

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.

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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.