U.S. CONSTITUTION: ROOTS

The U.S. Constitution is one of the world's oldest constitutions. Written in 1787, it did not come out of thin air. Rather, it was influenced by many significant political documents that preceded it both in America and abroad:

The Magna Carta (1215) In 1215 armed British nobles confronted King John at Runnymede. They forced the King to sign the Magna Carta or face civil war. The Magna Carta (which means "great charter") put limits on the King's power. No longer was he an absolute ruler, above the law. Some of the rights and freedoms found in the U.S. Constitution can be traced back to this ancient document. Most importantly, the Magna Carta helped establish the principle of "constitutionalism"—i.e., the idea that that (1) government power should always be limited and (2) those limits should be spelled out in an enduring document which is superior to ordinary laws and decrees.

Royal colonial charters (17th century) Great Britain encouraged individuals and groups to colonize America. However, you couldn't just get on a ship and stake out land in the New World; you needed formal permission from the King. Typically, this meant a royal charter. Royal charters were short documents that authorized settlement in a specific locale. They also prescribed a simple governing structure for the colony and guaranteed limited rights. In the this sense they resembled primitive constitutions. As the colony grew, the charters often evolved into more complex documents. At some point many of these charters were almost indistinguishable from a modern state constitution. Importantly, the American colonists began to appreciate the importance of having a charter, particularly when later rulers attempted to curb their rights (see sidebar: Connecticut's Famous Charter Oak).

The Mayflower Compact (1620) The Pilgrims aboard the *Mayflower* had a royal charter granting them permission to settle in Virginia. However, a storm blew the ship off course and they wound up in Plymouth, Massachusetts instead. They voted to stay put, but knew that their survival depended upon the cohesion of the group. Accordingly, before disembarking, the 41 men onboard drafted a simple compact or contract. In it they mutually pledged to create a government and abide by its laws. The Pilgrims were not rebelling from British authority—they expected the King to ratify their arrangement. The Mayflower Compact is nonetheless a significant milestone because it embodies the principle of government by the consent of the governed. And it demonstrates the confidence and capacity of ordinary people to design their own government.

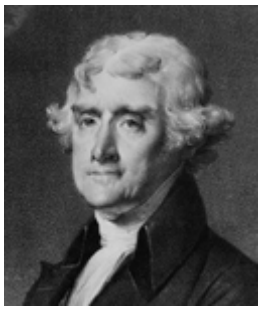
The English Bill of Rights (1689) British citizens were also politically maturing and demanding more rights during this period. As a condition of assuming the throne, William and Mary were forced to sign the English Bill of Rights at the end of the Glorious Revolution. It put limits on the arbitrary exercise of governmental power and established the supremacy of Parliament over the monarchy. Like the Magna Carta, these and other British rights advances were enthusiastically embraced by the American colonists.

The Declaration of Independence (1776) American relations with Great Britain began deteriorating in the mid-1700s. One trigger was Britain's effort to recoup the costs of the French and Indian War through new forms of

CONNECTICUT'S FAMOUS CHARTER OAK

Like other American colonies, Connecticut operated under a royal charter. In 1687, twenty-five years after the charter was issued, a new king (James II) tried to cut back on the colony's rights. However, when British agents showed up to physically seize the charter, the candles in the room suddenly went out. And in the ensuing confusion, the charter disappeared. The Connecticut colonists "saved" their charter by hiding it in a giant white oak tree. In 1999 Connecticut memorialized this episode by putting the famous tree (which unfortunately was felled by a severe storm in 1856) on its official state quarter. The larger point of the story is that during the 1600s Americans began to realize that having a charter was an important defense against arbitrary governmental power. The principle of constitutionalism became rooted in the American mind like the charter oak.

colonial taxation. Another irritant was the British attempt to limit America's westward expansion. Eventually these and other heavy-handed British policies caused the 13 separate colonies to unite for a series of protest meetings in Philadelphia known as a "continental congress."



During the Second Continental Congress the delegates voted to severe ties with Great Britain. Thomas Jefferson was given the task of drafting the Declaration of Independence. It was officially adopted by the Congress with small editorial changes on July 4th. The Declaration attempted to justify the American rebellion on both philosophical and factual grounds. Its eloquent second paragraph (see sidebar) asserted as a "self-evident" truth the right of citizens to overthrow an unjust government. The rest of the Declaration set forth the specific British offenses that purportedly justified the rebellion. Although some of these charges were overblown, and the philosophical ideas were not original (most can be traced to John Locke), the Declaration has been profoundly influential. It has been invoked to justify independence struggles throughout the world. And its lofty "all men are created equal" has inspired the continuing expansion of rights in the U.S. Although the Declaration of Independence does not have the force of law like the U.S. Constitution, many regard it as *the* statement of America's creed and aspirations.

The Articles of Confederation (1777, 1781) The Articles of Confederation was America's first "national" constitution. Drafted in 1777, it took several years for all the states to ratify it, and it only lasted a decade.) Americans did not want an oppressive national government so the Articles deliberately created a weak central government. Most governmental power remained with the states. In fact, the Articles described the arrangement as a "firm league of friendship" or confederacy of sovereign states. The central government consisted of a single branch—a legislature—where each state had one vote. Important matters, such as amendments to the Articles, required unanimity. This was hard to achieve especially when some states didn't even bother to show up. The lack of executive and judicial branches left the central government relying upon uncooperative states to enforce its decrees. And because it lacked the power to directly tax citizens, it was perpetually underfunded. The government was helpless to stave off mounting economic chaos as states printed their own currency and imposed tariffs against each other. The government was further embarrassed as the states made their own private trade deals with European nations. By 1786 the Articles government was on the verge of bankruptcy and barely functioning. It is nonetheless a political milestone because it did unify the states, however weakly. And its failures inspired many of the innovations of the U.S. Constitution which succeeded it.

The Northwest Ordinance (1787) The Northwest Ordinance was one of the few accomplishments of the Articles government. It dictated how the western territories would be governed and specified "equal footing" terms on which they would be eventually admitted as states. It was an enlightened piece of legislation: the ordinance banned slavery in the territory, promised decent treatment of Native Americans, made the first national provision for public education, and safeguarded freedom of religion and other important liberties.

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The Declaration of Independence

In just a few eloquent phrases, the Declaration of Independence offers a powerful philosophical justification for revolution. Jefferson asserts that all people have a natural right to replace an unjust government with a new government more suited to their needs:

> We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. –That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. –*That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute a new Government*, laying its foundation on such principles and organizing its power in such form as to them shall seem most likely to effect their Safety and Happiness (emphasis added).

Arizona adopts *part* of the Declaration

A recent Arizona law requires students in grades 4 through 6 to recite the following portion of the Declaration of Independence at the beginning of the day:

> We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. –That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed….

Interestingly, the Arizona Legislature omitted the right to overthrow the government—which was the whole point of the Declaration! (See A.R.S. 15-203(26))

THE CONSTITUTIONAL CONVENTION & AFTERMATH

JAMES MADISON: FATHER OF THE CONSTITUTION

As Madison modestly noted late in his life, the Constitution was "not the offspring of a single brain" but rather the work of many heads and many hands" (Letter to William Cogswell, March 10, 1834). Nonetheless, Madison is honored as the "Father" of the Constitution for many valid reasons:

- He was the prime organizer of the Convention.
- He was the author of the Virginia Plan on which the Constitution is loosely based.
- He was the most prepared of the delegates and made the most substantive contributions.
- He kept comprehensive notes of the Convention.
- He led the ratification struggle in his home state of Virginia.
- He helped New York's ratification through co-authorship of the *Federalist Papers.*

The U.S. Constitution was undeniably a group effort, with the whole truly greater than the sum of the parts. However, James Madison was the Convention's MVP—arguably the only indispensable participant.

The impetus Multiple factors led to the calling of a Constitutional Convention including: the weakness of the Articles of Confederation; a growing economic crisis; civil unrest and violence (e.g. Shay's Rebellion in 1786); instability in state laws; and concern that state governments were becoming *too* democratic and threatening the interests of wealthy elites. Accordingly, when five states met in Annapolis to negotiate common navigational issues in 1786, they called for a convention the following year to amend the Articles of Confederation. All of the states except Rhode Island agreed to send delegates. (Rhode Island was the most populist, with small farmers controlling the government. They did not want a more powerful national government.) Altogether 70 delegates were chosen to attend the convention in Philadelphia, but only 55 actually participated. Some left the convention midway, including the entire New York delegation. (Alexander Hamilton remained to help out on his own.) In the end 39 delegates signed the finished Constitution.

The delegates—"an assembly of demigods" Some of the most distinguished figures of the age were chosen as delegates to the Constitutional Convention, including George Washington, Benjamin Franklin (then 81 years old), James Madison, James Wilson, Gouverneur Morris, George Mason, and Alexander Hamilton. Notably, two giants of the Revolutionary Period, Thomas Jefferson and John Adams, did *not* participate. (They were both abroad, serving as ambassadors to France and Great Britain respectively). Some, like Patrick Henry of Virginia, refused to participate fearing that the Convention would betray the ideals of the Revolution. Most of the chosen delegates were elites and experienced politicians. Jefferson described the body as "an assembly of demigods." (Letter to John Adams, August 30, 1787).

Key procedural decisions At the very start the delegates made two key decisions. First, they chose George Washington to preside over the Convention. Although he made few substantive contributions, Washington's stature added credibility to the proceedings. Additionally, his skillful leadership arguably influenced nervous delegates to design an executive branch with a single head. Second, the delegates voted to operate in strictest secrecy to facilitate free debate and compromise. Accordingly, the details of the Convention were not publicly known until James Madison's handwritten notes were published more than 50 years later in 1840. (Madison left instructions that the notes were to be made public only upon the death of the last surviving delegate—which ironically turned out to be Madison himself.)

The Virginia Plan and the Connecticut ("Great") Compromise The delegates were supposed to be proposing *amendments* to the Articles of Confederation. However, when Virginia's delegates introduced a draft of a brand new government, it was evident that the Convention was starting from scratch. The Virginia Plan based legislative representation on population, giving the larger states had more votes. The small states vigorously objected and threatened to walk out. The Convention was deadlocked until Connecticut proposed the solution which became known as the Great Compromise. A bicameral (two-chambered) legislature would be created, with equal representation in the upper chamber (Senate) and population-weighted representation in the lower chamber (House of Representatives.) This satisfied both the large and small states.

Other compromises and controversies Virtually every provision in the Constitution was the result of vigorous debate and compromise. E.g., delegates fought over the design of the executive branch. Some were fearful of reposing

Independence Hall (dwarfed by Philadelphia's modern skyline). The Declaration of Independence, Articles of Confederation, and U.S. Constitution were all drafted and debated in this building and signed with the same pen!

The very room where the Constitutional Convention was held.

State Ratification Margins	
Delaware	100%
Pennsylvania	67%
New Jersey	100%
Georgia	100%
Connecticut	76%
Massachusetts	53%
Maryland	85%
South Carolina	67%
New Hampshire	55%
Virginia	53%
New York	53%
North Carolina	72%
Rhode Island	52%

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power in a single person and wanted a 3-person executive council instead. In contrast, Alexander Hamilton argued that the country needed a powerful, *lifetime* leader to unify the nation. In the end the delegates compromised by giving power to a single person with a renewable 4-year term of office. There were intense divisions over slavery. Again the delegates compromised: the importation of new slaves could be banned after 21 years, and slaves would be counted as 3/5 of a person for determining a state's representation in the House. Finally, and shortsightedly, the delegates voted against including a bill of rights in the new constitution. The majority argued that it was unnecessary since the states already had bills of rights and the national government was being given only limited powers. A few delegates, such as George Mason of Virginia, refused to sign the Constitution because of this omission.

Ratification The delegates had to decide how the Constitution would be officially adopted. They feared rejection by the existing state and central governments. So instead, Article 7 required approval by ¾ of the states, holding their own conventions. This allowed the Constitution to rest on greater popular support in keeping with the preamble, "*We the People* of the United States . . . do ordain and establish this Constitution . . . ." Initially, the strategy seemed to work: Delaware became the first state to ratify in December 1787. (Its license plate brags "First State.") By mid-1788 the requisite 9 states had approved. However, opposition began to build and two critical states—Virginia and New York—were looking doubtful. Opponents of ratification were called "Anti-federalists." They opposed the Constitution on multiple grounds, including the fact that it lacked a bill of rights. Anti-federalists feared that the national government would be too powerful—that it would swallow up the state governments and oppressively tax the citizens. They also objected that the national government was insufficiently democratic: i.e., that too many citizens had to share a single representative; that only one office (House) was directly elected by the people; that the president was given "kingly" powers; that there were no term limits for officeholders; and that the Constitution was too difficult to amend.

The *Federalist Papers* to the rescue James Madison played a major role in persuading his fellow Virginians to narrowly approve the Constitution. When it appeared that Anti-federalist arguments were making headway in New York, Alexander Hamilton organized a counter campaign. Under the pseudonym "Publius," he, Madison, and John Jay quickly wrote 85 short essays in support of the Constitution. The articles appeared in New York newspapers and helped sway the state to approve the Constitution (by 3 votes). Collectively known as the *Federalist Papers*, the essays are the single most important work on the U.S. Constitution. This is because two of the authors (Madison and Hamilton) were drafters of the Constitution so their interpretation of its provisions carries unique weight. The essays are continually cited in constitutional disputes that reach the courts. In addition, several of the essays (notably Madison's No. 10 and Hamilton's No. 78) are regarded as first-rate pieces of political theory.

Ratification with strings attached All 13 states ratified the Constitution although the votes in many states were close (see sidebar). Two states (Rhode Island and North Carolina) initially rejected the Constitution and did not reconsider until after the first federal elections were held in 1789. Notably, several states approved the Constitution only with the understanding that it would be immediately amended to add a bill of rights. In fact, the first Congress approved 12 amendments in 1789, and 10 of those officially became part of the Constitution in 1791 after they were ratified by the states. Today there are 27 amendments to the Constitution; the first 10 are known as the Bill of Rights.

U.S. CONSTITUTION: SIX DEFINING FEATURES

A Madisonian constitution

The U.S. Constitution, as James Madison modestly noted, was "not the offspring of a single brain…." Nonetheless, Madison is justly regarded as the Father of the Constitution. Not surprisingly, the Constitution strongly reflects his (pessimistic) view of human nature. Above all, Madison mistrusted power. He believed that it had seductive qualities and was difficult to constrain. Accordingly, the government that Madison helped design is filled with checks and balances that limit the powers of officials. Madison explained the rationale in a famous passage from *Federalist No. 51:*

> If men were angels no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and the next place oblige it to control itself. A dependence on the people is no doubt the primary control on the government, but experience has taught mankind the necessity of auxiliary precautions.

Finally, Madison wasn't only worried about the abuse of power by government officials. Rather, he believed that citizens were even more likely to abuse power. *Federalist No. 10*, arguably his most famous essay, cautions against the tyranny of the majority.

1. A republican form of government (representative democracy) Although many people label the United States as a "democracy" this isn't accurate. The Founders specifically rejected democracy in favor of a **republican form of government** (Art. 4, sec. 4). *Federalist No. 14* explains the difference:

> In a democracy the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives and agents. A democracy, consequently must be confined to a small spot. A republic may be extended over a large region.

Size wasn't the only reason why the Founders preferred a republic. To them democracy was a form of mob rule. They believed that ordinary citizens weren't sufficiently informed to govern wisely; the masses were likely to be swayed by emotion rather than reason, put self-interest ahead of the public interest, and trample the rights of the minority. Arguably, these dangers would be reduced in a republic where officials govern but remain accountable to the people. (Today the U.S.-style republic is more commonly called a ***representative* democracy** to distinguish it from a true or "pure" democracy.)

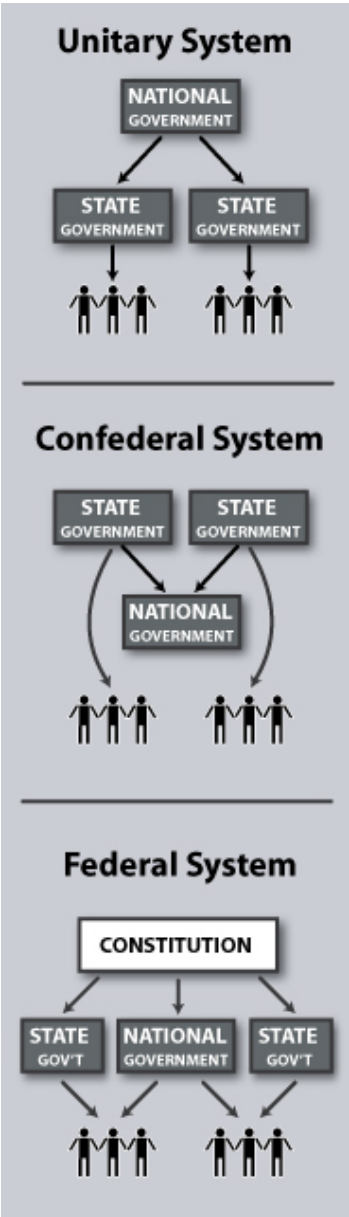
2. A federal system Federalism describes the relationship between the national and state governments. Prior to 1787, the thirteen states functioned like independent sovereign governments. They were bound together in a very weak national alliance under the **Articles of Confederation**. This **confederal system** wasn't working. Some proposed switching to a **unitary system** where there is just one all-powerful sovereign government. However, the states were unwilling to surrender their authority, and Americans feared a distant, powerful government. In the end, the Founders created a compromise that they called a **federal system** (see sidebar: Three systems of government). In a federal system the national and state governments share sovereign powers, with each having the authority to make and enforce its own laws directly on its citizens. Neither government empowers the other; instead, both derive their authority from the Constitution. A federal system has some of the benefits of a unitary system (e.g., a strong national government capable of uniting the people), as well as some of the benefits of a confederal system (e.g., more policy variation, and greater democratic participation.) A federal system also serves as a check against the abuse of power by either level of government. However, it has some downsides as well, including greater friction between the two levels of government, allowing state-to-state inequities, and making it more difficult to forge solutions to national problems. Today, most countries have unitary systems, with federal systems found primarily in the world's largest nations (e.g., Canada, Australia, India, and Brazil).

3. A national government with delegated (enumerated) powers The Constitution divides power between the national and state governments in a different way for each government: It *lists* the powers of the national government—mostly in Article I, sec. 8. For example, it specifies that national government has the power to declare war, raise and support armies, coin money, operate post offices, etc. These are called **delegated** or **enumerated powers**. However, the Constitution does not list the powers of the state governments. Rather it gives the states "reserved powers" (everything else). The **Tenth Amendment** makes this plain:

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

Broadly speaking, the Constitution expressly gives the national government authority over defense, foreign affairs, and a few domestic matters (such as currency regulation and interstate commercial activity) that require national coordination.

Three systems of government



However, most domestic matters (e.g., education, health, public safety, morality) are left to the states. The Constitution does contemplate some areas of overlap where both governments have the power to regulate (e.g. commerce). Obviously, this could lead to conflict. However, the **Supremacy Clause** in Article 6 specifies that in such situations the national law is supreme. Over the past two hundred years power has flowed to Washington, D.C. Under a very loose interpretation of the Constitution, the national government has been able to expand its regulation of domestic affairs well beyond that intended by the Founders.

4. Separation of powers The Founders recognized the need for a more powerful national government but worried that it might encroach upon the peoples' liberties (see sidebar: A Madisonian constitution). They came up with two solutions: separation of powers, and checks and balances. They borrowed the idea of separation of powers from the French philosopher Montesquieu. He advised dividing the three basic functions of government (i.e., legislative, executive, and judicial) into different departments, headed by different individuals, chosen at different times and by different means. The idea is that no single person or group wields all the power, thus providing a built-in, structural check against abuse.

5. Checks and balances In a true separation of powers system, *all* the lawmaking power would be confined to the legislative branch, *all* the enforcement power would reside with the executive branch, and *all* judging powers would rest with the judicial branch. However, Madison and other Founders feared that this wasn't enough; i.e., that one branch might grow more powerful and improperly invade the area of the others. Checks and balances attempts to prevent this from happening by deliberately giving each branch a little bit of authority to intervene in the business of the other. As explained by Madison in *Federalist No. 51:*

> But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others….. Ambition must be made to counteract ambition.

Thus the president, who heads the executive branch, is given some legislative power (e.g. the veto), and some judicial power (e.g. the power to grant pardons) as a "check" against these sister branches. Reciprocally, the Senate is given some power in the executive area (e.g., it must approve the president's high level appointments). The judicial branch interprets laws, and so forth. A close examination of the Constitution reveals dozens of checks and balances, which, in a strict sense, violate the principal of separation of powers. While these have added the measure of the safety that that Founders desired, there is a price. Checks and balances promote "gridlock"—especially where the different branches are controlled by opposing political parties.

6. The power of judicial review Judicial review gives the courts the final say over the interpretation of the Constitution. It allows judges to strike down (i.e. declare void) any law passed by Congress or any act of the executive branch that they deem "unconstitutional." It also gives the federal courts the power to overrule state actions deemed unconstitutional. Judicial review is the ultimate check and balance possessed by the judicial branch. It is controversial because judges and officials can honestly disagree on the interpretation of the Constitution, and federal judges are not elected. And although there is evidence that the Founders intended the courts to have this power as a check against the excesses of democracy (e.g., see *Federalist No. 78*), it is not expressly mentioned in the Constitution. Rather, the power of judicial review was established by the Supreme Court itself in the landmark case *Marbury v. Madison* (1803).

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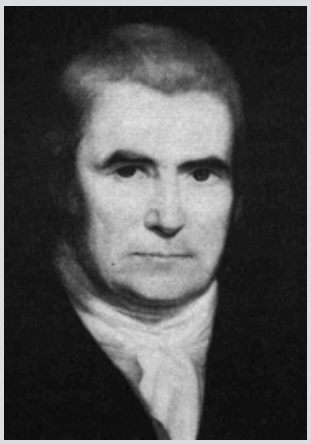
The Expansion of National Power

ARTICLE 1, SECTION 8:

Congress has the power to:

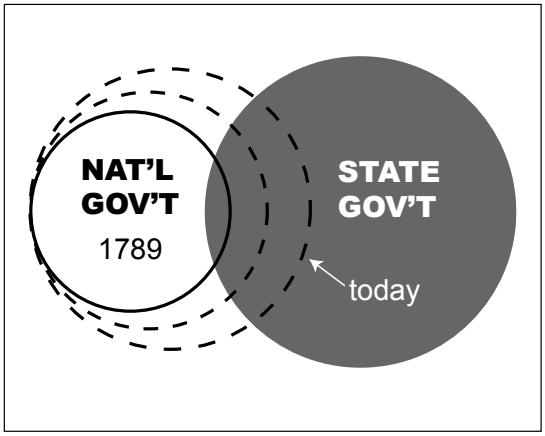
- Collect taxes;
- Spend for defense & the general welfare;
- Borrow money
- Regulate commerce (foreign, interstate, and with the Indian tribes)
- Regulate immigration
- Regulate bankruptcies
- Coin money and punish counterfeiting
- Set the standard of weights & measures
- Establish post offices
- Grant patents and copyrights
- Establish lower courts
- Punish piracies and violations of international law
- Declare war
- Raise and support armies
- Maintain a navy
- Make rules for the military
- Organize, train, and activate the National Guard
- Govern the capitol and military bases *and*
- "**…make all laws which shall be necessary and proper for carrying into execution the foregoing powers" and all other powers given to the national government by the Constitution** (Necessary and Proper Clause).



John Marshall was Chief Justice of the Supreme Court from 1803–1835. His early interpretations of the Constitution have shaped our understanding ever since. Marshall was a strong nationalist and supported the expansion of federal power.

The original concept—When the Founders wrote the Constitution in 1787 they wanted a more powerful central government than the one that existed under the Articles of Confederation. At the same time they were mistrustful of "Big Government" (think Great Britain) and did not want to supplant the states which were quite jealous of their powers. The Founders' solution was to give the central government a great deal of power, but to *limit the areas* in which it could operate. Accordingly, the Constitution carefully enumerates (lists) the national government's powers. Most are found in Article 1, sec. 8 (see sidebar). These powers primarily relate to national security and foreign affairs—the federal government's main area of operation. However, there are also a few domestic powers in areas requiring national coordination (e.g., regulation of currency, interstate trade, etc.) In contrast, the states have reserved powers or everything else that isn't expressly forbidden by the Constitution. That is, the Founders intended the individual states to have responsibility for most domestic matters: public safety, health, crime, morals, education, marriage, business, etc.

What's wrong with this picture?—Undeniably, the Founders' intentions do not square with modern reality. Consider the national government's massive involvement in our daily lives: It regulates working conditions, food and drugs, manufacturing, TV and radio, the environment, social security, civil rights, etc. And it is now heavily involved in education—a traditional area of state responsibility. How can this be? The short answer is that the scope of federal power has dramatically expanded over the past 200-plus years. This expansion has been largely triggered by changed social conditions. Today's interdependent nation is quite different from the isolated, 13 "sovereign states" that existed in 1789. Nonetheless, somebody usually challenges the expansion, giving the courts the final say over whether it is "constitutional." Mostly—but not always—the courts have sustained federal expansion with creative interpretations of the text. Here's the basic story:



Early expansion: *McCulloch v. Maryland*—Early on it became apparent that the national government needed more domestic powers than the skimpy listing in Article 1, sec. 8. For example, people wanted the federal government to build interstate roads and canals which were not among the listed powers. However, it was the government's decision to operate a bank that led to *McCulloch v. Maryland* (1819). In this landmark case Chief Justice John Marshall reasoned that: (1) the Constitution should not be read narrowly, and (2) the Necessary and Proper Clause (see sidebar) gave the government *implied powers* that flowed from the enumerated ones. Since a bank was a reasonable means for carrying out several enumerated powers (taxation, regulating currency, etc.) it was a legitimate exercise of national power. (Do you see why the Necessary and Proper Clause is nicknamed the "elastic clause"?)

Four major bases for federal expansion—Since *McCulloch,* four sections of the Constitution have been heavily relied upon to justify the expansion of national power:

(1) The Interstate Commerce Clause: Article 1, sec. 8 authorizes the national government to "regulate commerce …among the several states." These 6 words provide the basis for the greatest domestic expansion of federal power. Another landmark case, *Gibbons v. Ogden*

(1824), got the ball rolling: Chief Justice John Marshall (again!) broadly interpreted the term "commerce" and basically concluded that the federal government could regulate a commercial activity that affected more than one state. The implications of *Gibbons* were not fully realized until after the Industrial Revolution in the mid-1880s when mass-produced goods started flowing across state lines. Congress passed new laws to deal with the resulting problems. It began by regulating railroad rates and monopolies. Then it started to regulate food, drugs, and other aspects of manufacturing by simply prohibiting the interstate shipment of goods that didn't meet federal standards. At first, the Supreme Court upheld this broad reading of the Commerce Clause. However, it backtracked when more conservative justices joined the Court. In 1918, the Supreme Court struck down the national child labor law on the ground that the law exceeded the government's power under the Commerce Clause. It continued in this vein, and during the 1930s began striking down New Deal legislation designed to rescue the country from the Great Depression. A frustrated President Roosevelt proposed enlarging the Court to get around the rulings. However, a key justice changed his position in 1937. And with addition of new members, the Court reversed itself and began upholding virtually any federal law that contained the magic words "commerce clause." It was on this basis that the national government subsequently enacted social security, national wage and hours laws, TV and radio regulation, environmental laws, gun laws, and so forth. As long as *some* impact on interstate commerce could be argued—no matter how indirect—the Supreme Court approved the exercise of federal power. This continued until 1995, when the Rehnquist Court unexpectedly struck down the federal Gun-Free School Zones Act. By a 5–4 vote, the Court ruled that the law didn't "substantially" affect interstate commerce. In 2000, the Court struck down part of the federal Violence Against Women Act on the same basis. These recent decisions, however, represent only a modest retreat.

(2) The Spending Clause: Article 1, sec. 8 authorizes the national government to "provide… for the general welfare" of the country. That means that it can spend money on worthwhile projects. Since federal income tax was reintroduced after 1913, the national government has had considerably more resources than the states. It gives some of its tax money back to the states, *but often with strings attached*. This enables the national government to indirectly regulate areas (such as education) where it otherwise lacks power. A wealthy state, of course, can simply refuse the federal money and avoid the federal mandates. However, most states are so cash-starved that they don't have this option. The national government has used its highway funds to indirectly regulate speed limits, drinking age, and alcohol levels in drivers (see sidebar: The Drinking Age). And its controversial No Child Left Behind educational initiative is similarly imposed on the states that accept federal education money.

(3) The Taxing Clause: Article 1, sec. 8 also allows the national government to "lay and collect taxes." Ordinarily, taxes are imposed for revenue-raising purposes. But taxes can also be used to change behavior: A heavy tax can discourage certain purchases (e.g. alcohol, cigarettes) or unwanted activities. The national government sometimes uses its taxing powers to regulate in this indirect fashion. In fact, some argue that the national government should significantly raise gasoline taxes as a way of pressuring Americans to conserve fuel.

(4) The 14th Amendment: This amendment was added to the Constitution in 1868 to end the unfair treatment of former slaves. However, its language more broadly prohibits discrimination against "any persons" by the states. Section 5 authorizes Congress to pass "appropriate legislation" to carry out the purposes of the Amendment. In modern times this has led to sweeping civil rights laws that prohibit discrimination in the workforce, in housing, in schools and athletic programs, in restaurants, hotels, amusement parks, and other places of public accommodation. It is also the served as the constitutional basis for the Americans With Disabilities Act, for federal sexual harassment laws, and for other national regulations that reach deeply into American society.

THE DRINKING AGE

The Constitution's 21st amendment leaves alcohol regulation entirely up to the states. Prior to 1984, the drinking age* varied from state to state. In fact, the Vietnam War caused many states to lower their drinking age to 18, since 18-year olds were being drafted. However, the lowered drinking age led to an upsurge in automobile deaths. Mothers Against Drunk Driving (MADD) began lobbying for a national minimum drinking age of 21. Congress was sympathetic, but as noted above, lacked the power to pass such a law. Can you guess what it did instead? In 1984, Congress put a new condition in the federal highway funding bill: if a state wanted to receive its full share of the money, the state would have to raise the drinking age to 21 within 2 years. Many states (including Arizona) grumbled loudly, but reluctantly complied. South Dakota sued. It claimed that this was blackmail; that the national government was using its spending power to get around the 21st Amendment. South Dakota lost. The Supreme Court concluded that the state didn't *have* to take the money, and that national government had the right to use its spending power as "an encouragement to state action." See *South Dakota v. Dole* (1987). Today, all 50 states—including South Dakota—have 21 as the drinking age. And more recently, the national government used the identical approach to pressure the states into lowering the legal blood alcohol level for driving. Again, the Arizona Legislature protested, but went along.

*"Drinking age" here refers to the minimum age for purchasing and publicly consuming alcohol. (Many states permit private consumption by minors.)

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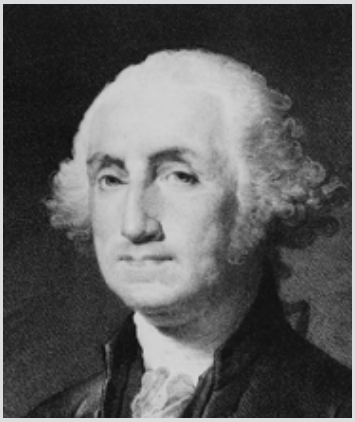
Congress

GEORGE WASHINGTON'S TEA PARTY



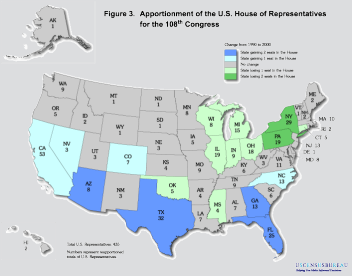
Purportedly, President Washington was drinking tea with the French ambassador, when the ambassador asked, "Why does the U.S. need a Senate? You don't have nobles like Great Britain."

Washington replied, "Why are you pouring your tea into your saucer? (The ambassador hand been pouring the hot tea back and forth.)

"Why, to cool it, of course!" responded the ambassador.

"And that's why we have a Senate," explained Washington, "to 'cool down' the House of Representatives!"

REAPPORTIONMENT WINNERS AND L0SERS



After the 2000 census:

Gaining 2 seats: AZ, FL, GA, TX

Gaining 1 seat: CA, CO, NC, NV

Losing 1 seat: CT, IN, IL, MI, MS, OH, OK, WI

Losing 2 seats: NY, PA

See: http://www.census.gov/population/cen2000/map03.gif

During the Constitutional Convention the delegates devoted the most time to the design of Congress. Their effort is reflected in Article 1 of the U.S. Constitution, which not surprisingly is the longest article. The Founders gave it so much attention because they believed that Congress would be the most important branch. They wanted it to dominate because it is the most democratic of the three branches, consisting of members drawn from the entire nation. The structural details described below may seem arbitrary but they are actually based on deep political thought and the Founders' own considerable political experience.

Bicameral—The most striking feature of the U.S. Congress is that it is bicameral, i.e. it consists of two separate chambers: a Senate, and a House of Representatives. It was split into two bodies primarily to settle a representation dispute between the large and small states. In the Senate the states are equal, with each having two senators. The number of representatives in the House is based upon state population. Thus California, the most populous state, currently has 53 representatives in the House to Arizona's 8, but both states have two senators. There are other reasons why the Founders favored the bicameral design: (1) it provided an additional check and balance, making it harder to corrupt the entire legislature; (2) it allowed for different types of representation, and the representation of different interests (see below); and (3) it was a familiar design, since the British Parliament was bicameral.

Type of representation: Delegates versus trustees—The Founders wanted the nation's laws and policies to be made by a representative body. But the concept of representation is complex. Some believed that the best representative would be a "delegate." This is a representative who closely resembles his constituency's demographics—especially income and occupation. The delegate would go to the Congress to simply register his district's preferences. E.g., a farming community would send a farmer to cast the votes that presumably would align with the preferences of his constituency. Others argued the country would be better served by "trustees." Trustees are well-educated elites. In Congress they would conduct vigorous debates and ultimately exercise their own independent judgment as to what was best for their constituents. With two chambers in the Congress the Founders were able to have both: The House was designed to promote "delegate" representation, while the Senate was designed to promote "trustee" representation. The two-chamber design could also accommodate the different interests of the wealthy and the masses. Even though America was much more egalitarian than Europe, by 1787 there were already significant tensions between the social classes. Many Founders agreed with John Adams that a "natural aristocracy" would always exist. A bicameral legislature permitted both interests to be accommodated: the House was designed to represent the masses; the Senate, consisting of elites, would represent the interests of the wealthy. This explains why the Senate is nicknamed the "upper chamber," while the House is called "the peoples' chamber."

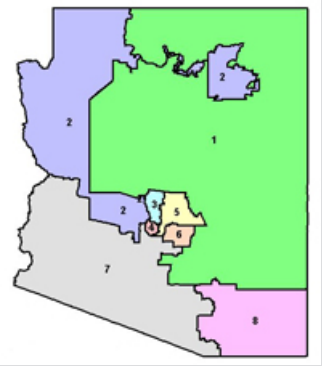
House apportionment—House members are elected from 435 districts throughout the U.S. The number of representatives that each state gets is based upon the state's proportionate share of the population. States which have growing populations (like Arizona) will be "winners" and gain additional representatives. This means that other states (mostly in the east) will lose. (See sidebar: Reapportionment Winners and Losers.) However, the apportionment isn't perfect because several states don't have enough population for a single representative (e.g., Wyoming), but are still entitled to a representative under the Constitution. And you can't cut a representative in half. Accordingly, the representative-to-constituent ratio varies from state to state. Currently, the average district size is roughly 700,000 people. This gives the U.S. one of the worst representative-to-constituent ratios of any modern democracy.

House / Senate Differences—The major structural differences between the House and Senate are not so arbitrary when you understand the different types of representation and benefits that the Founders were hoping to derive from each chamber:

	SENATE	HOUSE
Qualifications:	Higher: (must be 30; U.S. citizen for 9 years; state resident)	Lower: (must be 25; U.S. citizen for 7 years; district resident)
Terms:	Long (6 years); staggered (only 1/3 is up for re-election at the same time) • To insulate senators from election pressures • To promote expertise • To promote conservatism (resistance to quick change)	Short (2 years); concurrent (entire House up for re-election every 2 years) • To promote responsiveness to constituents • To promote new ideas & quick change when needed
Term limits:	None	None
Size:	100 (2 per state)	435 (frozen in 1911)
Method of selection:	• Before 1913: appointed by state governments • After 1913 (17th Amendment) elected by all the citizens of the state	Elected from local district
Debate rules:	• Unlimited debates and filibusters	Time-limited debates
Leader:	• Senate president (Vice President of U.S.) • President Pro-tem (when VP is absent; most senior senator)	Speaker of the House (elected by House)
Unique powers:	• Conducts impeachment trials and votes whether to convict & remove • Must approve most presidential appointments, including Supreme Court nominations • Must ratify treaties made by the president	• Power to impeach (accuse) • All tax bills must begin in this chamber • Chooses the president when there is a tie in the electoral college

Does the design work?—The Founders' careful design has produced some differences in the behavior of the two chambers. For example, the House has been the more "hotheaded" body—approving constitutional amendments like flag burning prohibitions. These amendments invariably die in the Senate. However, today both bodies are fairly elite, consisting mostly of lawyers, successful business executives, doctors, and other professionals. And although the House was designed to encourage frequent turnover, this hasn't been the case. Currently, most members of the House have been in office for ten years; the longest serving member, Representative John Dingell (D-MI), has held office for 51 years! The public often complains about the lack of turnover, but voters reelect incumbents 96% of the time. This is mostly due to: (1) uninformed voters who vote on the basis of name recognition; (2) the fundraising advantage that incumbents enjoy (allowing them to foster greater name recognition); and (3) the gerrymandering of most congressional districts to reduce competition from the opposing political party.

ARIZONA'S 8 CONGRESSIONAL DISTRICTS



Arizona currently has 8 congressional districts—a gain of 2 over the decade of the '90s.. (District 2 is a blatant gerrymander, but it was done at the demand of the Hopis who didn't want to be in the same district as the Navajos.)

HOW REPRESENTATIVE IS THE 110th CONGRESS? (2007—2009)

Senate

Average age = 61.7 years
Females = 16%
African-American = 1%
Hispanic = 3%
Asian = 2%
Native American = 0
Dominant profession = law (58%)
Dominant religion: Protestant
Foreign born = 1%
Military service = 29%

House

Average age = 55.9 years
Females = 16%
African-American = 9%
Hispanic = 5.9%
Asian = 1.3%
Native American = 1 member
Dominant profession = law (37%)
Dominant religion: Protestant; (first Muslim (1) and Buddhist (2) members)
Foreign born = 2.5%
Military service = 23%

Source: CRS Report RS22555

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U.S. CONSTITUTION: ELECTING THE PRESIDENT

ELECTORAL VOTES
(2004 and 2008 Elections)

AL	9	KY	8	ND	3
AK	3	LA	9	OH	20
AZ	10	ME	4	OK	7
AR	6	MD	10	OR	7
CA	55	MA	12	PA	21
CO	9	MI	17	RI	4
CT	7	MN	10	SC	8
DE	3	MS	6	SD	3
DC	3	MO	11	TN	11
FL	27	MT	3	TX	34
GA	15	ME	5	UT	5
HI	4	NV	5	VT	3
ID	4	NH	4	VA	13
IL	21	NJ	15	WA	11
IN	11	NM	5	WV	5
IA	7	NY	31	WI	10
KS	6	NC	15	WY	3

Total = 538
Needed to win: 270

POPULAR VOTE LOSERS

1824: John Quincy Adams Andrew Jackson won the popular and electoral vote but lacked a majority. The House chose Adams.

1876: Rutherford B. Hayes Tilden won the popular vote but the electoral vote was disputed. A Congressionally-appointed commission chose Hayes' electors.

1888: Benjamin Harrison Cleveland narrowly won the popular vote but lost the electoral vote.

2000: George W. Bush Gore won the popular vote (by less than 1%) but lost the electoral vote.

The U.S. presidential election process is complex. It combines constitutional provisions with state laws that undermine many of the Founders' core objectives. Both aspects must be considered in order to understand how the process works in actual practice.

The basic constitutional design The Founders created the **electoral college** system to remove politics from the presidential selection process.[1] Essentially, they wanted knowledgeable, unaffiliated citizens to choose the president. Article 2, sec. 1 sets forth the basic plan. It has been slightly modified by the 12th and 23rd amendments,[2] and can be summarized as follows:

- Every four years the 50 states and D.C. choose citizens to serve as **presidential electors**. The number of electors assigned to each state equals the number of its senators and representatives (see sidebar *Electoral Votes*).
- The electors—collectively known as the Electoral College—gather in their home states to vote for president. This takes place in December, and constitutes the official presidential election.[3]
- Whoever gets a *majority* (half plus one) of the electors' votes becomes president. If no candidate gets a majority, or there is a tie, the (newly elected) House of Representatives picks the president from the top three Electoral College winners. Each state, plus D.C., casts a single vote. A majority is needed to win. The same process applies to the selection of the vice president, except that the Senate chooses the winner when there is no majority.[4]

State laws The states determine how their presidential electors are chosen. This enables them to significantly alter how the system works: The voters now choose their state's electors in a statewide election held in November.[5] Although this is called "the presidential election," the voters are actually choosing electors, not the president. However, they must choose from competing slates of electors with each slate *pledged to a specific candidate*.[6] In some states (not Arizona), the electors' names do not even appear on the ballot—just the candidate that they are supporting. Additionally, under state **winner-take-all** laws, the candidate who wins the *most* votes in the state gets the entire slate of electors—i.e., *all* of the state's electoral votes. (Split slates are possible only in Maine and Nebraska, which use a slightly different system for selecting electors.[7])

In summary, the American voters do not directly or indirectly elect the president. Rather, they vote in 51 separate elections, choosing electors who are pledged to vote a certain way. Due to winner-take-all rules, and the fact that the electors are not accurately apportioned to population, the overall popular vote winner isn't always elected. In fact, the popular vote loser has become president four times, with the most recent occurrence in 2000 (see sidebar *Popular Vote Losers*).

Pros and cons In 1967 the American Bar Association famously described the electoral college as "archaic, undemocratic, complex, ambiguous, indirect, and dangerous." Specifically, critics argue: (1) It creates legitimacy problems by allowing a popular vote loser to win the election. (2) It unfairly gives voters in some states (mostly rural) significantly more voting power than in other states (see sidebar *Unequal Voting Power*). (3) It discourages voter turnout because the outcome in most states is known be-

UNEQUAL VOTING POWER: ELECTOR PER VOTER RATIOS IN SELECT STATES

2004 median:
1 elector per 372,286 voters

Wyoming	124,333
Alaska	150,333
North Dakota	155,333
Iowa	316,000
Oklahoma	371,714
Arizona	**412,200**
Texas	465,088
New York	467,484
California	474,273
Florida	486,407

* Based upon the 2004 VAP (Source: U.S. Census Bureau. Statistical Abstract of the United States: 2006. Table 406)

A Baseball Analogy

One reason why the popular vote doesn't always align with the electoral vote is because Americans vote in 51 separate elections with winner-take-all rules. This can be likened to a World Series where the winner is the team that wins the most games (electoral votes), not overall runs (popular votes). For example, in the 1960 World Series the Yankees outscored the Pirates by 56 runs to 26. However, Pittsburgh narrowly eeked out victories in four games, making it the series winner.

Game	NY	Pitt
1	4	6
2	16	3
3	10	0
4	2	3
5	2	5
6	12	0
7	9	10
Total	56	26

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forehand and the states get the same electoral vote irrespective of turnout. (4) It disenfranchises voters in the states where the other party holds a sizeable advantage since their votes are discarded under the winner-take-all rule. (5) It focuses attention on just a few battleground states and allows candidates to ignore issues important to most other states.[8]

In contrast, supporters of the current system argue: (1) It contributes to national cohesiveness by requiring broad geographical support to win. (2) It enhances the role of the states, thereby supporting federalism. (3) It promotes a two-party system since it is almost impossible for a third-party candidate to win under winner-take-all rules. (4) It enhances the importance of the individual vote in close states since a few votes can decide where *all* of the state's electoral votes will be allocated.[9] (5) It reduces the number of battles over election irregularities by focusing attention on just a few battleground states.[10] (6) It reduces campaign costs by allowing candidates to concentrate on a limited number of states.

Notes

1. They had other goals as well. The Founders wanted a president who would be of the highest caliber, a unifying figure, and independent of the other branches of government. These goals caused them to reject simpler selection methods. I.e., they rejected direct election by the citizens because they believed that ordinary citizens lacked sufficient information to make a wise choice regarding candidates from other states. (Consider that even in 1787 the country was huge and there were neither political parties nor mass media to spread the word.) They didn't want state governments to pick the president because that might encourage sectional rivalries or make the national government too dependent on the states. Finally, they rejected selection by Congress because this might make the president too dependent upon that body, undermining the Constitution's checks and balances. However, there is some evidence that they expected the election to frequently wind up in the House. That is, unless there was a popular national figure (like George Washington) it was likely that no candidate would get a majority of the electoral votes. In this situation, the electoral college would function more as a nominating body for Congress, rather than an electing body.

2. The 12th Amendment, added in 1804, authorizes a separate vote for vice-president. Formerly, the electors cast two ballots and the runner-up became vice president. However, in 1800 Jefferson and his vice presidential running mate got the identical number of votes, forcing the election into the House. This prompted the 12th amendment fix-up, which also reduced the list of names sent to the House from 5 to 3. The 23rd Amendment, added in 1961, gave electoral votes to the District of Columbia.

3. They vote on the Monday after the second Wednesday in December of presidential election years (3 U.S.C. § 7). The Founders rejected a central meeting of electors to reduce politicking and corruption.

4. Federal law mandates that the states select their electors on the first Tuesday after the first Monday of November in presidential election years (3 U.S.C. § 1).

5. The slates are chosen by the political parties, with appointments typically going to prominent members or contributors. It is now a purely honorary position since the electors are obligated under state law to support their party's candidate. In some states—not Arizona—there is a penalty for violating this pledge. Although there have been "faithless electors" who betray their trust, it is rare and has not affected any election outcome.

6. Maine and Nebraska select some of their electors through a statewide election, and the remainder by a popular vote in each Congressional district.

7. The presidential election has been decided by the House of Representatives twice: In 1800 (when it chose Jefferson) and in 1824 (when it chose J. Q. Adams). The Senate chose the vice president in 1836.

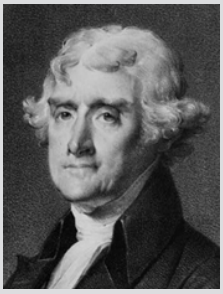
8. E.g., in 2004, only a dozen or so states were "in play." Parochial issues such as ethanol (important mostly to Iowa farmers) took precedence over issues that mattered to the many more voters living in California and New York whose states were not in play.

9. In the 2000 election, Bush won the popular vote in Florida by a mere 537 votes, giving him all 25 of Florida's electoral votes, to win the electoral vote. Gore won New Mexico by a mere 363 votes.

10. I.e., critics argue that with a national popular vote for president, every voting precinct could become a potential Florida, with protracted battles over voting irregularities.

U.S. Constitution: National Security

Presidential Supremacy



In 1789, Thomas Jefferson applauded the way the U.S. Constitution gave Congress the power to declare war. He wrote to Madison:

> *We have…given...one effectual check to the dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.*

But that was *before* Jefferson became president! As America's third president, he began the First Barbary War in Tripoli without a congressional declaration of war.

Military Scorecard (1798–2004)

Instances of the use of military force abroad:	**319**
Declared wars: War of 1812; Mexican-American War; Spanish-American War; World War I; World War II	**5**
Major foreign conflicts that were not declared: Naval War with France (1798–1800); First Barbary War (1801–1805); Second Barbary War (1815); Korean War (1950–1953); Vietnam War (1964–1973); Persian Gulf War (1991); the War Against Terror (pending); and the War with Iraq (pending)	**8**

Source: Congressional Research Report RL30172 (10-5-2004) http://www.au.af.mil/au/awc/awcgate/crs/rl30172.pdf

Overview—The national government's primary responsibility is to keep the nation secure in a dangerous world. This involves more than simply fighting wars. It also includes foreign diplomacy, foreign aid, foreign trade, treaties and international agreements, intelligence gathering, etc.—in short, everything that helps protect the American way of life from external threats. The Founders recognized the importance of this issue. However, they broke with tradition and didn't give the president all the power that traditionally belongs to a chief executive. The Founders believed that Europe's kings were continually embroiling their countries in costly wars and didn't want the American president to behave similarly. So they divided the national security powers between the president and Congress, hoping that Congress would thereby "rein in" the president. Here's how the Constitution allocates the various national security powers:

Congress has the power to…	The President has the power to…
• Authorize all defense spending • Regulate commerce with foreign nations • Regulate the value of foreign money • Define international crimes and crimes on the high seas • **Declare war** • Make rules for the capture of enemies • Raise and support armies • Maintain a navy • Make the rules for the armed forces • Call up the national guard • Oversee the organization and training of the national guard in collaboration with the states • Make all rules for military bases • Suspend the writ of habeas corpus • Approve all foreign treaties (*senate only; requires 2/3 vote*) • Approve ambassador nominees (*senate only*)	• Direct the nation's armed forces as the **commander in chief** • Negotiate treaties with foreign nations *(requires senate approval to become binding)* • Nominate ambassadors *(requires senate approval)* • Receive foreign ambassadors

The president's list may seem skimpy alongside Congress's. However, "commander in chief" is one of those constitutional black holes like the phrase "commerce clause." As explained below, its meaning has expanded profoundly since the nation's inception.

Who initiates wars?—The Founders wanted the president to be able to repel a sudden attack without needing Congress's approval. However, they did not want the president to be able to unilaterally *initiate* a war. Hence, they chose the phrase "declare war" over "make war," to distinguish the two situations.[1] James Wilson (a key drafter) later explained why they interjected Congress into the war-making process:

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large. This declaration must be made with the concurrence of the House of Representatives; from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into war.[2]

The Founders' plan hasn't worked. Only five American wars have been formally declared by Congress as the Constitution directs (see sidebar: Military Scorecard). Most of America's 300-plus combat actions have been short-lived missions rather than full-scale wars. However, at least eight undeclared conflicts would satisfy anyone's definition of "war." (This includes America's current engagements in Afghanistan and Iraq.) In all but the Korean War, Congress did authorize these undeclared wars in some fashion, either before or after the deployment of troops. However, even a formal declaration of war by Congress is no guarantee that it has meaningfully participated in the decision to initiate war. For example, Congress declared war on Mexico in 1846 with only minimal debate after President Polk proclaimed with considerable exaggeration that Mexico had "invaded our territory and shed American

blood on American soil." In short, contrary to the Founder's game plan, America's military conflicts have been chiefly initiated by presidents. There are both practical and political reasons why this has occurred. (See pros and cons below.)

Congress fights back—In the past 35 years Congress has used three different strategies to try to regain its national security role. First, it enacted the War Powers Resolution over President Nixon's veto in 1973. It requires the president to "consult" with Congress before troops are deployed into imminent hostilities, *but permits the president to unilaterally deploy troops as long as: (a) the president formally reports to Congress within 48 hours; and (b) the troops are withdrawn within 60–90 days* (unless Congress authorizes the military action in the interim.) Every President since Nixon has regarded the Resolution as unconstitutional, and no president has fully complied. (In particular, presidents contend that the 60-day limit infringes upon the commander-in-chief's authority to conduct military operations.) Second, Congress has passed various laws to monitor the intelligence and covert operations of the executive branch.[3] To do this, Congress created special intelligence oversight committees that operate with top-secret security clearances. However, like the War Powers Resolution, these measures have not been particularly effective either. (See sidebar: the Iran-Contra Affair.) Finally, Congress has occasionally attempted to rein in the president by refusing to fund a military conflict. This approach helped end the Vietnam War. However, it backfired in the Iran-Contra affair, and it is politically difficult to de-fund a military operation that is already underway. In short, none of Congress's strategies of the past 35 years have been particularly successful.

Executive agreements—The Founders also worried about treaties, which have the capacity to either keep a nation out of war or drag it into a war. So instead of exclusively entrusting the president with the treaty-making power they required senate ratification by a 2/3 vote. Such a supermajority is often impossible to achieve in a partisan body like the Senate. Presidents have simply sidestepped this requirement by entering into "executive agreements" with foreign nations that do not require senate approval. The extent of the president's power to make such commitments is simply unclear, since executive agreements are not mentioned in the Constitution. Finally, while treaties clearly require senate approval to take effect, the Constitution fails to specify who can break them. (President Carter unilaterally terminated a mutual defense agreement with Taiwan over strong Senate objections, and in 2001 President Bush unilaterally terminated the ABM treaty.)

The pros and cons of presidential supremacy—For better or worse, presidents call the shots in foreign policy, largely ignoring Congress's constitutional role. Some defend this presidential domination arguing: (1) modern technological realities (e.g., nuclear and biochemical threats) require quick, firm action that only a president can deliver; (2) it is necessary to speak to a dangerous world with a single voice—something that a large, bipartisan body like Congress cannot do; (3) Congress simply lacks the expertise, information, and structural nimbleness to conduct foreign policy effectively; (4) a body as large as Congress cannot maintain the secrecy that is required for effective national security. On the other side, it is argued that: (1) the very high stakes of modern warfare make shared decision making more imperative than ever; (2) presidential expertise is exaggerated, and the president's advisors often behave like court courtesans, unwilling to speak truth to power; (3) the congressional intelligence committees have a fairly good track record of maintaining secrets; and (4) most foreign policy decisions do not require rapid decision making nor emergency implementation.

1. Madison, *Records of the Federal Convention*, 17 August 1787.

2. Elliott, *Debates in the Several State Constitutions on the Adoption of the Federal Constitution*, 11 Dec. 1789.

3. E.g., the Hughes-Ryan Act of 1974 (which required the president to report all covert CIA operations to Congress); the Intelligence Oversight Act of 1980 (which modified Hughes-Ryan and required the intelligence agency heads to keep the newly-created congressional intelligence committees fully informed); and the Foreign Intelligence Surveillance Act of 1978 (which created a top-secret FISA Court to authorize secret wiretapping to collect foreign intelligence).

The Iran-Contra Affair

The Iran-Contra Affair (1985–86) involved a serious constitutional breakdown between the president and Congress. To free American hostages kidnapped by Hezbollah, President Reagan secretly authorized the sale of weapons to Iran, using Israel as a middleman. The plan didn't work. Worse, Iran was on a weapons embargo list, and the official policy of the U.S. was not to bargain with terrorist kidnappers. Congress did not learn of the arms sale until it was reported in a Lebanese newspaper more than a year later. This violated the "timely notification" requirement of the 1980 Intelligence Oversight Act. The "Contra" part of the scandal involved the diversion of some of the money that the U.S. secretly received from the Iranian weapons sale. A portion was given to the Contras, a rebel group seeking to overthrow the leftist Sandinista government in Nicaragua. President Reagan wanted to help the Contras, but the Democratically-controlled Congress passed the Boland Amendment in 1984 prohibiting aid. When the details of the scandal came to light, several top members of the executive branch, including the Secretary of Defense, lied to Congress and were criminally indicted. Some convictions were later overturned on technicalities, and President Bush (41) (who was implicated in some accounts) pardoned all the defendants during his last month in office.

The 9/11 AUMF

One week after the 9/11 terrorist attack, Congress passed Senate Joint Resolution 23 authorizing the president to use military force against the perpetrators and their supporters. It provides the justification for the ongoing war in Afghanistan. More controversially, President Bush contends that the resolution justifies his warrantless wiretapping program and Guantanamo policies. S. J. Res. 23 is noteworthy for its broad language, lack of a termination date, and targeting of unspecified individuals as well as nations. Its key language reads:

> *...[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.*

(President Bush obtained a separate authorization from Congress for the Iraq War. See: P. L. 147-203.)

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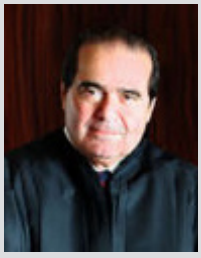
The U.S. Judicial Branch

The U.S. Supreme Court

Chief Justice John G. Roberts, Jr.
Since 9/2005 (Bush-43)

Justice John Paul Stevens
Since 12/1975 (Ford)



Justice Antonin Scalia
Since 9/1986 (Reagan)

Justice Anthony M. Kennedy
Since 2/1988 (Reagan)

Justice David Hackett Souter
Since 10/1990 (Bush-41)

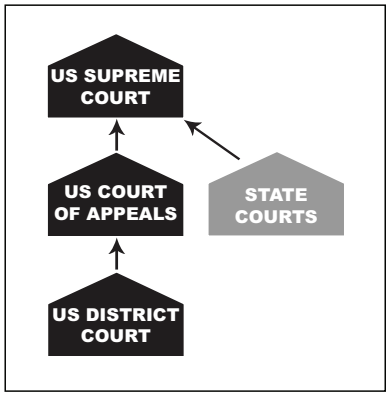
Article 3 overview—Article 3 of the U.S. Constitution sets up the judicial branch of the national government. In comparison to the treatment of the other two branches, it is positively skimpy. Article 3 mentions a supreme court but does not specify the number of judges on this court or their qualifications. It does not establish any lower courts but leaves this and other details up to the future Congress. Fatigue and disagreement are partial explanations for these omissions. But it also reflects the Founders belief that the courts would be the "least dangerous" branch of government.[1] Nonetheless, Article 3 does do two important things: (1) it makes federal judges highly independent, and (2) it outlines the jurisdiction of federal courts.

Judicial independence—Article 3 insulates federal judges from political and outside pressures in three ways: First, it makes the courts a separate branch of government. (In many other countries they are part of the executive). Second it prohibits Congress from reducing judicial salaries—which could be a way to pressure judges. Finally, and most importantly, it gives federal judges lifetime tenure. Article 3 actually states that judges shall serve "during good behavior"—meaning so long as they are not impeached and removed. In fact, federal judges do typically serve for a long time. The average tenure on the Supreme Court is 15 years, although in recent years it has been longer. (The longest serving justice on the current court, Justice John Paul Stevens, was appointed in in 1975 by President Ford and is 86 years old.)

Court jurisdiction—Article 3 restricts the jurisdiction of the federal courts to "cases" and "controversies." This prevents the courts from giving advice (e.g., to president or Congress). The Court can rule only in bona fide lawsuits, where opposing parties have a real stake in the outcome. Beyond that, federal jurisdiction is a somewhat complex; the Constitution specifies 9 different categories of cases that can be tried in federal courts. Today, most federal cases fall into 4 categories:

- cases where the United States government is a party
- cases involving U.S. Constitution, federal statutes, or treaties
- cases between citizens of different states
- cases involving bankruptcy, patents, copyrights, and maritime law

This is in contrast to state courts which handle a much wider range of cases. I.e., the cases that affect most citizens—everyday crimes, family matters, traffic cases, contract disputes—are generally tried in state courts. Finally, there is some overlapping jurisdiction between federal and state courts. For example, a dispute that involves both federal and state law (e.g., a challenge to a state law on constitutional grounds) can be brought in either federal or state court.

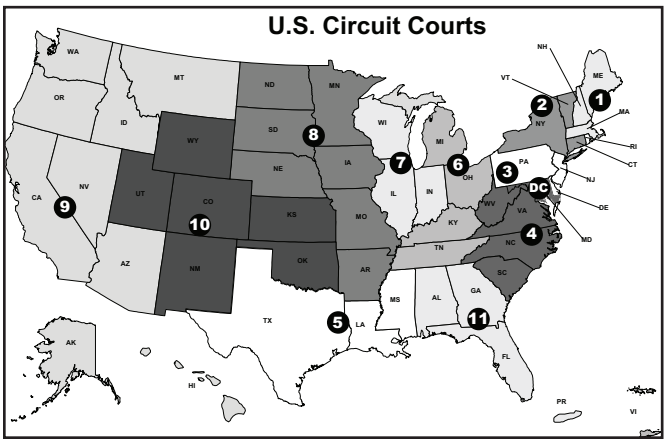


The modern federal court system—Today, there are three major federal courts:[2] the U.S. District Court, the U.S. Court of Appeals, and the U.S. Supreme Court. The judges on each of these courts serve for life and are chosen in the same way. They are nominated by the president and confirmed by the U.S. Senate with a simple majority vote.

The U.S. District Courts: The District Courts are trial courts; there are 94 of them. (Every state is a single district, but some of the larger states are divided into multiple districts.[3]) These courts function very much like state trial courts: a single judge typically presides, witnesses testify, physical evidence is presented, and a jury

usually decides the outcome. Except in criminal cases where the defendant is acquitted, the losing side has an automatic right to appeal to the next level court, the U.S. Court of Appeals.

***The U.S. Courts of Appeals ("circuit courts")*:** There are 12 regional Courts of Appeals, plus a Federal Circuit court that handles specialized appeals. When a case is appealed to this court, a 3-judge panel is ordinarily assigned to the case. Because it is an appellate court, there are no trials. Rather, the court's task is to simply determine whether a serious error occurred in the lower court. It determines this by reviewing written arguments ("briefs") filed by the opposing parties and by conducting a short hearing. If the court finds a serious error it will typically wipe out the lower court judgment and send the case back for a new trial. Otherwise it will "affirm." Majority vote decides the outcome, so with a 3-judge panel agreement of 2 judges is required. One of the judges writes the official opinion of the court, which is normally published. The opinion then becomes legal precedent, binding on lower courts. A judge who disagrees can write a dissenting opinion. It has no legal force, but is written as a matter of principle, to influence future cases. Finally, a judge who agrees with the outcome, but not the majority's reasoning, will write a concurring opinion. Most federal court cases end with this court's decision.



***U.S. Supreme Court*:** The Supreme Court is located in Washington, D.C. It is the nation's top court, and arguably the most powerful court in the world. Nine judges (called "justices") serve on the Supreme Court, and all typically work on every appeal. Unlike the Court of Appeals, the Supreme Court's jurisdiction is mostly discretionary—i.e., the justices themselves decide which cases they will take (4 votes are needed). In recent years the Court has decided less than 75 cases a year—out of more than 7,500 applications. Although roughly 60% of its caseload comes from the lower federal courts, the Supreme also takes appeals from state courts too. Unlike the Court of Appeals, the Supreme Court is more focused on establishing broad legal guidelines than correcting errors in individual cases. Accordingly, it tends to pick cases that involve important, unresolved federal issues or cases where the circuit courts are in disagreement. The cases are so important that it is common for outsiders, who are not parties to the litigation, to weigh in by filing written amicus curiae or "friend of the court" briefs. These can be influential. The Supreme Court operates like the Court of Appeals: it reads written briefs filed by the opposing sides, conducts a short oral argument, and secretly confers. It normally takes 5 justices (a majority) to render an official opinion, and dissenting and concurring opinions are quite common. When the Supreme Court interprets the Constitution, its decision becomes the "last word." It is binding on the president, Congress, state governments, and all lower courts. Only a constitutional amendment, or a subsequent opinion of the Court, can undo it.

1. This is Alexander Hamilton's famous comment in *Federalist Paper No. 78*.

2. These are the main federal courts, established pursuant to Article 3. However, Article 1 empowers Congress to establish speciality courts to carry out certain narrow functions. Today these are known as "legislative courts" to distinguish them from the three major "constitutional courts" implemented under Article 3. The judges on legislative courts are appointed but do not serve for life.

3. D.C. and Puerto have their own districts too.

The U.S. Supreme Court cont'd

Justice Clarence Thomas
Since 10/1991 (Bush-41)

Justice Ruth Bader Ginsburg
Since 8/1993 (Clinton)

Justice Steven G. Breyer
Since 8/1994 (Clinton)

Justice Samuel A. Alito, Jr.
Since 1/2006 (Bush-43)

Supreme Court Factoids

(For the current Supreme Court)

Average age: 67 years

Average length of service: 14 years

Religion:
Catholic (Scalia, Kennedy, Thomas, Roberts, Alito)
Protestant (Stevens, Souter)
Jewish (Ginsburg, Breyer)

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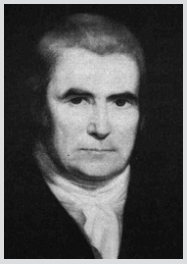
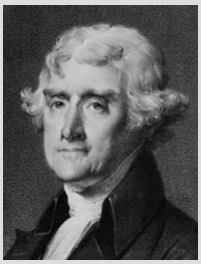
Judicial Review

THE PROTAGONISTS

William Marbury



Chief Justice John Marshall



President Thomas Jefferson

FEDERALIST No. 78

Federalist Paper No. 78, written in 1788 by Alexander Hamilton (one of the Constitution's drafters) *assumes* that the courts would have the power of judicial review:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is…a fundamental law. It therefore belongs to them to ascertain it meaning, as well as the meaning of any particular part proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two…the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

(This passage is often cited by defenders of judicial review to argue that Founders intended the courts to have this power even though it is not mentioned in the Constitution.)

The power of judicial review—Judicial review is the process by which a court strikes down any law or action by a public official which conflicts with the Constitution. It is controversial because the Constitution's language is vague and can be interpreted in different ways. Judicial review makes the courts' interpretation supreme: it trumps that of the president, Congress, and all state and local officials. In other words, it is a powerful check and balance. A constitutional ruling by the U.S. Supreme Court can be overturned only by a constitutional amendment[1] or by a subsequent ruling of the Court. Some contend that this power is undemocratic—that it allows 5 unelected judges with life tenure to override the will of the people. Supporters counter that it provides a necessary check to the excesses of democracy; that the majority can be short-sighted, easily swayed, and intolerant of minority rights.

Marbury v. Madison—Judicial review is not mentioned in the Constitution. (Then again, Article 3 has many omissions.) The Supreme Court first exercised this power in *Marbury v. Madison* (1803), a landmark case. The facts of the dispute aren't very important: William Marbury was appointed justice of the peace in the final days of Adams' presidency. During the confusion surrounding the presidential transition, Marbury's official appointment papers weren't delivered. Adams' successor, Thomas Jefferson, was angered by Adams' many 11th-hour appointments, and instructed his new secretary of state (James Madison) not to give Marbury the necessary papers. Marbury sued. Significantly, he filed his lawsuit directly in the U.S. Supreme Court, bypassing the lower courts. He was strictly following the Judiciary Act of 1789—a federal law that set up the national court system. That law required cases against high-level federal officials to be filed in the Supreme Court. When it came time to decide the case, Chief Justice John Marshall had a serious dilemma. He sided with Marbury. But Marshall feared that if the Supreme Court ordered Jefferson to give Marbury the job, Jefferson might simply refuse.This would cause lasting damage to the prestige of the Court. So Marshall came up with a clever solution: The Supreme Court's ruling criticized Jefferson but then dismissed the case on jurisdiction grounds. Although the Judiciary Act of 1879 plainly gave the Court jurisdiction, Marshall concluded that *the federal law was unconstitutional* (in that respect). According to Marshall, Congress had impermissibly expanded the Supreme Court's jurisdiction beyond the categories of cases mentioned in the Constitution.[2] He concluded, "a law repugnant to the constitution is void…." Technically, Jefferson won the *Marbury* dispute, but the real winner was the U.S. Supreme Court. While it superficially appeared that the Court was modestly declining power, it was actually exerting an enormous new power: the power of judicial review.

Judicial review after *Marbury*—The Supreme Court didn't strike down another federal law for 54 years. However, begining in 1810 it began using the power of judicial review to void state and local laws.[3] (To this day, roughly 90% of the laws invalidated by the Court are state rather than federal.) However, the next time the Supreme Court struck down a federal law was disastrous. The case was *Dred Scott v. Sanford* (1854). At issue was whether Dred Scott, a slave who had been transported from Missouri, to Illinois, back to Missouri, was free by virtue of his sojourn in a free state (Illinois). Chief Justice Taney concluded that blacks were not citizens; that they had "no rights which any white man was bound to respect." Although the Court could have decided the case solely on this rascist basis, it went much further. The Southern-dominated court used the power of judicial review to strike down the Missouri Compromise of 1820. This wasn't a relatively minor law, like that involved in *Marbury.* Rather, it was an important compromise worked out between the northern and southern on the explosive issue of slavery. Many historians believe that this unfortunate ruling lit the fuse of the Civil War. Not surprisingly, the Court was a bit more cautious in exercising the power of judicial rule for the next few decades. However, it fully recovered in the 20th century. To date, more than 150 federal statutes and over 1200 state laws have been

declared unconstitutional by the Supreme Court. Although comparatively fewer in number, the voiding of federal legislation has arguably had greater socioeconomic consequences. For example, during the Reconstruction Era the Supreme Court struck down federal civil rights laws. This permited racial discrimination to flourish for another 70 years. And until 1937, a pro-business Supreme Court struck down most national labor and economic regulations, including a ban on child labor (1918) and some New Deal recovery programs. However, in 1937 the Court abruptly changed direction and began upholding sweeping federal economic regulations. And since *Brown v. Board of Education* (1954), the Supreme Court has sustained most federal civil rights legislation. In recent years the Court has been especially protective of free speech. It has struck down laws that infringe upon it, from flag-desecration laws to pornography laws (see sidebar: Major Federal Laws Struck Down). It has also been protective of states' rights, and voided national laws that it believes intrude upon state sovereignty.

Doctrines of Judicial Restraint—The Supreme Court realizes that the power of judicial review creates friction with the other branches of government. It therefore has developed various rules to avoid such decisions if at all possible:

(1) Stare decisis: This Latin phrase means "let the decision stand." In practice, it means that judges will adhere to prior rulings ("precedents"). It won't overrule a prior decision unless it is absolutely necessary due to changed circumstances or to correct a serious judicial error. *Stare decisis* promotes respect for judicial rulings, stability in the law, and the predictability that is necessary for lower courts to do their jobs.

(2) Case or controversy requirement: The Constitution limits the federal courts' jurisdiction to "cases" and "controversies." The Court interprets this to preclude advisory opinions. That is, the Court will only render opinions in bona fide lawsuits.

(3) Standing: The Court will dismiss a case if the parties to the lawsuit do not have a significant, personal stake in the outcome. This helps assure that the issues on both sides will be vigorously argued by the individuals who care the most.

(4) Mootness: The Court may dimiss a case if a "live" dispute no longer exists by the time the case reaches the Court.

(5) Ripeness: The Court may dismiss a case if it believes that a lawsuit is premature. For example, if the scope of a new law is uncertain, the Court may refuse to entertain a legal challenge to the law until the government has actually begun enforcing the law.

(6) Political question: The Court may refuse to rule if it believes that the Constitution leaves the issue up to the other branches of government and provides no clear guidance for a judicial ruling. (The Court often refuses to settle disputes between the Congress and the President on this ground.)

(7) State comity: The Court may sometimes refuse to rule where the interpretation of a new state law is at issue, in order to give state courts the opportunity to rule first.

All of these doctrines are somewhat fuzzy, and none are ironclad—the Supreme Court applies or ignores them at its own discretion.

1. It is extremely difficult to amend the U.S. Constitution. More than 10,000 amendments have been proposed but only 27 have been ratified since 1789. Only 4 of those amendments "overrule" a Supreme Court decision: the 11th Amendment (right to sue a state); the 16th Amendment (income tax); the 14th Amendment (citizenship for former slaves); and the 26th Amendment (18-year old vote).

2. Article 3 of the Constitution divides Supreme Court jurisdiction into 2 categories: "original" and "appellate." Original refers to cases that can originate (begin) in the Supreme Court, thereby bypassing the lower courts. The Constitution mentions only two types of cases within this category: (1) disputes between states; and (2) cases involving foreign ambassadors. Marshall concluded that this was an exclusive listing (a debatable interpretation) and therefore Congress lacked the power to expand the Supreme Court's original jurisdiction to include cases against high-level officials.

3. The power of judicial review rests on firmer constitutional footing with respect to state and local laws because of the Supremacy Clause (see Article 6).

MAJOR FEDERAL LAWS STRUCK DOWN

These are just *some* of the federal laws that have been voided, in whole or in part, by the Supreme Court:

1857:	Missouri Compromise
1870	Law allowing paper currency*
1883	Civil Rights Act of 1875 (barring private discrimination)*
1895	Income tax law*
1908	Law imposing liability on railroads for employee injuries*
1923	Law establishing minimum wage for women in DC*
1918	Child Labor ban*
1935-1936	Multiple New Deal recovery laws
1954	Law establishing segregated schools in D.C.
1969	1 year residency requirement for welfare eligibility (DC)
1970	Voting rights for 18-yr olds*
1973	Gender-based military benefits for dependents
1976	Limitations on campaign spending
1983	Legislative veto
1990	Flag-desecration law
1995	Gun-Free School Zones Act
1997	Brady Act provision for background checks
1997	Communications Decency Act (regulating online indecency)
1997	Religious Freedom Restoration Act
1998	Line-Item Veto
1999, 2000, 2001	Provisions allowing private damage suits against state governments in the Fair Labor Standards Act, the Age Discrimination Act, and the ADA
1999, 2002, 2002	Advertising bans: casinos, tobacco, agricultural promotions & prescription drugs
2000	Violence Against Women Act
2002	Ban on virtual child pornography
2004	Child Online Pornography Act

* These have been overruled by subsequent Court rulings or constitutional amendments.

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U.S. Constitutional Amendments

THE 27 AMENDMENTS

Amendments expanding rights and liberties:

1 Freedom of religion; speech; assembly; petition (1791)
2 Bearing arms (1791)
3 Quartering of soldiers (1791)
4 Searches and seizures; warrants (1791)
5 Grand jury; double jeopardy; self-incrimination; due process; eminent domain (1791)
6 Criminal trial rights (1791)
7 Jury trial (civil cases) (1791)
8 Excessive bail and fines; cruel and unusual punishment (1791)
9 Unenumerated rights (1791)
13 Slavery ban (1865)
14 State rights; equality guarantee (1868)*
15 Right to vote (black males) (1870)
19 Right to vote (women) (1920)
23 Right to vote (D.C.) (1961)
24 Poll tax ban (1964)
26 Right to vote (18-year olds) (1971)*

Amendments affecting the structure of government:

10 Reserved powers of states (1791)
11 Suits against states (1795)*
12 Election of president (1804)
16 Income tax (1913)*
17 Direct election of senators (1913)
20 Commencement of terms (1933)
22 Presidential term limits (1951)
25 Presidential succession; disability (1967)
27 Congressional salaries (1992)

Public Policy Amendments:

18 Prohibition of alcohol (1919)
21 Repeal of prohibition (1933)

* Adopted to reverse a Supreme Court decision.

How the Constitution is amended—The Founders hoped that the Constitution would be an enduring document. At the same time, they knew they were fallible and could not anticipate all the needs of the future. Accordingly, they provided for a way to amend or change the Constitution. Article 6 sets forth two ways to officially propose amendments, and two ways to ratify amendments. These can be mixed and matched, meaning that there are four methods—although historically only three have actually been used. Amendments can be proposed by: (1) a 2/3 vote of each chamber of Congress; or (2) a new constitutional convention when 2/3 of the state governments call for one. (This latter method has never been used.) Once the amendment is officially proposed, there are two methods of ratification: (1) by the approval of ¾ of the state *legislatures* (38 states); or (2) by the approval of *conventions* held in ¾ of the states. (A "convention" can be any body that the state designates, including a vote of all the citizens.) Only one constitutional amendment was ever ratified through the convention method—the 21st Amendment repealing prohibition. The remaining 26 amendments were proposed by Congress and ratified by state legislatures. Thomas Jefferson believed that the drafters made the amendment process too difficult, that every generation ought to be able to easily transform its government. Madison, however, did not want the nation's fundamental charter to be vulnerable to momentary prejudices and passions. Finally, it should be noted that the president plays no role in the amending process, and that ordinarily both levels of government—state and federal—must approve.

Amendment overview—There are 27 amendments to the Constitution. The first ten, known as the Bill of Rights, were added on the same day in December, 1791. The next 17 were ratified over the course of 200 years. The last amendment—which has a bizarre history (see sidebar on reverse: Madison's Lost Amendment)—became effective in 1992. The amendments can be loosely classified into three subject categories: (1) amendments expanding the peoples' rights and liberties; (2) amendments altering the structure of government; (3) amendments making social policy (see sidebar).

Amendments expanding rights and liberties—The main body of the Constitution contains a few important rights, such as the right to trial by jury in criminal cases. However, the delegates voted against including a "bill of rights" or comprehensive listing of rights. This is somewhat surprising since most of the Founders were strong rights advocates. There are several possible explanations. First, some Founders believed that a bill of rights was simply unnecessary because state constitutions already had them, and the national government was being given only limited domestic powers. Second, the delegates would have had difficulty drafting a national bill of rights. For example, slavery was a divisive issue then, just as it was 70 years later. Finally, the Founders considered the issue at the end of the Convention when the delegates were exhausted and anxious to wrap up.[1] Whatever the explanation, the omission of a bill of rights was a major blunder. The anti-Federalists seized upon it and made it the major rallying cry of their battle to defeat the Constitution. Ultimately, the Constitution was ratified only after its supporters promised to add a Bill of Rights as an amendment.

(1) The Bill of Rights: James Madison had a change of heart about the need for a bill of rights in early 1788. Perhaps Jefferson's scolding got to him. Jefferson wrote on December 20, 1787, that "a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse, or rest on inferences."[2] When Madison was elected to the First Congress he worked tirelessly on a bill of rights. He eventually got the House of Representatives to pass 17 rights provisions, but the Senate whittled the list down to 12. In late 1789, these 12 were sent to the state legislatures for ratification. It took two years, and the states rejected the first two, but on December 15,

1791, the remaining proposals became the first ten amendments to the Constitution. These are collectively known as the Bill of Rights, although technically, only the first eight actually protect specific rights and liberties.

(2) Other rights amendments: The Civil War put an end to slavery, but it did not significantly improve the condition of former slaves. The 13th, 14th, and 15th amendments were added in the immediate aftermath of the War to rectify the situation. (Southern states were forced to ratify these amendments as a condition for ending Reconstruction and regaining control over their governments.) The 13th Amendment legally ended slavery. The 14th Amendment guaranteed full citizenship to state residents and required the states to treat all persons within its borders fairly and equitably. Although it was enacted to protect African-Americans, the broad language of the 14th Amendment has made it the Constitution's most important equality guarantee for *all* persons today. Finally, the 15th Amendment gave African-American males the right to vote. In fact, altogether there are five amendments in the Constitution dealing with the right to vote. When the country was first founded in 1789, only a small fraction of the population was eligible: Voting was largely restricted to white males over 21 who owned property. However, constitutional amendments have significantly expanded the franchise, making the United States a far more democratic nation. In addition to the 15th Amendment (1871), the 19th Amendment gave women the right to vote (1920); the 23rd gave residents of D.C. the right to vote in presidential elections (1961); the 24th prohibited taxes on voting—a ploy designed to exclude minorities and the poor (1964); and the 26th Amendment extended the right to vote in federal elections to 18-year olds (1971).

Amendments altering government structure—As the sidebar on the reverse indicates, nine amendments relate to the structure of government. Some, like the 12th and 25th amendments, were "fix-ups." (The presidential election of 1800 exposed a serious flaw in the presidential election system that was corrected by the 12th, and the 25th amendment clarified presidential succession in the event of death or incapacity. President Reagan, who was shot, was the first to briefly invoke it on his way into the operating room.) Two amendments further "democratized" the country: The 17th Amendment, which was a project of the Progressive Movement, provided for the election of U.S. senators by the people. Prior to the adoption of the amendment 1913, senators were appointed by state governments. And the 22nd Amendment limited presidents to two full terms. This was adopted in 1951, shortly after Franklin Roosevelt won a record four times.

Amendments affecting social policy—In 1919, the country adopted the 18th Amendment which banned the manufacture, sale, and transportation of alcoholic beverages in the U.S. The country's experiment with Prohibition was a failure, and the amendment was repealed in 1933, leaving the issue of drinking up to the individual states. This is the only amendment that was ever repealed.

Modern proposals—Over 10,000 constitutional amendments have been introduced in Congress, but only 33 have ever passed the 2/3 vote requirement (see sidebar: Failed Amendments). It is obviously a difficult hurdle. It is not uncommon for more than 100 amendments to be introduced in single session. Many of these proposed amendments, such bans on abortion and flag desecration, are introduced year-after-year. Others include amendments to: permit school prayer; protect the mention of "God" in the pledge of allegiance; allow naturalized citizens to become president (think Schwarzenegger); abolish the electoral college in favor of the direct election of president; restrict eminent domain; lower the minimum age for Congress to 21; bar same-sex marriage; restrict the president's pardon power in election years; require a balanced federal budget; limit the terms of federal judges; repeal income tax; impose term limits for members of Congress; require a super majority vote for bills that raise taxes; provide for presidential run-off elections if no candidate receives more than 50% of the vote; eliminate the death penalty, and more.

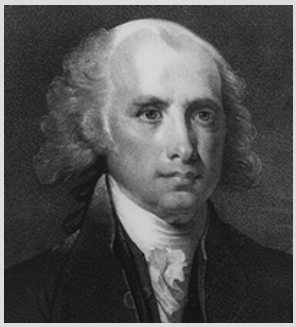
1. *Farrand's Records of the Federal Convention of 1787* (12 September, 1787).
2. Letter to James Madison, 20 December 1787.

FAILED AMENDMENTS

Six amendments were formally proposed by Congress, sent to the states, but never ratified:

- Congressional apportionment (1791)
- Revokes citizenship of those who accept foreign titles (1810)
- Prohibits a ban on slavery (1861)
- Allows Congress to ban child labor (1924)
- Bars discrimination based upon gender (1972)
- Gives D.C. voting representation in Congress (1978)

MADISON'S LOST AMENDMENT



In the 1980s, Texas college student Gregory Watson learned of Madison's proposed amendment regarding congressional pay increases. (It was one of the original 12 amendments sent to the states in 1789, but not ratified.) Watson wrote a term paper arguing that the amendment could still be ratified. He got a "C." But Watson began a letter-writing campaign to select state legislatures. (Congressional pay increases were a hot issue.) Slowly, the states began to approve the amendment as a protest. (Arizona became the 13th state to ratify in 1985—and it wasn't even a state when the amendment was proposed!) With Michigan's ratification in 1992, the requisite 38 states (3/4) had approved. Although some experts grumbled that it wasn't kosher—203 years was too long—the First Congress had not imposed any time limits. Thus, Madison's amendment is now the 27th Amendment to the Constitution. It provides that no congressional pay raise can take affect until after the next election—to prevent an obvious conflict of interest.

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Last updated: 09-01-06

The Nationalization of the Bill of Rights

THE 14th AMENDMENT

"All persons born or naturalized in the United states and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws**...."**

The emphasized language is known as the Due Process Clause. It provides the legal basis for the nationalization of the Bill of Rights.

INCORPORATED PROVISIONS

The following rights were extended to the states in the landmark cases listed below:

1st Amendment

Establishment of religion: *Everson v. Board of Ed.* (1947)

Free exercise of religion: *Cantwell v. Connecticut* (1940)

Speech & press: *Gitlow v. New York* (1925)

Assembly: *DeJong v. Oregon* (1937)

Petition: *Hague v. CIO* (1939)

4th Amendment

Search & seizure: *Wolf v. Colorado* (1949)

Exclusionary Rule: *Mapp v. Ohio* (1961)

5th Amendment

Double Jeopardy: *Benton v. Maryland* (1969); *Crist v. Bretz* (1978)

Self-incrimination: *Malloy v. Hogan* (1964)

Eminent domain: *Chicago, Burlington & Qunicy R.R. v. Chicago* (1897)

Continued on reverse

Introduction—The nationalization of the Bill of Rights refers to the process that extended the U.S. Constitution's basic rights provisions to state and local governments. The Bill of Rights was intended to apply only to the national government. However, over the course of 100 years Supreme Court decisions have made nearly all of the protections of the Bill of Rights applicable to state and local governments.[1] The process, known as "selective incorporation," is explained below.

The original interpretation: states are *not* bound—The first ten amendments to the U.S. Constitution are collectively known as the Bill of Rights. They officially became part of the Constitution in 1791, and protect basic liberties such as freedom of speech and religion. James Madison, the primary drafter, wanted some of the provisions to apply to the states but Congress would not go along. At the time, people feared the distant national government, but largely trusted their local governments. And it was believed that state governments could be adequately controlled through individual state constitutions. Accordingly, the First Amendment begins: "*Congress* shall make no law respecting an establishment of religion…" (emphasis added). In other words, the prohibition applied only to the national government—the only government with a "Congress." The states could totally ignore this restriction, and many did. (Official religions or state-supported churches existed in some states until the 1820s.) Finally, any doubt about the coverage of the Bill of Rights was resolved by the Supreme Court in 1833. In *Barron v. Baltimore* Chief Justice Marshall concluded that Maryland did not have to pay "just compensation" for taking private property. The Court stated that the 5th Amendment, like the rest of the Bill of Rights, simply did not apply to the states.

The adoption of the Fourteenth Amendment—It turned out that Madison's worries about state misconduct were well-founded. Over time, these governments became the primary violators of people's rights. This was particularly true in the South where African-Americans were enslaved. The Civil War ended slavery, and the 14th Amendment was one of three amendments added to the Constitution in the immediate aftermath of the war.[2] It was expressly targeted at state governments and was intended to protect the rights of former slaves. However, the language of the amendment was quite broad (see sidebar). It referred to "all persons" not just former slaves. And more importantly, it didn't specify *which* rights and liberties were protected from state interference. Some contended that the 14th Amendment made the all of the Bill of Rights now applicable to the states. However, the Supreme Court rejected this interpretation and initially refused to apply those rights to the states.[3]

Reinterpreting the 14th Amendment—Pressure from business interests at the end of the 19th century eventually caused the Supreme Court to reconsider its interpretation of the 14th Amendment. Business groups were looking for a way to strike down new state laws that mandated minimum wage, maximum hours, and various other workplace protections. However, there was nothing in the U.S. Constitution that actually prohibited state governments from enacting such laws. To declare these laws unconstitutional the pro-business Supreme Court had to get creative: It came up with a new interpretation of the 14th amendment's Due Process Clause. This interpretation is called "substantive due process" to distinguish it from "procedural due process" (the true meaning).[4] Simply stated, substantive due process holds that there are certain fundamental liberties that no state can violate. These liberties do not even have to be mentioned in Constitution. (For example, the Court concluded that the right to freely enter into labor contracts without governmental interference was one such fundamental freedom. It struck down state labor laws on this basis for decades.) The Court's new, expanded interpretation of the 14th Amendment paved the way for the nationalization of the Bill of Rights. Accordingly, in 1897 it overruled *Barron v.*

Baltimore and concluded that state governments *did* have to obey the 5th Amendment and pay just compensation when they took private property. *Burlington & Quincy R.R. v. City of Chicago*.

"Selective" versus "total" incorporation—After the *Burlington* case, the Supreme Court began applying other provisions off the Bill of Rights to the states. For example, *Gitlow v. New York* (1925) declared:

> …[W]e may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the states.

Over the next 22 years all of the provisions in the First Amendment (free exercise of religion; prohibition against religious establishment; freedom of speech, press, assembly and petition) were extended to the states using the 14th Amendment's Due Process Clause. This still left the states immune from many of the important criminal justice safeguards found in the 4th, 5th, 6th, and 8th amendments. A major debate developed on the Supreme Court. Some members, such as Justice Hugo Black, contended that the adoption of the 14th Amendment in 1868 made *all* of the Bill of Rights protections applicable to the states. However, this position, known as "total incorporation" was never embraced by a majority of the Court. Instead, the Supreme Court opted to incorporate individual provisions of the Bill of Rights on a case-by-case basis. This gradual process is known as "selective incorporation." During Chief Justice Earl Warren's tenure (1953–1969), the Supreme Court incorporated most of the Constitution's remaining criminal justice protections. This had a profound affect on the American justice system because law enforcement is primarily conducted by state and local officials. (See sidebar: Gideon's Story.) Thus, while Justice Black's total incorporation doctrine did not carry the day, the outcome has been almost the same. Today, over 100 years after the first incorporation decision, most of the provisions of the Bill of Rights have been nationalized (see note 1 for the remaining exceptions).

Chief Justice Earl Warren

1. Significant provisions that have not been made applicable to the states include: the 2nd and 3rd amendments, the grand jury indictment clause of the 5th Amendment, the 7th Amendment, and the "excessive fines and bail" clause of the 8th Amendment.

2. The 14th Amendment was officially ratified in 1868. The 13th Amendment (1965) legally abolished slavery. The 15th Amendment (1871) gave former (male) slaves the right to vote.

3. Early on, the Supreme Court considered using the 14th Amendment's "privileges and immunities" language to extend the Bill of Rights to the states. However, it interpreted this clause so narrowly in *The Slaughterhouse Cases* (1873) as to make it virtually a dead letter. And in 1884, the Court considered but rejected using the Due Process Clause as a conduit. See *Hurtado v. California* (holding that the 5th Amendment's grand jury requirement did not apply to the states).

4. The Due Process Clause (see sidebar: The 14th Amendment) is really only a guarantee of procedural fairness.The provision doesn't say that the state can't take away rights. Rather, it simply requires the state to use fair legal procedures ("due process of law") when it does take away rights! Substantive Due Process ignores the literal meaning of the provision. It remains a controversial interpretation to this day. Ironically, although it was initially adopted by a conservative Supreme Court to protect business interests, it has been embraced by liberal justices in modern times. Some of the Court's most divisive rulings, such as the recognition of a right of abortion, rely upon substantive due process.

6th Amendment

Speedy trial: *Klopfer v. North Carolina* (1967)

Public trial: *In re Oliver* (1948)

Jury trial: *Duncan v. Louisiana* (1968)

Notice: *Cole v. Arkansas* (1948)

Confrontation of witnesses: *Pointer v. Texas* (1965)

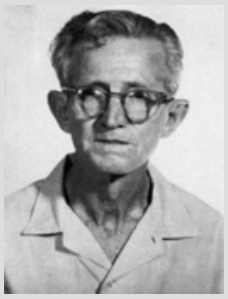
Compulsory process to obtain witnesses: *Washington v. Texas* (1967)

Right to counsel: *Powell v. Alabama* (1932) (capital cases, special circumstances); *Gideon v. Wainwright* (1963) (all felonies); *Argersinger v. Hamlin* (1972) (all misdemeanors with jail potential)

8th Amendment

Cruel & unusual punishment: *Louisiana ex rel. Francis v. Resweber* (1947)

GIDEON'S STORY



The nationalization of the Bill of Rights has had major human consequences. Clarence Gideon was one of the many beneficiaries: He was a longtime loser, accused of stealing $100 worth of cheap wine from a pool hall. Too poor to hire a lawyer, he was forced to defend himself in a Florida courtroom. Gideon appealed his conviction to the U.S. Supreme Court with a handwritten petition and won. In *Gideon v. Wainwright* (1963), the Warren Court nationalized the right to counsel in felony cases. Thousands of indigent inmates were freed in Florida alone, and the case led to the creation of the public defender system. (Gideon himself was acquitted with the help of a lawyer on retrial.)

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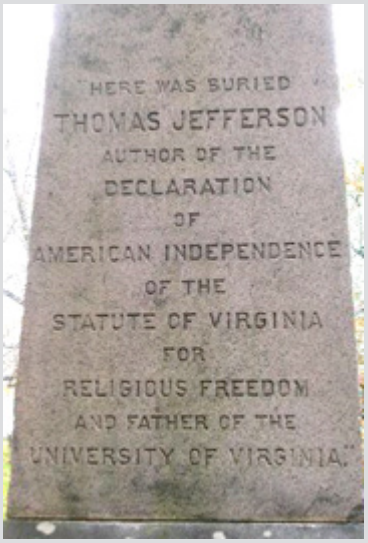
The Establishment Clause

A "WALL OF SEPARATION"



Religious persecution in Europe brought many colonists to America. However, once here they established their own official churches and discriminated against non adherents. Most colonies forced citizens to support the official church through taxation, or by limiting voting and office-holding to members of the favored religion. Quakers were executed in some colonies for their faith, "witches" were tried and executed in Massachusetts, and Baptists were persecuted in Virginia. Both Thomas Jefferson and James Madison believed strongly in religious freedom, or "freedom of conscience" as they called it. In 1785 Madison wrote his **Memorial and Remonstrance Against Religious Assessments**. It opposed a Virginia bill that sought to impose a tax for religious teaching. The next year, the state passed Thomas Jefferson's **Virginia Act for Establishing Religious Freedom,** (which was actually drafted in 1779). This law forcefully prohibited any official association between the government and religion. Later on, as the nation's third president Jefferson wrote to the Danbury Baptist Association that the First Amendment built **"a wall of separation between church and state."** Although the phrase does not appear in the Constitution itself, the Supreme Court approvingly quoted it in the *Everson* case (see note 2). Jefferson was so proud of his Virginia Act for Establishing Religious Freedom that he directed that it appear on his tombstone as one of his three greatest life achievements (omitting mention that he was the nation's third president!)

Overview—The First Amendment begins with the Establishment Clause: "Congress shall make no law respecting an establishment of religion…." It is one of three provisions in the Constitution that deal with religious freedom,[1] and it is arguably the most controversial. A few principles are settled: First, the Establishment Clause restricts government, not private parties. Second, the Clause technically applies only to the national government as the word "Congress" indicates. However, a 1947 Supreme Court decision used the 14th Amendment to extend the same protection to state and local governments.[2] For all practical purposes, the Establishment Clause now limits the official actions of *all* public employees, including teachers, firefighters, local police, etc. Finally, the term "religion" is broadly interpreted. It is not restricted to America's dominant Christian faiths or even established religions. It equally protects religious cults, and spiritual beliefs unique to a single person.

Separationists v. accommodationists—Most Americans agree that the Establishment Clause prevents the government from creating an official church, from preferring one faith over another, and from discriminating against non-believers. But people disagree as to whether it also prevents the government from simply encouraging religion in non-discriminatory ways. Those who advocate the "separationist" view say yes it does; that government must be completely neutral on the issue of faith. Separationists contend that religion belongs exclusively in the private sphere, and that it is not the business of government whether its citizens are religious or not. When the "wall of separation" is breached, separationists argue, conflicts result, the rights of nonbelievers are trampled, and the autonomy of religious organizations is threatened. Thomas Jefferson and James Madison both strongly subscribed to the separationist position (see sidebar: A Wall of Separation). However, other Founders disagreed. John Adams viewed religion as being essential to national survival (see sidebar on reverse.) According to his "accommodationist view," government needs religion to instill the moral values required for maintaining civil order. Modern-day accommodationists also argue that religion is part of the national heritage, and adds solemnity and dignity to civic events. Accordingly, accommodationists contend that government *should* encourage religious behavior and make space for religion in the public square. Historically, the accommodationist view dominated until the 1940s. In the early years, it was common for public schools to teach children to read using the Bible. George Washington and successive presidents invoked God in speeches. America's coins began displaying the motto "In God We Trust" in 1864, public schools had daily classroom prayers, and so forth. However, lawsuits challenging some of these widespread practices began reaching the Supreme Court in the 1940s. (Although some of the cases were brought by nonbelievers, many were brought by deeply religious people who felt that the government was discriminating against their particular faith.) For roughly three decades, the Court favored the separationist view, especially where public schools were involved. However, presidents Reagan, Bush (41), and Bush (43) appointed mostly accommodationists to the Court, reflecting their own ideological preference. As a result, today the Supreme Court is almost evenly divided, and its decisions over the past two decades have not always been consistent.

Religion in the public schools—The most intense battles over religion involve America's public schools. Both sides agree that children are impressionable. Separationists want religion kept out to prevent indoctrination; accommodationists want some religion included, so that religious habits can take root. Over the past 40 years, the Supreme Court has sided with the separationists. The clearest example involves school prayer: Up to 1962 it was quite common for public schools to begin with a daily prayer. However, ***Engel v. Vitale* (1962)** ruled that classroom prayers violated the Establishment Clause. The following year the Court similarly prohibited Bible readings.[3] Successive cases banned school-endorsed prayers at after-school events such as graduation ceremonies and football games.[4]

In 1985, the Court struck down a "moment of silence" law because the law was clearly enacted to evade the school prayer ban and students were specifically told they could pray.[5] The Supreme Court also struck down laws that required the posting of the Ten Commandments in classrooms, that forbade the teaching of evolution, and that required the teaching of creationism.[6] However, this doesn't mean that public schools are "religion-free zones." Although *school personnel* may not encourage religious activity, Supreme Court decisions allow some *student*-initiated religious expression on campus.[7]

Religion in the public square—Outside of schools, the more permissive accommodationist view prevails. For example, Supreme Court cases have allowed the Nebraska Legislature to hire an official chaplain to deliver daily prayers; approved the display of the Ten Commandments on Texas capitol grounds; approved a city's Christmas display that contained a variety of seasonal objects, including a nativity scene.[8] It has largely defended these and other similar cases on grounds that the religious content was simply invoking the country's historical traditions, was non-sectarian, or was intended to dignify or solemnize a civic act, not proselytize. However, the Court has struck down displays that were excessively sectarian, or that were located in sensitive areas like courthouses.[9]

Public funding of religious activity—Governments occasionally wish to give financial aid to private religious organizations that operate schools, run charities, or perform other social services such as drug counseling. Accommodationists defend such funding, arguing that these organizations are often more effective than secular ones, and provide valuable public benefits that ought to be reimbursed. Separationists counter that such public funding supports religious proselytizing, indirectly aids religion by freeing up the organization's other funds for core religious activities, and forces taxpayers to support religious organizations that they oppose. Initially, the Supreme Court mostly sided with the separationists. It developed the fairly stringent "*Lemon* test" that struck down government aid unless: (1) the purpose of the funding was secular; (2) the primary effect of the funding was to neither advance nor inhibit religion; and (3) the monitoring of funding would not excessively enmesh the government in the religious organization's operations.[10] However, in recent years, the Court has reversed some of its earlier rulings. It has allowed some public money to directly or indirectly benefit private religious schools and colleges. Because the law is so unsettled, it is not possible to articulate clear rules in this area.

1. Article 6, sec. 3 (in the main body of the Constitution) declares: "…no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." (This generated some controversy during the ratification debate, with some insisting that a belief in God should be a requirement for holding federal office and others wanting to exclude Jews and Muslims.) The Constitution's third religious freedom guarantee is the Free Exercise Clause, which follows immediately after the Establishment Clause in the First Amendment.

2. See ***Everson v. Board of Education*** (1947) and my Nationalization of the Bill of Rights fact sheet for details.

3. ***School District of Abington Township v. Schempp*** **(1963)**.

4. ***Lee v. Weisman*** **(1992)** (middle-school graduation ceremony); ***Santa Fe Independent School District v. Doe*** **(2000)** (student-led prayer at football games).

5. ***Wallace v. Jaffree*** **(1985)**.

6. ***Stone v. Graham*** **(1980)** (Ten Commandments); ***Epperson v. Arkansas*** **(1968)** (evolution ban); ***Edwards v. Aguillard*** **(1987)** (requiring creationism to be taught).

7. As Justice O'Connor wrote in ***Westside Community Bd. of Ed. v. Mergens*** **(1990):**"There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." (upholding the federal Equal Access Act which authorizes student religious clubs); see also, ***Rosenberger v. University of Virginia*** **(1995)** (approving campus funding for a proselytizing Christian newspaper); ***Good News Club v. Milford Central School*** **(2001)** (permitting use of school facilities by after-school religious youth club).

8. ***Marsh v. Chambers*** **(1983)** (official chaplain); ***Van Orden v. Perry*** **(2005)** (Ten Commandments); ***Lynch v. Donnelly*** **(1984)** (holiday display).

9. ***Allegheny County v. Greater Pittsburgh ACLU*** **(1989)** (nativity scene inside courthouse); **McCreary County v. ACLU (2005)** (Ten Commandments inside courthouse).

10. ***Lemon v. Kurtzman*** **(1971)**. Applying this test, the Court struck down a state law to pay the salaries of parochial school teachers.

THE ACCOMMODATIONIST VIEW

In contrast to Jefferson and Madison, many of the Founders were deeply religious men, or believed that religion played a vital role in the well-being of society. John Adams (who was a Unitarian), subscribed to the latter view. He saw religion as being essential to maintaining public order. In 1798, as the nation's second president, he stated:

> We have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge, or gallantry, would break the strongest cords of our Constitution as a whale goes through a net. Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other. [11 October 1798 Address to the Military]

Adams was the primary author of the Massachusetts Constitution of 1780 which influenced the U.S. Constitution and other state constitutions. It specifically required the governor to be a declared Christian. And although it barred religious persecution, it mandated public displays of religion and called for government funding of religion. "It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe" the Constitution stated.

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The Free Exercise Clause

Overview—The Free Exercise Clause is found in the First Amendment, immediately following the Establishment Clause. It is one of three separate religious protections in the U.S. Constitution,[1] and it reads: "Congress shall make no law … prohibiting the free exercise [of religion]." The Supreme Court has not always agreed on the proper interpretation of this provision, although some aspects are well settled. First, as with the rest of the Bill of Rights, the Free Exercise Clause restricts only government, not private parties or businesses. And strictly speaking, it applies only to the national government. However, a 1940 Supreme Court decision "incorporated" the provision into the 14th Amendment, thereby extending it to all state and local governments.[2] So today, the Free Exercise Clause effectively limits the official actions of *all* public employees, including teachers, firefighters, local police, etc. Second, as with the Establishment Clause, the term "religion" is broadly construed to cover all sincerely-held spiritual beliefs, including cult religions and beliefs unique to a single person. (In actual practice, the Free Exercise Clause is mostly invoked by religious minorities, because it is unlikely that the government would take an action that is offensive to the majority.) Finally, like the Free Speech Clause, the Free Exercise Clause contains no exceptions whatsoever. Read literally, it prevents the government from interfering with *any* practice undertaken in the name of religion. E.g., a modern-day Aztec might argue a constitutional right to engage in human sacrifices. Common sense suggests that this is not acceptable. Accordingly, over the past century the Supreme Court has developed various rules to spell out when the government can or cannot interfere with a religious practice. The most important rule is the distinction between religious *beliefs* and religious *practices*. According to the Court, a person has an absolute right to believe whatever he or she wants; e.g., a modern-day Aztec could not be punished for simply believing in the need for human sacrifices. However, religious practices are a different story; these can be regulated, and even criminalized, under certain circumstances. As outlined below, the Court has had considerable difficulty spelling out these circumstances.

Rule 1: The "valid secular purpose" test—In the late 1800s the government prosecuted a Utah Mormon, George Reynolds, for the crime of polygamy. Reynolds argued that plural marriages were mandated by his faith, and therefore the Free Exercise Clause gave him a constitutional right to engage in this lifestyle. He lost. ***Reynolds v. United States*** (1878) held that a religious belief was not a defense to a criminal law that served a legitimate, secular purpose. The Supreme Court reasoned, "To permit this would be to make … religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." For the next 85 years, the Supreme Court continued to follow this rule, which became known as the "valid secular purpose" test. So long as the law was not motivated by religious bigotry, but rather served a valid, non-religious objective, it was fully enforceable against everyone. Thus, in ***Jacobsen v. Massachusetts*** (1905), the Court upheld a state law that required mandatory smallpox vaccinations. There was a legitimate secular reason for the law (i.e., public health), so the Court concluded that the religious objections to immunization had to yield.

Rule 2: The "compelling interest" test—By 1963, the Supreme Court's valid secular purpose test was coming under increasing attack. Critics charged that it gave insufficient weight to religion, and allowed ordinary laws to trump an important constitutional liberty. The Supreme Court agreed, and used two cases to change course. ***Sherbert v. Verner*** (1963) involved the denial of unemployment benefits to woman who refused to work on Saturdays. She was a Seventh Day Adventist, and her faith prohibited Saturday labor. Under the valid secular purpose test she would have lost—since the state's denial of benefits was motivated by economic considerations, not religious prejudice. However, the Court adopted a new balancing approach, known as the "compelling interest" test. It required the govern-

RELIGION AND THE FLAG

The flag salute did not become a widespread school practice until shortly before America entered World War II. With war tensions rising, many states began adopting mandatory flag salute laws. This posed a problem for Jehovah's Witnesses (who view the flag salute as a form of idolatry that is forbidden by the Ten Commandments). ***Minnersville v. Gobitis*** (1940) involved the suspension of two Jehovah's Witness children who refused to salute the flag. The Supreme Court acknowledged the students' Free Exercise claims, but ruled against them. Justice Frankfurter concluded that the need to instill American values trumped their religious beliefs. "National unity is the basis of national security," he wrote. The decision unleashed unprecedented violence against Jehovah's Witnesses during the next year. Thousands were assaulted (one was even castrated); a Witness meeting hall was burnt in Maine; and laws were enacted to prosecute the children as delinquents if they refused to salute the flag. These developments prompted the Supreme Court to reconsider the issue a mere 3 years later. In ***West Virginia Board of Education v. Barnette*** (1943), the Court overruled *Gobitis*, and held that students had a constitutional right to refuse to salute the flag—not simply on religious grounds, but on broader free speech grounds. Justice Jackson wrote for the Court:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not occur to us now.

ment to accommodate religion (i.e., make an exemption for the believer), unless there was a very compelling reason why the law had to be enforced against everyone. Because the state's unemployment compensation system would not collapse if it made a few exceptions for people like the plaintiff, the Seventh Day Adventist won. In ***Wisconsin v. Yoder*** (1972) the Supreme Court ruled in favor of the Amish, applying the same balancing test. Jonas Yoder and other members of the Amish Mennonite Church had violated a state law requiring children to attend school until the age of 18. (The Amish home schooled their children after the 8th grade in furtherance of their devout lifestyle.) The Supreme Court concluded that there was no compelling reason why an exemption could not be made. Although the Court's the new test improved the odds that the religious person would prevail, it did not guarantee that outcome. For example, the Amish lost a subsequent challenge to having to pay social security tax. This time, the Supreme Court concluded the government *did* have a compelling reason to enforce its tax laws against everyone. See ***United States v. Lee*** (1982). Similarly, an orthodox Jewish psychologist lost his battle with the Air Force over the right to wear a yarmulke under his official military cap, see ***Goldman v. Weinberger*** (1982). Bob Jones University lost its tax-exempt status for engaging in religiously-motivated race discrimination, see ***Bob Jones University v. United States*** (1983). And Native Americans lost their battle to block construction of a road across national forest lands held sacred by the tribe, see ***Lyng v. Northwest Indian Prot. Cemetery Assn.*** (1988).

The Court flip-flops!—In 1990, with virtually no prior warning, the Supreme Court returned to the original, valid secular purpose test (at least where criminal laws are involved). ***Employment Division v. Smith*** (1990) involved the denial of unemployment benefits to two Native Americans who were fired from their jobs for using peyote in religious rituals. Although some states give exemptions to members of the Native American Church, Oregon did not. Its drug laws criminalized the use of all hallucinogenic drugs. The fired Native Americans (who ironically had been employed as drug counselors) argued that peyote was part of a longstanding religious tradition, and the state had no compelling reason to deny them an exemption. They might have prevailed with this argument, but five justices of the Supreme Court abandoned the compelling interest balancing test. They concluded that the free exercise of religion does not give a person the right to violate a valid, neutral law that is not targeted at religion. In other words, they seemingly returned to the original approach adopted in the polygamy case. The peyote decision was widely criticized, with some arguing that the Supreme Court had "gutted" the Free Exercise Clause. In fact, Congress responded in 1993 by passing the Religious Freedom Restoration Act (RFRA). (It was approved by the Senate in a near-unanimous vote of 97 to 3, and signed into law by President Clinton.) The law attempted to overrule the Supreme Court and mandate the use of the compelling interest balancing test. It led to an upsurge in lawsuits, especially by inmates. However, four years later, in ***City of Boerne v. Flores*** (1997) the Court declared the RFRA unconstitutional! Justice Kennedy wrote that Congress had exceeded its power; that in accordance with ***Marbury v. Madison*** (1803), it was "emphatically the province and duty of the judicial department to say what the law is." It is not clear, however, how the Supreme Court will handle future Free Exercise Clause disputes. One of the five supporters of the peyote decision is no longer on the Court (Rehnquist), and two new justices have come onboard. It is quite possible, therefore, that the Supreme Court could return to the compelling interest test, or develop a new approach to dealing with these controversies.

1. Article 6, sec. 3 (in the main body of the Constitution) declares "…no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." The Constitution's second religious freedom guarantee is the Establishment Clause which is discussed in a separate fact sheet.

2. The case was **Cantwell v. Connecticut (1940)** (reversing the conviction of a Jehovah's Witness for preaching door-to-door in violation of a state anti-solicitation law.) For details on the "incorporation" process see my Nationalization of the Bill of Rights fact sheet.

ANIMAL SACRIFICE

In 1987 the Church of Lukumi Babalue Aye leased land in the small Florida community of Hialeah. The Church is part of the Santeria religion, which originated in Africa, moved to Cuba, and incorporated Roman Catholic beliefs along with African spiritual elements. Its customs include the sacrifice of animals (chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles). The animals are killed by the cutting of the carotid arteries in the neck. Except in certain death and healing rituals, the sacrificed animals are then cooked and eaten. When the Florida townspeople learned of the church's practices, they called emergency city council meeting and passed several ordinances prohibiting the ritual sacrifice of animals within city limits. The Church sued, arguing that the ordinances violated their Free Exercise rights under the Constitution. In ***Church of Lukumi Babalu Aye v. City of Hialeah*** (1993), the Supreme Court unanimously agreed. (It should be noted unanimous rulings in the area of religion are extremely rare!) Justice Kennedy reasoned that the city's ordinances were not religiously neutral, but were rather aimed at suppressing a specific religious practice. And the laws could not be defended on sanitation or animal rights grounds, since they did not prohibit non-religious killings of those same animals within city limits. Justice Kennedy concluded:

> The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.… Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

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The Free Speech Clause

POLITICAL DISSENT

American governments are typically less tolerant of dissent in times of crisis or war. For example, Congress passed the Alien and Sedition Acts of 1798 to unify the country for a possible war with France. These laws criminalized virtually any publication that was pro-France or merely critical of the president or Congress. The laws expired in 1801, and for a while dissent resumed. However, during the Civil War journalists were again imprisoned—this time for pro-South writings. World War I unleashed prosecutions against socialists, communists, and anti-war activists. E.g., Charles Schenck was prosecuted for a flyer that challenged the legality of the military draft and called for resistance. The Supreme Court unanimously rejected Schenck's free speech arguments in ***Schenck v. U.S.* (1919).** Justice Oliver Wendell Holmes explained that the pamphlet posed a "clear and present danger" to America's war effort. See also, ***Abrams v. U.S.* (1919)** (20-year prison sentences upheld for socialists who criticized the president's foreign policy and called for a general strike); and ***Gitlow v. New York* (1925)** (upholding a state prosecution). During the 1950s, the federal government prosecuted Communist party members. See e.g., ***Dennis v. U.S.* (1951)** (upholding 5-year prison sentences for advocating Communism.) However, in 1969, the Supreme Court changed course: ***Brandenburg v. Ohio* (1969)** adopted the more tolerant approach to dissent that presumably applies today. (See: seditious speech at right).

ASSERT YOUR RIGHTS!

By today's standards, Schenck's flyer (above) was tame. You can view it and other documents involved in landmark free speech cases at: http://1stam.umn.edu/main/primary/primary.htm

Overview—The Free Speech Clause is found in the First Amendment. It reads: "Congress shall make no law…abridging the freedom of speech…" It is one of the most important guarantees in the Constitution. It not only safeguards personal expression in all its diverse forms, but also makes democratic government possible. (Without free speech elections would be hollow, meaningless affairs.) The Supreme Court interprets the word "speech" to include all forms of human expression, not just the spoken word. This means that the Free Speech Clause potentially protects writings (books, magazines, newspapers, flyers), multimedia (movies, video, TV, radio), art (paintings, sculpture, music, theater, fashion) online expression (e-mail, blogs, web sites), nonverbal expression (gesturing, picketing, protest marches, walkathons), "symbolic speech" (e.g., flag desecration, armbands), and more. It also protects the right *not* to speak in certain instances.[1] And it protects the freedom to privately associate with others—the Court reasons that speech would be meaningless without this coordinate right.[2] However, the Free Speech Clause only restrains the *government*; it does not apply to censorship by private persons or businesses. And technically, it directly applies only to the national government since it refers to "Congress." However, in 1925 the Supreme Court interpreted the 14th Amendment (which is targeted at the states) to include the same free speech protections.[3] So for all practical purposes, the Free Speech Clause now applies to all levels of government in the U.S. (This includes public entities like schools, colleges, police and fire departments, etc.) Lastly, although the Free Speech Clause refers only to laws, it is interpreted to cover any action taken by a public employee in his/her official capacity.

Unprotected speech—The Free Speech Clause doesn't contain any exceptions. However, governments *do* prohibit some types of expression with the blessing of the Supreme Court. In fact, court cases recognize three categories of speech: unprotected, partially protected, and fully-protected. Unprotected speech can be prohibited and criminally punished because of its potential harm. The classic example, cited by Justice Oliver Wendell Holmes in ***Schenck v. U.S.*** (1919), is shouting "fire!" in a crowded theater. Here are some other types of speech that currently receive no constitutional protection:

(1) Fighting words: "Fighting words" refers to any expression that is likely to cause an *immediate* breach of peace or violence.[4] The test isn't whether the words themselves are rude; rather it is the context and the *likely reaction of the listeners* that controls. (For example, the innocent greeting "Hi, girls!" could be fighting words if uttered as a taunt in a bar filled with Hells Angels.) Conversely, writings—even those that contain hate speech or other inflammatory content—do not generally constitute fighting words, because the imminency requirement is lacking. It is the danger of sparking riots or fights that deprives fighting words of constitutional protection, not their offensiveness.

(2) Seditious speech: Sedition is expression that calls for the violent overthrow of the government. The Supreme Court has not treated this type of speech consistently throughout American history (see sidebar: Political Dissent). However, in ***Brandenburg v. Ohio*** (1969),[5] the Court adopted the test that is still in use today. Under this test, speech which advocates unlawful action *in the abstract* is constitutionally protected. The speech loses its protection only when: (1) it is directed to inciting imminent lawless action; and (2) it is likely to produce such action.

(3) Obscenity and child pornography: "Obscenity" is a narrow category of sexual expression that is off-limits even to consenting adults. The national government and most states have criminal laws which make the public display, sale, distribution, etc. of this material a serious felony. The constitutional difficulty is defining what constitutes obscenity. A work can be fairly explicit, even pornographic, but not necessarily "obscene" or off-limits to consenting adults. The Supreme Court struggled with the definition for years. In fact, in 1964,

Justice Potter Stewart famously remarked that he couldn't define it, "but I know it when I see it."[6] ***Miller v. California*** (1973) finally resolved the definition, laying down the 3-part test used by judges and juries to this day (see sidebar: Obscenity). Child pornography is any material that uses minors in sexually suggestive situations. It is not necessarily obscene (e.g., simple nudity will violate the child pornography laws in most jurisdictions), but this material is criminalized nonetheless for the protection of children. Even non-commercial possession of child pornography is illegal.

(4) Other types of unprotected speech: In addition to the above broad categories, there are other "speech crimes" such as threats, blackmail, bribery, etc., that are not protected by the First Amendment. Governments—with the approval of the Court—have simply concluded that in these instances the societal harms outweigh the benefits of free speech.

Partially-protected speech—This middle category covers speech that is allowable, but that can be heavily regulated by the government. Today, this includes commercial speech (advertising), and defamation (libel, slander).

Fully-protected speech—Expression that doesn't fall within the above categories is deemed "fully-protected" or "pure" speech. Most expression is of this type. Only limited regulation by government is allowed, and there must be a compelling reason for it. The Supreme Court's Time, Place, and Manner Doctrine permits *reasonable* restrictions on speech that takes place on government property. For example, a city could forbid a charity walk-athon during rush hour, separate opposing protest groups into separate areas (i.e., as long as it doesn't play favorites), ban tobacco billboards near schools, or forbid a particular method of speech (e.g., noisy sound trucks in residential neighborhoods). Importantly, none of these restrictions foreclose the speech altogether. Another Supreme Court doctrine, known as the Public Forum Doctrine, focuses on the location of the speech. The Court defines a "public forum" as a place that is normally open to the public for the free exchange of ideas—e.g., parks, sidewalks, the grounds outside government buildings. This is where citizens have maximum freedom of speech. However, other government locations are not open to the general public (e.g., prisons, military bases, inside some government offices). Speech can be heavily restricted or even banned in these places without violating the Constitution. (The Supreme Court regards K-12 schools as non-public forums. This means that school authorities can bar outside visitors, and more heavily regulate student speech on campus.) The Supreme Court has developed many other free speech doctrines over the years, defining the boundaries of government regulation. However, perhaps the most important rule is that when the government is dealing with fully-protected speech, *it cannot engage in viewpoint discrimination*. This means that it must treat all speech the same, irrespective of its content or message. In other words, if a city permits the Girl Scouts to gather in a public park, it must extend the same privilege to the KKK.

1. For example, the Supreme Court has held that students cannot be forced to recite the pledge of allegiance, ***West Virginia State Board of Education v. Barnette* (1943)**; and drivers cannot be forced to display state mottoes on their license plate that are personally offensive. ***Wooley v. Maynard* (1977).**

2. ***N.A.A.C.P. v. Alabama* (1958)** (civil rights organization can't be forced to disclose its membership lists to state).

3. ***Gitlow v. New York* (1925)**. For background on how the Free Speech Clause was "nationalized" (or extended to state and local governments), see my fact sheet: Nationalization of the Bill of Rights.

4. The fighting words exception was first announced in ***Chaplinsky v. New Hampshire* (1942)**, where a Jehovah's Witness called a marshal a "God damned racketeer" and a "damned Fascist." (He had been preaching on a street corner, an angry mob formed, and the marshal was leading him away.) Chaplinsky was convicted of violating a state law that prohibited insulting or offensive utterances in public. The Supreme Court rejected his free speech argument, holding that a person doesn't have a right to create a public disturbance by words or other means.

5. This case reversed the conviction of a KKK leader whose hateful speech targeting blacks and Jews said, "if our President, our Congress, and our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."

6. ***Jacobellis v. Ohio* (1964)** (Stewart concurring).

OBSCENITY

***Miller v. California* (1973)** sets forth the current definition of obscenity. In order to be judged legally obscene, a work must flunk all three parts of the *Miller* test:

(1) the work must appeal to the "prurient interest" (this means an aberrant, unhealthy, morbid sexual interest);

(2) the work must depict or describe sexual conduct in a "patently offensive way"; and

(3) taken as a whole, the work must lack serious artistic, political, or scientific value.

The first two parts of the *Miller* test are to be judged by *local community standards*—or more precisely, how the average member of that community would react. This is significant, because it means obscenity can vary from city to city. (I.e., a conservative, strait-laced community doesn't have to tolerate material that might be acceptable in Las Vegas.) However, the last part of the *Miller* test is to be judged by *national standards.* This means that a local community cannot criminalize a work that has won a Pulitzer Prize, or is widely recognized as a legitimate work of art, literature or science.

MINORS: A DIFFERENT STORY

Minors do not have the same free speech rights as adults with regard to sexually suggestive material. Most states make it a felony to share adult material with minors. One problem area is the Internet, which is accessed by minors as well as adults. To protect children, Congress passed the Communications Decency Act of 1996. It attempted to ban "indecent" online material, much like broadcast TV. However, the Supreme Court struck down the law in ***Reno v. ACLU* (1997).** And in ***Aschroft v. Free Speech Coalition* (2002)**, the Court voided the Child Pornography Prevention Act which banned "virtual" child pornography. In both of these cases the Court concluded that the federal laws were broader than the *Miller* test (above) and therefore deprived adults of material protected by the First Amendment. The problem of safeguarding children—without infringing upon adult free speech rights—remains a thorny, unresolved issue.

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The Fourth Amendment

WHAT IS A "SEARCH"?

Just because the police see something incriminating does not mean there has been a "search" within the meaning of the 4th Amendment. The amendment only safeguards *reasonable* expectations of privacy. ***Katz v. United States*** (1967). What a person knowingly exposes to the public is considered "plain view" or unprotected by the 4th Amendment. Thus, as long as police are positioned where they have a right to be (e.g., on a public sidewalk), they may peer into the interior of parked car or the window of a home without triggering the 4th Amendment. In fact, they can even use common devices, such as binoculars, to enhance their view. (However, ***Kyllo v. United States*** (2001) ruled that the use of a thermal device to measure heat emissions from a home went too far.) Similarly, drug sniffing dogs do not violate the 4th Amendment because they are merely detecting odors that have escaped into the public airspace. (This is a "plain odor" analog to "plain view.") Police can also sift through garbage bags left on the curb, because the owner is not taking steps to safeguard privacy. Finally, if police are legally inside a private building (either by consent of the occupant, or with a search warrant), "plain view" expands to the officer's new location. That is, it allows the police to seize illegal items within the officer's new field of vision, even if they were not listed on the search warrant.

EVIDENTIARY STANDARDS

Conviction (criminal case):	Proof beyond a reasonable doubt
Liability (civil case):	A preponderance of the evidence
Warrant:	Probable cause
Investigative stop:	Reasonable suspicion

Overview—The Fourth Amendment reads in full:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This amendment does two things: (1) it prohibits unreasonable searches and arrests; and (2) it establishes requirements for warrants. Like the rest of the Bill of Rights, the Fourth Amendment restricts only the national government. However, in 1914, the Supreme Court used the 14th Amendment to extend the same protections against state and local governments.[1] I.e., today, all public employees—including teachers, firefighters, and police—must obey its mandates. Justice Brandeis famously described the Fourth Amendment as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[2] It is a controversial right because it protects the privacy of criminals as well as law-abiding citizens. In other words, there is a trade-off between privacy and safety, and Americans do not agree on where the line should be drawn. Finally, although the warrant language is fairly specific, the rest of the amendment is not. The Supreme Court has been defining the term "unreasonable" for nearly a century. What follows is necessarily a simplified outline; virtually every rule mentioned below has exceptions, and even the exceptions have exceptions!

The warrant requirement— Although the Fourth Amendment mentions warrants, it doesn't actually require them. However, the lack of a warrant could make a search or arrest "unreasonable."[3] A warrant is a document that legally authorizes a particular search or arrest. It can only be issued by a judge or magistrate—making it an important check against the abuse of power by the executive branch. The Fourth Amendment imposes three requirements for obtaining a warrant: (1) probable cause; (2) oath or affirmation; and (3) specificity. "Probable cause" is an evidentiary standard (see sidebar). It means that the judge must have a reasonable belief that a crime has been committed and that a particular person is responsible (arrest warrant), or that evidence of the crime can be found at a certain location (search warrant). Thus, in order to obtain a warrant, the police must already possess *some* reliable evidence—more than a mere hunch, but less than the amount of evidence needed to convict. The second element requires the police officer to formally attest to the existence of such evidence, making the officer liable for perjury if he or she lies. Finally, a search warrant must identify a specific search location as well as the type of items sought. This prevents the police from invading the privacy of every home in a city just because a suspect or evidence might be hidden somewhere within its boundaries.

Common arrest warrant exceptions—All lawful arrests require probable cause. However most are made without a warrant because they fall within one of the established exceptions recognized by the Supreme Court. For example, the police don't need a warrant to arrest someone in a public area (e.g., a street, restaurant, store, etc.). Thus, if police witness someone robbing a bank, they obviously have probable cause. It would be absurd to require them to procure a warrant before apprehending the robber. In contrast, arrests that take place in private buildings normally do require a warrant. However, even here there are some common sense exceptions: If our bank robber takes off running and dashes into a private building, the police can follow under the "hot pursuit" exception. The police can also enter a private building at any time to provide emergency assistance or to prevent likely harm to an occupant. This falls within the "exigent circumstances" exception. Finally, the police can stop and briefly detain a suspicious individual for questioning without having either a warrant or probable cause. Such investigative stops are not deemed to be "arrests." However, the police must have some objective basis for the stop, because the Fourth Amend-

ment generally safeguards the right to move freely without being accosted (see sidebar: *Terry* Stops.)

Search warrant exceptions—Ordinarily, the police need a warrant to search in areas that society regards as private (e.g., dwellings, car trunks, luggage, pockets, phone calls etc.) However, there are well-established exceptions here too. For example, a person can waive the warrant requirement by simply consenting to a police search. Warrantless searches are also allowed at the time of an arrest. The police may search the person of the arrestee, as well as the immediate surroundings, for possible weapons. Similarly, police are allowed to frisk a person for weapons during an investigative stop (see sidebar: *Terry* Stops). Although these exceptions are recognized for police protection, if the officer discovers illegal drugs instead of weapons, the search is still legal. Warrantless searches are also permitted in certain "exigent circumstances," and to preserve evidence that would be destroyed before the police could procure a warrant. Finally, whether a search is "reasonable" often depends upon the context. Thus, the Supreme Court has developed special Fourth Amendment rules for border searches,[4] vehicle searches,[5] school searches,[6] and drug testing.[7]

The exclusionary rule—The most controversial aspect of the Fourth Amendment isn't found in the amendment itself. Rather, it is the exclusionary rule that the Supreme Court invented to give the Fourth Amendment teeth. Simply stated, if the police obtain evidence during an illegal search, the evidence cannot be used in a court of law. And under an addendum known as the "fruit of the poison tree," evidence obtained from a subsequent *legal* search will also be excluded if it wouldn't have been discovered but-for the prior illegal search. The Court justifies the exclusionary rule on two separate grounds: (1) the need to deter the police from crossing the line in their zeal to get the bad guy, and (2) the need to maintain the purity of the criminal justice process. The exclusionary rule has many critics—including some current members of the Supreme Court. They charge that society pays too great a price when key evidence is excluded from trial. In some cases, the exclusion of evidence will allow a guilty party to get off free. However, the Exclusionary Rule has been applied against the federal government since 1914, and against state and local governments since 1961.

1. For details see ***Weeks v. United States*** (1914) and my fact sheet: Nationalization of the Bill of Rights.

2. ***Olmestead v. U.S.*** (1928) (Brandeis dissenting).

3. Other facts can make a search/arrest "unreasonable" (i.e., illegal). For example, using excessive force to arrest someone (think Rodney King) will also violate the Fourth Amendment.

4. A person entering the U.S. has very limited Fourth Amendment rights. Agents can search luggage, vehicles, clothing etc. without a warrant, *and without probable cause or any suspicion whatsoever*. Essentially, the person is deemed to consent to such searches as a condition of entry. (A more invasive search, such as a strip search, does require a reasonable suspicion. And border agents must satisfy the *Terry* stop standard when they conduct searches that are not at the physical border.)

5. The Supreme Court adopted an "automobile exception" to the warrant requirement in 1925. (This was mostly out of recognition that cars move, and are less private than homes). Probable cause is still needed to search the trunk of car or other locked areas that are not readily accessible. However, during a stop for a traffic violation, or a valid investigative stop (see sidebar: *Terry* stops), the police can protect themselves and search for weapons. This search can extend to all of the vehicle's occupants, the passenger compartment, and any accessible bags or containers. *Probable cause is not needed.* The rationale is officer safety, but if illegal drugs or other contraband is discovered, the seizure is legal. (And the discovery of such items can give officers the necessary probable cause for searching the trunk.)

6. Students have *some* 4th Amendment rights in school, but school officials have leeway to conduct searches for the protection of children in their care. Accordingly, ***New Jersey v. T. L. O.*** (1985) holds that school officials may conduct a search of the student and his/her belongings if the authorities have a reasonable suspicion that either the law *or* a school rule is being violated. (This is a much lower standard than probable cause.)

7. A drug test is a "search" within the meaning of the Fourth Amendment. This means that the government must ordinarily have probable cause and a warrant in order to compel someone to submit to such a test. However, the Supreme Court has approved of random drug testing (i.e., with no focused suspicion whatsoever) in a few special situations. For example, it has approved the testing of railway employees involved in train accidents, and customs agents who have easy access to contraband. Finally, two Supreme Court cases have authorized random drug testing for students who engage in *extracurricular* activities: ***Vernonia School District v. Acton*** (1995) (student athletes) and ***Board of Education v. Earls*** (2002) (all extracurricular participants). It is unclear whether the Court would approve of compulsory testing of all students.

TERRY STOPS

In 1968, the Supreme Court approved an important police practice known as an "investigative stop and frisk." *Terry v. Ohio* arose from the following facts: Plainclothes Officer McFadden, a veteran policeman, observed Terry and 2 other men behaving suspiciously. McFadden believed that the men were casing a store for a possible burglary. He confronted Terry, identified himself, and asked what the men were up to. When Terry mumbled evasively, McFadden grabbed him, frisked him, and discovered an illegal, concealed weapon. At trial, Terry argued that McFadden lacked probable cause. He was correct: at most, McFadden was fearing that a crime *would* be committed—not that one had already occurred. However, the Supreme Court concluded that probable cause was not needed in these circumstances. Ordinarily, the Court explained, a person has a Fourth Amendment right to move freely and refuse to answer police questions. However, when the police have a "reasonable suspicion that criminal activity is afoot" they may forcibly stop and briefly detain a person for questioning. "A reasonable suspicion" is a lesser evidentiary standard than probable cause. It is more like a well-founded hunch, factoring in the officer's experience, and the totality of circumstances. (For example, Terry's own evasiveness was one factor that helped justify the officer's actions.) During such a *Terry* stop, the suspect can be frisked for weapons. (Subsequent Supreme Court cases have expanded the "frisk zone" beyond the person of the suspect to the immediate vicinity. For example, when the *Terry* stop involves a vehicle, the search can extend to all the passengers, their bags, and the interior of the car.) Finally, if drugs or other illegal items turn up instead of weapons, the search is still legal. *Terry* is controversial, because some contend that it has led to unjustified stops, such as those based solely on racial profiling. (Racial profiling is not constitutional because a person's race or ethnicity, without more, does not satisfy the "reasonable suspicion" standard required by *Terry*.) However, with today's terrorist threat, it is unlikely that the Supreme Court will abandon or even narrow the *Terry* stop exception.

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Equal Protection

RACIAL DISCRIMINATION

The Equal Protection Clause was enacted to end the long-standing mistreatment of African-Americans. Unfortunately, it didn't work. The Civil War and 13th Amendment ended slavery, but the South began enacting segregation laws that mandated separate facilities for blacks and whites. One of these "Jim Crow" laws was challenged on equal protection grounds in ***Plessy v. Ferguson*** (1896). At issue was a Louisiana law requiring separate railroad cars for whites and blacks. Plessy, who paid for a first class ticket, was jailed when he refused to vacate his seat in the white car. With only one justice dissenting, the Court upheld the law, thereby endorsing the infamous doctrine of "separate but equal." (Justice Harlan memorably dissented, protesting that, "Our constitution is color-blind, and neither knows nor tolerates classes among citizens.") Unfortunately, *Plessy* gave the green light to segregation laws which multiplied throughout the South. Beginning in the mid-1930s, the NAACP, under the guidance of Charles Hamilton Houston, began a lengthy legal campaign to dismantle such laws. Houston's strategy focused on schools. It used empirical evidence to demonstrate that the black schools were not "equal." Slowly, the federal courts began ordering states to improve the black schools. But the breakthrough came in 1954 (four years after Houston's death).The Supreme Court ruled unanimously in ***Brown v. Board of Education I*** that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." Unfortunately, the remedy proved more difficult. For nearly 40 years federal judges battled local school officials over desegregation plans. Children were bused, school districts were merged, and costly "magnet" programs were created in the effort to achieve racial balance. At the same time, worsening racial segregation in northern states was tolerated because it resulted from private ("de facto") discrimination (i.e., housing patterns) rather than legal discrimination ("de jure"). In very recent years, school districts, including those in Arizona, have been released from court desegregation orders. Studies indicate that these schools are re-segregating as a result of housing patterns.

Overview—The equal protection clause is located in section 1 of the Fourteenth Amendment, immediately following the due process clause. It reads: "…nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws." It was adopted in 1868 to end the long-standing mistreatment of former slaves. However, the language of the clause doesn't refer to African-Americans, but more broadly protects "persons."[1] As a result, the equal protect clause has become the Constitution's major weapon against unreasonable *governmental*[2] discrimination of all types.

The 3-tier test—Laws and government policies often discriminate in some way. That is, they make classifications which treat groups of people differently on the basis of age, education, income, etc. A person who is denied privileges might argue that these laws violate the Constitution's equality guarantee. However, the Supreme Court interprets the equal protection clause to bar only "unreasonable" discrimination. It has developed a three-tier test to determine reasonability. Admittedly, the Court does not always apply the three-tier test consistently, and the test does not always provide clear-cut answers. Nonetheless, it does offer rough guidance for whether a governmental law or policy unconstitutionally discriminates. The test is explained below:

Test	Applies to:
Highest ("strict") scrutiny: The classification is valid only if it serves a very compelling government objective and it is as narrowly drawn as possible.	1. Classifications that deprive any group of a fundamental constitutional right (e.g. voting, free speech, jury trial, etc.) or 2. Classifications that discriminate against the members of a suspect class. (A "suspect class" is (a) a discrete minority (b) that historically has experienced irrational, unequal treatment, and (c) that lacks the political power to protect its own interests. To date the Supreme Court has identified racial, ethnic, national origin, and religious minorities as suspect classes.)
Intermediate ("heightened") scrutiny: The classification is valid if there is a substantial justification for it and the law/policy serves an important government objective.	Mostly gender classifications
Lowest ("rational basis") scrutiny: The classification is valid if there is any reasonable basis for it and the law/policy serves a legitimate government purpose.	All other government classifications (e.g. those based on age, income, educational level, disability, sexual orientation).

Lowest scrutiny—Most classifications are evaluated under the lowest scrutiny test. This means that the Court will uphold the law or policy as long as there is *some* legitimate basis for the classification. It doesn't have to be a particularly good reason, just a reason. Essentially, the Court is deferring to the judgment of the elected officials who are responsible for policy making. For example, there are many laws that have minimum age requirements (e.g., for drinking, buying lottery tickets, receiving social security benefits). As long as there is some rational basis for the age cutoff, the Court will not substitute its judgement for that of policy makers. Currently, laws which classify on the basis of age, income, education, disability, sexual orientation, and most other criteria are evaluated under this lowest scrutiny test. Since legislatures usually have some basis for enacting such laws they are usually upheld.

Highest scrutiny—Two different types of classification will trigger the highest scrutiny test: those which deny *fundamental rights* to any group of people, and those which dis-

criminate against *certain, vulnerable groups* on any ground. The Court is highly suspicious of either type of classification. In order for such a law or policy to stand, the government must have a very compelling justification—not just *a* reason, but a powerful reason. Typically, this means that the government must convince the Court that the classification serves a very important governmental objective, that the discrimination is as narrowly drawn as possible, and that there is no other way to accomplish the objective. A "fundamental" right includes those expressly protected by the Constitution, such as freedom of speech and the right to a jury trial. But it also includes the unmentioned liberties that the modern Supreme Court has been protecting under substantive due process (e.g., the right to travel, the right to marry, the right of privacy, and the right of abortion.)[3] Occasionally the government is able to pass the highest scrutiny test when it deprives a group of such rights. For example, voting is a fundamental right, but it can be lawfully denied to minors, non-citizens, and inmates since the government is able to justify discrimination in such situations. However, laws and policies which discriminate against groups known as "suspect classes" are almost always unconstitutional, even if fundamental rights are not involved. The Court defines a suspect class as a minority that has suffered unjustifiable discrimination in the past. These include racial and ethnic minorities, religious minorities, and groups targeted for their national origin. It isn't that these particular groups are being given "special treatment." Rather, the Supreme Court reasons that race, ethnicity, national origin, and spiritual beliefs are never grounds for discriminatory legal treatment (in contrast to youthfulness, for example.) And because these groups were unfairly targeted in the past, the Court is simply being extra vigilant. In fact, since the 1940s it has never approved of discrimination against a suspect class.[4]

Intermediate scrutiny for gender cases—Until the 1970s, laws discriminating against women were fairly commonplace. For example, women were denied the right to engage in many occupations, they were subjected to workplace restrictions similar to those that applied to children, and when they married they surrendered rights to their husband. What's more, women couldn't effectively prevent these laws from being enacted because they were denied the right to vote and hold office.[5] And when they challenged the discrimination in court they invariably lost. The Supreme Court would apply the lowest scrutiny test and conclude that innate physical differences made it reasonable to treat men and women differently. The landmark case *Reed v. Reed* in 1971 was the first decision to strike down a law that discriminated against women. The Court concluded that there was simply no rational basis to favor men over women in the appointment of executors. Similar rulings quickly followed. However, to date the Court has refused to treat gender as a "suspect class" thereby ensuring that gender discrimination is always illegal. Rather, since 1976 (see sidebar: Men, Women, and Beer), the Court has applied an intermediate standard to evaluate gender discrimination—whether targeted at women or men. Essentially, the Court reasons that in contrast to race, there may be legitimate grounds for treating men and women differently in some situations. However, today it will require a fairly strong justification that is not based upon past cultural stereotypes.

1. The Supreme Court interprets "persons" to include corporations, children, and to a limited degree non-citizens.

2. The equal protection clause applies only to discrimination by government. However, Court decisions have interpreted "state action" in a very loose, creative way to reach some private activities. See e.g. ***Shelley v. Kraemer*** (1948) (racially restrictive covenants in private deeds violated equal protection because they required court assistance for enforcement); and ***Burton v. Wilmington Parking Authority*** (1961) (restaurant was subject to equal protect clause because it leased land from city). But in ***Moose Lodge No. 107 v. Irvis*** (1972) the Court held that the mere fact the private club had a liquor license from the state was not enough to make its racially discriminatory membership practices subject to the equal protection clause. (Today, federal and state civil rights laws prohibit some types of private discrimination.)

3. See my Due Process fact sheet.

4. The last time that it allowed such discrimination was during World War II, when it refused to declare the internment of Japanese-American citizens unconstitutional. See ***Korematsu v. United States (1944)***. However, this ruling is widely criticized today: Congress issued a formal apology and partial reparations in 1988, and Presidents Reagan, Bush (41), and Clinton issued apologies as well.

5. The Nineteenth Amendment, which guarantees woman's suffrage, was not ratified until 1920.

MEN, WOMEN, & NEAR BEER

By 1976, when ***Craig v. Boren*** came before the Supreme Court, laws discriminating against women were already being struck down. But this case involved discrimination against men: At issue was an Oklahoma law that allowed 18-year-old women to purchase "near beer" (beer with a 3.2% alcohol content), but required men to be at least 21 years old. A young man challenged the law on equal protection grounds. Oklahoma defended its statute pointing to differences in the drunk driving rates for young males and females. The Supreme Court was not persuaded. It struck down the law, signaling that the equal protection clause protects both genders from unreasonable discrimination. At the same time, it announced a new equal protection test: Instead of evaluating gender claims under the lowest, "rational basis" scrutiny, the Court would now require a higher, "substantial justification" to sustain these laws. (Some argued that gender discrimination should be treated the same as racial discrimination, but the Court disagreed). The intermediate standard means that sometimes gender discrimination is permissible, sometimes not. For example, the Supreme Court refused to invalidate the all-male selective service system in ***Rostker v. Goldberg*** (1981) citing the military's restriction against women in combat. And in ***Michael M. v. Superior Court*** (1981) the Court upheld a statutory rape law that applied only to males. (In this particular case both the male and female were minors). However, since the *Micahel M.* decision, most states have switched to gender-neutral sex laws. Finally, in ***Nguyen v. INS*** (2001), by a narrow 5-4 vote, the Supreme Court upheld a federal law that made it easier for persons born out-of-wedlock overseas to claim American citizenship if their mothers were American than if their fathers were American. On the other hand, the Court frequently invalidates gender discrimination. For example ***United States v. Virginia*** (1996) struck down the Virginia Military Institute's all-male admissions policy. The Supreme Court concluded that the state had failed to provide an "exceedingly persuasive" justification for the admissions policy, and that it was based upon dubious stereotypes.

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