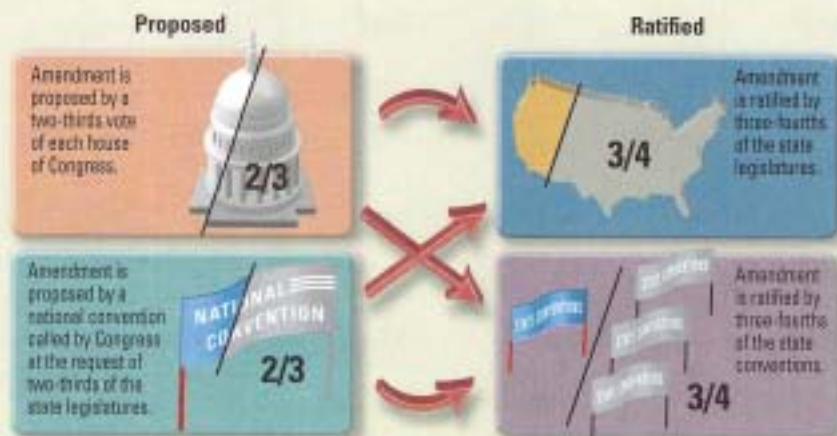


Judicial

- Interprets the laws
- Reviews lower-court decisions
- Judges whether laws and executive actions are constitutional
- Rules on cases between states

Amending the Constitution

The Constitution spells out four methods of approving amendments. All amendments except one have been proposed by Congress and ratified by the state legislatures. The one exception was the Twenty-first Amendment, which repealed the Eighteenth Amendment and ended the national ban on alcohol, known as prohibition.



It also states that the Constitution is the “supreme Law of the Land.” This section, known as the **Supremacy Clause**, means that federal law supersedes all state and local laws. When the laws conflict, federal law reigns supreme.

In addition, it stipulates that all federal and state officials must take an oath swearing their allegiance to the Constitution. Also, no religious standard can be imposed on any official as a qualification for holding office.

Article VII Explains the Ratification Process

Article VII stipulates that the Constitution would not take effect until ratified by at least nine states. Although the Constitution was signed by the framers on September 17, 1787, ratification did not occur until the following year.

4.3 Amending the Constitution

The framers never meant for the Constitution to provide a complete and detailed blueprint for government. As Alexander Hamilton noted in 1788, “Constitutions should consist only of general provisions: The reason is, that they must necessarily be permanent, and that they cannot calculate for the possible changes of things.”

In general, the framers made broad statements and left it to political leaders to work out many of the specific details of governing. They also built in an

amendment process, in Article V, that would allow for formal changes to the Constitution. They hoped that this flexibility would allow the Constitution and the government to endure.

The Amendment Process Is Not Easy

Although the framers understood that amendments might be necessary, they did not want such changes to be taken lightly. For that reason, they made the amendment process difficult. More than 11,000 amendments have been introduced in Congress over the years, but only 33 have been sent on to the states for ratification, and of these, only 27 have been ratified.

Article V lays out a two-step amendment process. Amendments can be proposed and ratified in four ways, as shown in this diagram. However, one method has been used almost exclusively over the years.

In this typical method, an amendment is first proposed by a two-thirds vote in both houses of Congress. The proposed amendment is then sent to the states, where it must be ratified by the legislatures of at least three-fourths of the states.

Only one amendment, the Twenty-first, which ended prohibition, was ratified in a different way. It was approved not by state legislatures, but by special conventions in three-fourths of the states.

The president has no formal role in the amendment process. The chief executive can support or oppose a proposed amendment, but has no power to approve or block its passage. That power lies exclusively with Congress and the states.



In this cartoon, a man broadly interprets the freedoms guaranteed by the First and Second amendments. However, in reality, these freedoms are limited. Americans disagree on what each amendment in the Bill of Rights was meant to protect.

Only one provision of the Constitution—the equal representation of states in the Senate—is not open to amendment. This point is made explicit in Article V: “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” This prohibition was meant to ensure that all states—even the smallest and least populated—would always have two seats in the Senate. This was a key compromise worked out during the writing of the Constitution.

Some critics contend that the equal-representation provision is undemocratic. They point out that today over half the U.S. population lives in just nine states: California, Texas, New York, Florida, Illinois, Pennsylvania, Ohio, Michigan, and Georgia. Yet just 18 out of 100 senators represent this half of the population.

The First Ten Amendments: The Bill of Rights

The first ten amendments to the Constitution—also known as the Bill of Rights—were proposed by Congress in 1789 and ratified by the states in 1791. The rights listed in the Bill of Rights outline the freedoms guaranteed to the people and the states.

First Amendment: Basic freedoms. Guarantees five basic freedoms: religion, speech, press, assembly, and petition.

Second Amendment: Right to bear arms. Protects the right to bear arms and form state militias. The national and state governments, however, claim the right to regulate firearms.

Third Amendment: Quartering of soldiers. Bans quartering of troops in private homes during peacetime. This was a key concern in the 1700s but has little relevance today.

Fourth Amendment: Search and seizure. Prevents unreasonable search and seizure. Police and other authorities have no right to search or seize property or people without just cause.

Fifth Amendment: Rights of the accused. Outlines the right to due process of law and other legal protections. This amendment covers various rights of people accused of crimes. It also covers **eminent domain**, which prevents the government from taking over private property without just or fair compensation.

Sixth Amendment: Right to a fair trial. Guarantees the right to public and speedy trial by a jury in criminal cases. The accused also has other rights such as to call witnesses and to be represented by an attorney.

Seventh Amendment: Civil trials. Guarantees the right to jury trial in civil cases. A **civil case**, such as a lawsuit, is one that does not involve criminal conduct.

Eighth Amendment: Bail and punishment. Bans excessive bail and punishment. The courts may not impose unreasonable bail, fines, or cruel and unusual punishment.

Ninth Amendment: Rights retained by the people. Guarantees other rights not listed in the Constitution or Bill of Rights.

Tenth Amendment: States' rights. Reserves powers for the states and the people that are not specifically given to the national government.

Two Early Amendments Strengthened the New Federal Government

The remaining amendments came about because of a widely recognized problem, or as the result of a reform movement, or both. The first of these, the Eleventh Amendment, adopted in 1795, protected states from lawsuits by citizens of other states or

Amendments to the Constitution After the Bill of Rights, 1798–1992

Amendments Defining the Powers of Government

Eleventh Amendment (1795)
Limited federal court jurisdiction over lawsuits involving states

Fourteenth Amendment (1868)
Defined citizenship and prohibited states from denying due process, equal protection, and other basic rights to citizens

Sixteenth Amendment (1913)
Gave Congress the power to levy and collect taxes on incomes



Twenty-seventh Amendment (1992)
Limited the power of Congress to raise members' pay

Amendments Affecting the Election or Tenure of Officeholders

Twelfth Amendment (1804)
Required separate electoral college ballots for president and vice president

Seventeenth Amendment (1913)
Called for the direct election of senators by voters

Twentieth Amendment (1933)
Changed the date when the president, vice president, and members of Congress take office

Twenty-second Amendment (1951)
Limited the president to two full terms or no more than ten years in office

Twenty-fifth Amendment (1967)
Provided for succession in case of the president's death or disability

Amendments Reflecting Changing Social Values

Thirteenth Amendment (1865)
Banned slavery and involuntary servitude



Eighteenth Amendment (1919)
Empowered the federal government to prohibit the sale of alcohol

Twenty-first Amendment (1933)
Repealed the highly unpopular 18th Amendment (prohibition)



Amendments Expanding Voting Rights

Fifteenth Amendment (1870)
Extended voting rights to male citizens of all races

Nineteenth Amendment (1920)
Extended the right to vote to women



Twenty-third Amendment (1961)
Granted voting rights in presidential elections to the residents of the District of Columbia

Twenty-fourth Amendment (1964)
Banned poll taxes, or fees imposed on voters

Twenty-sixth Amendment (1971)
Lowered the voting age from 21 to 18

foreign countries. It was adopted after Georgia lost a Supreme Court case involving a suit brought by a South Carolina resident.

The Twelfth Amendment, ratified in 1804, changed voting procedures in the Electoral College to separate the vote for president and vice president. This became necessary after the 1800 election resulted in an Electoral College tie.

Three Civil War–Era Amendments Extended Rights to African Americans

The Thirteenth Amendment made President Lincoln's emancipation of slaves the law of the land. The

Fourteenth Amendment overturned the Supreme Court's Dred Scott decision—which had denied citizenship to African Americans—by making all people born in the United States citizens with equal rights and protections. The Fifteenth Amendment was passed to protect the voting rights of freedmen during Reconstruction.

Four Progressive-Era Amendments Dealt with Social and Political Reforms

The Progressive period of the early 1900s saw the ratification of four amendments, all designed to promote social and political reform. The Sixteenth

Amendment allowed Congress to establish an income tax. Today the income tax is the main source of revenue for the federal government.

The Seventeenth Amendment provided for the direct election of senators. Previously, senators were elected by state legislatures. The Nineteenth Amendment extended voting rights to women.

The Eighteenth Amendment instituted prohibition, banning the sale of alcohol. The Twenty-first Amendment later repealed prohibition.

Four Twentieth-Century Amendments Addressed Governance

The Twentieth Amendment changed the start date of presidential and congressional terms. Known as the “lame duck” amendment, it shortened the period in which officeholders who had not been reelected remained in office.

The Twenty-second Amendment limited presidents to two terms. This amendment was prompted by the election of Franklin D. Roosevelt to four terms. The Twenty-fifth Amendment provided for succession to the presidency in case of a president’s death or disability and the filling of a vacancy in the office of vice president.

The Twenty-seventh Amendment—the last to be ratified, in 1992—was first proposed 203 years earlier, along with the Bill of Rights. It states that any pay raise Congress votes for itself cannot go into effect until after the next congressional election.

Three Civil Rights–Era Amendments Extended Voting Rights

Between 1961 and 1971, three amendments expanded suffrage for different groups. The Twenty-third Amendment allowed residents of the District of Columbia to vote in presidential elections. As a result, district voters now elect three members of the Electoral College.

The Twenty-fourth Amendment banned poll taxes, which had been used to keep African Americans from voting in some states.

The Twenty-sixth Amendment lowered the voting age from 21 to 18. Ratified during the Vietnam War, it was prompted by arguments that anyone who is old enough to go to war—that is, an 18-year-old—is old enough to vote.

Of all the amendments proposed by Congress but never ratified by the states, perhaps the most famous

is the equal rights amendment. The ERA, first introduced in 1923, was intended to guarantee equal rights for women. It was proposed by Congress again in 1972, but did not win ratification in the necessary three-fourths of the states.

■ 4.4 Guiding Principles of the Constitution

Over the years, the Constitution has acquired an almost sacred status for Americans. Part of the reason for that is its durability: the Constitution has survived, with relatively few changes, for more than two centuries. It ensures stability and continuity in American political life. Furthermore, it has come to represent who we are as a people and a nation. It symbolizes our collective values in a way that most Americans—no matter what their political views—are able to embrace.

Establishing a Limited Government

The framers’ main goal in crafting the Constitution was to create a system of limited government. They knew that absolute power often leads to the abuse of rights. On the other hand, they also knew that a lack of governmental power could result in chaos and instability.

The framers tried to make sure that the Constitution gave the government enough power to ensure peace and order, but not so much that its power went unchecked. As James Madison wrote in *The Federalist* No. 51, “You must first enable the government to control the governed; and in the next place to oblige it to control itself.”

The limited government envisioned in the Constitution is based on six guiding principles: (1) popular sovereignty, (2) the rule of law, (3) separation of powers and checks and balances, (4) federalism, (5) an independent judiciary, and (6) individual rights.

Popular Sovereignty

This principle means that power resides in the will of the people. The framers understood that making people the source of power is the best assurance that government will act in the people’s interest.

In *The Federalist* No. 39, Madison defined a republic as “a government which derives all its powers directly or indirectly from the great body of



Lampposts in front of the Supreme Court Building in Washington, D.C., are decorated with this carving of a female figure popularly known as Lady Justice or Blind Justice. Portraying Justice as a female figure dates back to ancient times. Today Justice is usually shown with a set of scales, representing the impartiality of the law. She carries a sword symbolizing the power of those who make decisions based on the law. She wears a blindfold to indicate that justice is blind to considerations such as wealth and social status.

the people." The Constitution supports popular sovereignty through **republicanism**, or the idea that people elect leaders to a governing body of citizens. One section that upholds this idea is the following:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States.

—Article I, Section 2, Clause 1

In other words, the people elect members of the House, the more representative body of Congress. Another section ensures republicanism in the states:

The United States shall guarantee to every State in this Union a Republican Form of Government.

—Article IV, Section 4

By guaranteeing republican government in the states, the Constitution extends the principle of popular sovereignty to the states.

The Rule of Law

This principle requires that the American people and their government abide by a system of laws. This is another way to ensure that power is limited and not used in an arbitrary manner. Examples in the Constitution include these:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

—Article IV, Section 2, Clause 1

In other words, no state may discriminate against the residents of another state. The law must be applied in the same way to all. Another section says,

The Constitution . . . shall be the supreme Law of the Land.

—Article VI, Section 2

This section asserts the authority of the Constitution and federal law over state and local law. When there is a conflict, the Constitution prevails.

Checks and Balances

The system of checks and balances is a guiding principle of the Constitution and a key component of limited government. This system works to prevent any one branch from wielding too much power.



Separation of Powers—Checks and Balances

The Constitution divides power in the national government among the three separate branches. This separation of powers was a key component in the framers' vision of limited government. In *The Federalist* No. 47, James Madison wrote, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."

In the framers' view, separating the powers of government among the three branches would ensure that no one branch could dominate. The framers took this principle a step further by inserting provisions in the Constitution that would allow each branch to check, or limit, the power of each of the other branches. This system of **checks and balances** can be seen in many parts of the Constitution, including the following provision:

He [the president] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.

—Article II, Section 2, Clause 2

Although the president has the power to make treaties, such treaties must be approved by a two-

thirds vote of the Senate to take effect. In this way, the Senate can check the power of the president. This clause goes on to say that the Senate can also block the president's appointment of ambassadors, Supreme Court justices, and executive officers.

Another clause establishes the president's **veto power** over bills passed by Congress. It says that the president can refuse to sign a bill into law and instead send it back to Congress:

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 the House in which it shall have originated.

—Article I, Section 7, Clause 2

The clause goes on to say, however, that if Congress passes the bill again with a two-thirds majority, it becomes law without the president's signature, thus checking the president's veto power.

Other sections of Article I address the removal of top officials:

The House of Representatives shall . . . have the sole Power of Impeachment.

—Article I, Section 2, Clause 5

The only way to remove a president, other members of the executive branch, or federal judges from office is by **impeachment**. This process requires that a simple majority of House members vote to impeach, or formally charge, the official with wrongdoing. A trial then takes place in the Senate:

The Senate shall have the sole Power to try all Impeachments . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present.

—Article I, Section 3, Clause 6

Conviction in a Senate trial requires a two-thirds vote of guilty. The power of impeachment gives Congress a check on the other two branches of government.

Federalism

The fourth guiding principle, **federalism**, divides power between the central government and the various state governments. In creating a federal system of government, the Constitution also established three types of powers: delegated, reserved, and concurrent.

Delegated powers are those powers granted to the national government. Delegated powers may be either enumerated or implied in the Constitution. The delegated powers of the federal government include regulating immigration, making treaties, and declaring war.

Reserved powers are those powers kept by the states. Reserved powers allow states to set marriage and divorce laws, issue driver's licenses, and establish public schools, among many other things. Under the Constitution, much of the exercise of day-to-day power affecting citizens is carried out by the states.

Concurrent powers are those that are shared by the federal government and state governments. Examples of concurrent powers include taxation and law enforcement.

The federalist principle in the Constitution is most evident in articles and amendments that refer to delegated, reserved, and concurrent powers, such as these:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

—Article I, Section 8, Clause 3

This clause, known as the **Commerce Clause**, gives the federal government the power to regulate trade across state lines within the United States and to both regulate and tax foreign trade. Another article establishes the amendment process:

The Congress . . . shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments.

—Article V

The amendment process is an example of concurrent powers. The federal government and the states share the power to amend the Constitution. Other powers are reserved to the states, however:

The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people.

—Tenth Amendment

This amendment reserves for the states or the people any powers that are not given to the federal government.

An Independent Judiciary

The fifth guiding principle, an independent judiciary, was considered essential by the framers to support the rule of law and preserve limited government. In *The Federalist* No. 78, Alexander Hamilton wrote, "The independence of the judges may be an essential safeguard against the effects of occasional ill humors in society." In other words, an **independent judiciary** would protect against abuses of the system by self-interested parties. This principle is found in Article III, which establishes the judicial branch.

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 Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

—Article III, Section 1

As this section makes clear, judicial authority rests with the Supreme Court and other federal courts. Where the article says that judges shall serve “during good Behaviour,” it essentially means “for life,” unless there is just cause to remove them.

In addition, the salaries of judges may not be reduced while in office. These two provisions—lifetime tenure and a secure salary—help to insulate federal judges from political pressure and influence, and thus preserve their independence.

Individual Rights

The sixth guiding principle, individual rights, played a major role in the struggle to ratify the Constitution. The Anti-Federalists argued that the Constitution did not offer adequate protection for individual rights. The Bill of Rights was added to address their concerns.

Individual rights receive their broadest protection under the First Amendment, which says,

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

—First Amendment

The First Amendment of the Bill of Rights guarantees Americans the freedom of speech and the right to assemble. In 2011, Americans exercised these rights by launching the movement known as Occupy Wall Street. Demonstrators carried protest signs that expressed their grievances toward the 1 percent of Americans who owned more than 30 percent of the nation’s wealth.



This amendment protects the rights of individuals to speak their minds and act on their beliefs without fear of arrest or persecution by the government.

In addition, the original text of the Constitution contains references to basic rights, such as trial by jury:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.

—Article III, Section 2, Clause 3

Trial by jury is a fundamental right guaranteed to all Americans. Another clause in the Constitution defines treason:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

—Article III, Section 3, Clause 1

This provision defines the crime of treason in a way that protects the rights of free speech and free expression. Under this definition, no American can be charged with treason for simply criticizing the government. Nor can such charges result in conviction without substantial evidence.

4.5 Interpreting the Constitution

Although the Constitution provided a firm foundation for a new national government, it left much to be decided by those who put this plan into practice. Some provisions that did not work as hoped were later changed by the formal amendment process. Other features of the government were established by actions of Congress, the executive branch, and the courts. These changes did not alter the wording of the Constitution, but they did clarify its provisions.

The Supreme Court plays an especially important role in our political system because it has the ultimate power to interpret, or establish the meaning of, the Constitution. Through its decisions, the Court helps to define the limits of constitutional rights and powers. Its decisions can affect your rights as a citizen.

The Process of Judicial Interpretation

When judges are asked to apply the Constitution to a legal issue, they look to five sources of information:

1. The text, or exact wording, of the Constitution itself
2. The **original intent** of the framers—what they meant or were trying to achieve—when they debated and wrote the Constitution
3. Court **precedent**, or the past decisions of the Supreme Court
4. The practical consequences for society of a particular interpretation
5. Basic moral and ethical values

Of these five, the most important are the text of the Constitution, original intent, and precedent.

Not surprisingly, judges and legal scholars do not always agree on how to interpret the Constitution. Some rely more on the original text or intent of the framers, while others give considerable weight to precedent, consequences, and values. These differences have given rise to debate over the degree to which the Constitution is a “living document” that should change with the times.

Strict Construction: Looking at the Text

On one side of this debate are those who favor **strict construction**, or a literal reading of the Constitution. Legal scholars often call this approach

originalism. It holds that the original language of the Constitution and the intent of the framers must serve as primary guides to judicial interpretation.

One of the leading advocates of originalism is Justice Antonin Scalia. In 2005, Scalia observed that “the Constitution is not a living organism . . . it’s a legal document and like all legal documents, it says some things and doesn’t say others.” Scalia accepts that the Constitution should be interpreted in a reasonable manner. However, he argues that judges should not try to make it conform to modern values. “I do believe you [should] give it the meaning it had when it was adopted,” he said.

Loose Construction: Adapting the Constitution to Today

On the other side of the debate are those who favor **loose construction**, or a flexible reading of the Constitution. Legal scholars often call this approach **interpretivism**. It holds that modern values and social consequences must be taken into account in interpreting the Constitution.

Schools of Constitutional Interpretation

Today, as in the past, both judges and the general public are divided on how the Constitution should be interpreted. Some favor a strict interpretation, while others favor a loose interpretation. That debate is likely to continue as long as the Constitution remains the foundation of our system of government.



One of the chief advocates of interpretivism was the late Supreme Court justice William J. Brennan Jr. In a speech delivered in 1985, Brennan explained,

We current Justices read the Constitution in the only way we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

—Justice William J. Brennan Jr.,
speech at Georgetown University, 1985

Over the years, Court decisions reflecting both sides of this debate have helped to define the Constitution. Four cases that illustrate the Court's interpretive role are *Marbury v. Madison*, *McCulloch v. Maryland*, *United States v. Nixon*, and *Goss v. Lopez*.

Marbury v. Madison: Establishing Judicial Review

This case, which dates back to the early days of the republic, established the key principle of **judicial review**. This principle grants the Supreme Court the power to declare acts of Congress, the executive branch, and the states unconstitutional. In other words, the Court can overturn laws or government actions that do not comply with the Constitution. This principle is not stated directly in the Constitution, though it is implied in Article III, which outlines the Court's judicial powers. It would take the *Marbury* case to make judicial review an accepted principle.

The case had its origins in the election of 1800. That year John Adams, the incumbent president and candidate of the Federalist Party, lost to Thomas Jefferson. Just before leaving office, Adams created dozens of new federal judgeships and appointed Federalists to fill these posts. Since federal judges serve for life, this action would ensure the continued influence of the Federalist Party in the federal government. However, Adams was not able to get all the commissions, or appointments, delivered by the time he left office.

Angered by Adams's "court packing" scheme, President Jefferson instructed his new secretary of state, James Madison, not to deliver the remaining commissions. William Marbury was one of those who failed to receive his commission. Marbury took his case to the Supreme Court. He based his argument on Section 13 of the Judiciary Act of 1789. This section empowered the Supreme Court to issue a "writ of mandamus" to force an official, in this case Madison, to perform a duty for which he was legally responsible.

Chief Justice John Marshall, a firm Federalist who was himself one of Adams's last-minute appointments, faced a delicate dilemma. If he issued the writ, Jefferson and Madison might simply ignore it, thus weakening the Court's authority. If he refused to issue the writ, however, it might imply that the Court had no power to judge the actions of the executive branch. Instead, Marshall did neither.

On February 24, 1803, the Supreme Court issued its decision. Writing for the majority, Marshall said that Marbury deserved his commission and that Madison should have delivered it.

But then Marshall added an unexpected twist. He wrote that Section 13 of the Judiciary Act violated the Constitution. Article III, which established the Judicial Branch, did not, he argued, give the courts power to issue a writ of mandamus. Declaring that a law "repugnant to the constitution is void," the Supreme Court struck down Section 13 of the Judiciary Act as unconstitutional and decided against Marbury.

It was a brilliant decision, both legally and politically. Although Jefferson did not support judicial review, he could do nothing to oppose it because the Court did not ask him to enforce the writ. Marshall had thus preserved the Court's authority and also given it the power to review the constitutionality of acts of Congress and the executive branch.

Judicial review has played a key role in Court decisions since *Marbury*. One of its main consequences has been to allow citizens to challenge in court any law or government action that they believe violates the Constitution. A case such as *Goss v. Lopez* would never have come before the Supreme Court without the establishment of judicial review.



The headquarters of the First Bank of the United States was completed in Philadelphia in 1797. The creation of the national bank proved controversial because the Constitution did not expressly give Congress the power to establish a bank. In *McCulloch v. Maryland* (1819), the Supreme Court upheld the constitutionality of this use of congressional power.

McCulloch v. Maryland: Making the Constitution the Supreme Law of the Land

A second landmark case, *McCulloch v. Maryland*, also came before the Marshall Court in the early 1800s. This case affirmed the supremacy of the national government over the states and upheld the implied powers of Congress under the Constitution.

The case revolved around disputes over the creation of a national bank. In 1791, Congress chartered the First Bank of the United States, even though some national leaders, including Thomas Jefferson, argued that such a bank was not authorized by the Constitution. The bank's charter ran out in 1811 and was not renewed.

In 1816, Congress decided to charter the Second Bank of the United States. Many states opposed the creation of this new national bank, and a number of them—including Maryland—passed laws to tax its branches. The cashier of the Maryland branch, James McCulloch, refused to pay the tax. When Maryland courts ordered him to pay, he appealed his case to the Supreme Court.

On March 6, 1819, the Court issued a unanimous decision in favor of the bank and McCulloch. In his written opinion, Marshall first argued that the federal government's power to establish a bank, though not specifically cited in the Constitution, was supported by the Elastic Clause in Article I, Section 8. That clause allows Congress to make all laws that are

"necessary and proper" to carry out its duties. Marshall asserted that the power to establish a national bank was implied in the enumerated powers of Congress, including the powers to lay and collect taxes, to borrow money, and to regulate commerce. A national bank, he said, would conceivably be useful for carrying out those powers and was therefore constitutional.

Marshall went on to say that no state has the power to tax the national bank or any other arm of the federal government. Such power would make state law superior to federal law, since, as he put it, "the power to tax involves the power to destroy." The people, he added, "did not deign to make their government dependent on the states." In fact, they declared just the opposite when they ratified the Constitution as "the supreme Law of the Land."

The decision in *McCulloch v. Maryland* had far-reaching consequences. By confirming the Elastic Clause, the Court supported a broad expansion of congressional power. It also sent a clear message that in conflicts between federal and state law, federal law would prevail. In both regards, the Court's decision helped to strengthen the national government.

United States v. Nixon: Reaffirming the Rule of Law

A third key case, *United States v. Nixon*, is more recent. This case reaffirmed the rule of law as a key principle of American government.



In 1974, the Supreme Court ruled that the president, like all other citizens, is subject to the rule of law. During the Senate investigation of the Watergate scandal, President Nixon claimed executive privilege and refused to release tapes of his Oval Office conversations. When ordered to do so by the Supreme Court, the White House handed over the tapes but admitted that two conversations had not been recorded and that 18 and a half minutes were missing. This cartoon reflects public suspicion about President Nixon's involvement in the scandal.

The origins of the case lie in the Watergate scandal of the early 1970s. During the 1972 presidential campaign, burglars broke into the Democratic national campaign headquarters, located in the Watergate complex in Washington, D.C. When evidence tied the break-in to President Richard Nixon, the Senate formed a special committee to investigate the incident. Under mounting pressure, Nixon and his attorney general, Elliot Richardson, also set up a special prosecutor's office to look into the matter. Richardson appointed Harvard law professor Archibald Cox as special prosecutor.

In the course of its investigation, the Senate discovered that Nixon had made secret tape recordings of his conversations in the Oval Office. Both the

Senate and the special prosecutor asked the president to hand over the tapes. Nixon refused. As justification, he claimed **executive privilege**. This is the right to keep internal discussions and documents of the White House private. Although executive privilege is not mentioned in the Constitution, various presidents throughout the country's history have claimed this right on the basis of separation of powers and national security.

After Cox demanded the tapes, Nixon had him fired. The public outcry was so great, however, that the president soon agreed to the appointment of a new special prosecutor. Cox's successor, Leon Jaworski, took Nixon to court to force him to release the tapes.

In 1974, the Supreme Court decided unanimously in the case *United States v. Nixon* that the president had to surrender the Watergate tapes. Chief Justice Warren Burger acknowledged that presidents have a legitimate claim to executive privilege. However, this claim, he said, "must be considered in light of our historic commitment to the rule of law." In cases of criminal prosecution, Burger said, executive privilege must give way to the "fundamental demands of due process."

Nixon complied with the decision and handed over the tapes. One of them proved to be a "smoking gun" that implicated the president in efforts to cover up the Watergate crimes. Faced with the prospect of impeachment, Nixon resigned. The Watergate scandal and the Court's decision demonstrated that no one, not even the president, is above the law.

Goss v. Lopez: Extending the Individual Rights of Students to Include Due Process

The case *Goss v. Lopez* involved the constitutional rights of Dwight Lopez and eight other students in Columbus, Ohio. The students, with the help of their parents, brought a lawsuit against school officials. The suit accused school officials of violating the students' constitutional right to due process by suspending them from school without a hearing. It also asked the schools to remove references to the suspension from the students' school records.

The students' suit eventually made its way to the Supreme Court. In making their decision, the justices focused on an Ohio law that allowed public

school principals to suspend a student for misconduct for up to ten days without a hearing. The law did require that the student's parents be notified of the suspension and the reasons for it. The school officials being sued argued that they had acted properly under Ohio law.

On January 22, 1975, a closely divided Supreme Court delivered its decision in a 5-4 vote. Writing for the majority, Justice Byron White acknowledged that schools must sometimes use discipline to maintain an orderly learning environment.

The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action.

—Justice Byron White, *Goss v. Lopez*, 1975

White went on to argue that the legitimate need for order in a school did not justify the violation of students' due process rights. Before being suspended or expelled, students should know the charges against them and have a chance to tell their side of the story.

As a result of the *Goss v. Lopez* decision, school districts across the United States established new procedures to protect the due process rights of students like you. Should you be facing an expulsion, you have the right to be notified of the charges against you. You also have the right to a prompt disciplinary hearing. During that hearing, you must have an opportunity to hear the evidence that led to the charges. You must also be allowed to present your side of the story before an impartial person or group of people. Anything less is a violation of your due process rights under the Constitution.

Summary

For more than 200 years, the Constitution has served as a blueprint for republican government and a guarantor of basic rights and freedoms for the American people. It has endured because of its flexibility and the strength of its underlying principles.

Elements of the Constitution The Constitution is structured in three parts: Preamble, articles, and amendments. The Preamble sets the purpose of government, the articles establish the governing framework, and the amendments make formal changes.

Amending the Constitution The amendment process requires the participation of both Congress and the states. Just 27 amendments have been ratified over the years. The first ten constitute the Bill of Rights. The other 17 cover a range of issues, including voting rights and the powers of government.

Guiding principles of the Constitution The limited government envisioned in the Constitution is based on six principles: (1) popular sovereignty, (2) the rule of law, (3) separation of powers and checks and balances, (4) federalism, (5) an independent judiciary, and (6) individual rights. The principles underlie many features of our government.

Interpreting the Constitution The three branches of government all play a role in working out the details of governing under the Constitution. The courts interpret the Constitution and decide whether laws and government actions are constitutional, a power known as judicial review.

Do zero-tolerance policies violate the due process rights of students?

During the 1990s, concern about drug use and violence in schools prompted a new approach to enforcing school rules. This approach, known as zero tolerance, calls for automatic punishment for violating a rule. Schools with zero-tolerance policies immediately suspend students accused of breaking certain rules. These rules generally include possessing drugs, carrying weapons, or starting fights. Students are not given a disciplinary hearing before being expelled.

The news story here describes a zero-tolerance incident that took place in January 2005 at a school in Haverford, Pennsylvania. As you read it, ask yourself, **Was the student involved deprived of her due process rights? Or did she knowingly violate a reasonable policy designed to maintain a safe and drug-free school?**

Zero Tolerance: Student Suspended for Taking Medicine

by Lois Puglionesi

HAVERFORD—A Haverford High School honor roll student, known to all as a conscientious, high achiever, was suspended from school last week for taking what might be considered the equivalent of an aspirin. The suspension was based on a zero tolerance drug and alcohol policy, which expressly forbids any form of self-medicating—including use of over-the-counter products—without proper authorization. The incident sparked an outraged response from parents, and raised questions about school policy.

It began innocently enough when a senior female student experiencing menstrual cramps asked a friend for a Tylenol or Advil. The classmate had none, but in an effort to be helpful, asked a third student, who supplied a generic form of Aleve. Aleve is a non-prescription strength form of Anaprox, sold over the counter as a fever reducer, and for temporary relief of minor aches and pains.

The young woman took the Aleve, but continued experiencing discomfort and went to the

nurse. When questioned, the student told the truth and admitted obtaining Aleve from another student. An assistant principal was summoned to the scene.

Although these young women may not have viewed the incident as a serious offense, officials did. School policy prohibits students “from carrying on their person any medication that is prescribed or purchased over the counter.” (This includes eye drops, Tylenol, nasal sprays.) If it’s necessary to take medication during school hours, the medicine must be accompanied by a written order from a physician and administered through the nurse, policy states.

The Aleve affair was deemed a level 5 violation, subject to a maximum three-day suspension prior to a hearing with the principal. Both girls were sent home. Based on findings, initial suspensions may be extended, with possible referral to an assessment team, or the police when appropriate. Disciplinary actions are recorded on school records.

A call from irate parents expedited a hearing with Haverford Principal Nicholas Rotoli.

Parents felt the punishment was inappropriate. A level 5 violation is applicable in cases where a student "possesses drug-related paraphernalia and/or possesses, uses or is under the influence of drugs, alcohol, or mood-altering substances," according to school district policy.

The student's mother argued, "There has to be a distinction between someone who takes a cough drop or a Midol, opposed to a kid who's smoking [marijuana]. It's like throwing a hand grenade on an anthill. The world isn't black and white. The school didn't look at who this child is. They didn't delve into history or character. This is a kid who wants to be in school, loves to be in school, and gives back to the community."

The mother also questioned whether students were adequately informed about the rules.

Rotoli allowed the young woman to return to school after one day, but stood by the school's response and the need for a zero tolerance policy on self-medicating.

"These policies are not put in place to be unreasonable. It's for the protection of all the kids," Rotoli said. Contrary to the family's perceptions, Rotoli

insisted there was a sliding scale, that adjustments are made to individual cases pursuant to an investigation.



"We don't expel a kid for 10 days for using eye drops," he said. While distributing marijuana falls at the highest end of the drug and alcohol policy, taking pain relievers falls at the lowest, said Rotoli. But "a suspension of some extent is warranted. It's more of an educational thing—don't come to school and self-medicate. Don't take meds from others."

Rotoli emphasized the need for safety precautions in a drug-

oriented society where people "believe you swallow a pill and it will take care of problems. Kids will ingest anything. People want immediate relief and don't think about possible side effects and allergic reactions," he said.

"Kids have to realize these are medicines," said 12th-grade assistant Principal Richard Kline. He expressed concerns about the theft and sale of OTCs by students, and warned of "look-alike" drugs, or illegal substances in disguise. The nurse called the Poison Control Center, in fact, because the pills in question were marked only with a code number and brought to school in a jewelry-type pillbox.

And despite the student's good credentials, Rotoli maintained, "We can't have individual policies—one for the 'better' kids and one for the others. They're all great kids. They all make mistakes."

While those "mistakes" are recorded on school records, the information is purged annually and never released, Rotoli said.

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