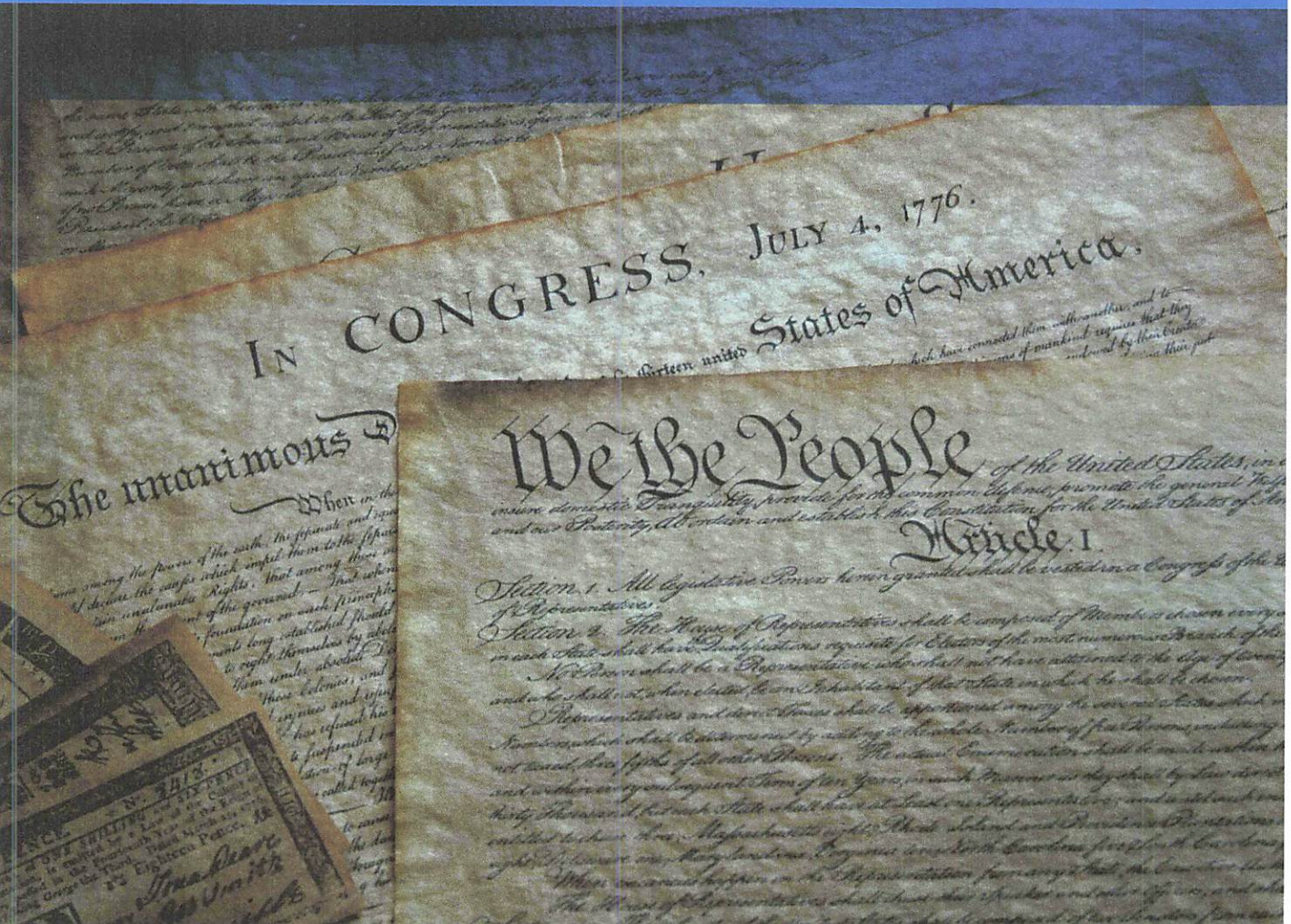
CHAPTER 2

MYTHS & REALITIES

Is the Constitution a living document?

Constitutional Foundations



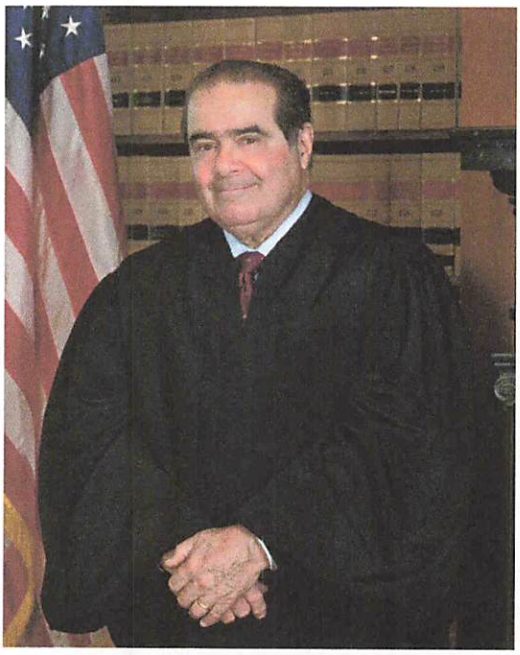
"The Only Good Constitution Is a Dead Constitution"

The death of any well-known public official is a newsworthy event at any time, but the passing of U.S. Supreme Court associate justice Antonin Scalia on February 13, 2016, was especially notable for its immediate impact in what one U.S. senator called an already "toxic" political environment. Suddenly, in the midst of one of the most heated and tumultuous presidential campaigns in history, the issue of filling a vacancy on the nation's highest court (see Chapter 14, on the judicial branch) became a major focus of attention.

Filling a vacancy on the Court required that the president put forward a nominee who would then be subject to scrutiny and a vote of the U.S. Senate. However, within hours of the announcement that the 79-year-old justice had died while on a hunting trip in Texas, the majority leader of the U.S. Senate, Republican Mitch McConnell, announced that his party would not entertain any nominee to fill the vacancy from the current sitting president, Barack Obama; instead, they would wait until after a new president took office in January 2017. In effect, McConnell and his GOP colleagues in the Senate were telling the president not to bother to put forward a nominee. She or he would not even receive a hearing before the Senate Judiciary Committee (part of the usual process), let alone come up for a vote before the full body. President Obama responded a little more than a month later by nominating Merrick Garland, the chief judge of a federal appeals court, as his nominee, and the controversy sparked by Justice Scalia's death was set for months to come.

< The U.S. Constitution is often seen as a framework for our political system, establishing the guidelines and basic principles for government, yet providing enough room for informal and formal changes. Franklin D. Roosevelt called it "the most marvelously elastic compilation of rules of government ever written."

CHAPTER OUTLINE AND FOCUS QUESTIONS



Given his importance as an advocate of constitutional "originalism," the death of U.S. Supreme Court justice Antonin Scalia in February 2016 had significant repercussions on the 2016 presidential race.

But as politically significant as Scalia's death was, many students of constitutional law—that is, the study of what provisions of the Constitution mean when applied to specific cases—would argue that his passing might prove as consequential on a much higher level. During his thirty years on the Supreme Court, Scalia was best known for his acerbic dissents in cases involving issues related to constitutional meaning. Although he was often on the losing side of key decisions, his opinions articulated a particular approach to making sense of the Constitution that was increasingly gaining support throughout the legal profession.[1] At the time of his death, that position—termed **originalism**—had emerged as a major challenge to the view that the 230-year-old document was best understood as a "living constitution" that has endured because it has been adapted over the years to meet the changes and challenges of American society. Originalism challenged this myth of the living constitution by making the case for judges and other public officials to adhere to the meaning and intent of the words used by the Constitution's Framers.[2]

Originalism An approach to interpreting the Constitution that seeks to rely on the original understanding of its provisions by the Framers.

As an originalist, Scalia would argue that "The only good Constitution is a dead Constitution"—one whose meaning was "enduring" and relied on a clear understanding of *what the words of the Constitution meant at the time they were used by the Framers*. For judges or anyone else to impose their own views on those words through laws or legal decisions, Scalia argued, would be an exercise of "unconstitutional" authority. For Scalia, if you want to alter the meaning of the Constitution, do it through the process of amending the document.

In this chapter we will take up the challenge of making sense of the U.S. Constitution by examining both the myth of the living constitution and its alternatives.

An Imperfect Document

> **What were the circumstances surrounding the framing of the Constitution?**

In 1987, along with thousands of other Americans, political historian Sanford Levinson visited an exhibit at Philadelphia's Independence Park that celebrated the two hundredth anniversary of the Constitution. At the end of the exhibit

was a display of the final draft of the Constitution presented to the delegates for their acceptance or rejection on September 17, 1787. At that point, Levinson and other visitors to the exhibit were confronted with a sign that asked visitors: "Will You Sign This Constitution?" Levinson hesitated. As a noted authority on American constitutional history, he knew that many of the delegates to the 1787 convention that drafted the document also hesitated before putting their signatures to the very document that we now venerate; in fact, at least three of those present on that day refused to add their names to what they regarded as a fundamentally flawed document. The Framers of the Constitution, it seems, had their own doubts about this imperfect document and its possible rejection by the states. And, even if it were ratified, several Framers openly wondered whether it would last.[3]

In what ways was the proposed Constitution flawed? The answer depended, of course, on who you were and your expectations of government. If you wanted a democracy in which the voice of the people would be directly and clearly represented in the laws of the land, then you would have found the proposed arrangements difficult to accept. You would have also been disappointed if you believed that every American should have an equal voice in the national legislature. As drafted, in our constitutional system, the voices and influence of some people are intentionally given more weight than those of others.

For example, at the time of the founding, the state of Virginia had ten times the population of Delaware—yet each state would have the same number of votes in the proposed U.S. Senate. Despite changes in how senators are selected (see the Seventeenth Amendment), the Constitution still guarantees each state two seats in the Senate. This means that the 12 percent of the U.S. population that live in California have the same representation—the same voice in the Senate—as the 0.2 percent that reside in Wyoming.

If you favored the abolition of slavery or were opposed to the continuation of the slave trade, you probably would have regarded the proposed Constitution as morally flawed in how it responded to those issues. Those who came from states whose economies depended on the exploitation of slave labor were not pleased with provisions that ended the slave trade in twenty years and would not allow slaves to be counted as whole persons when determining representation in the U.S. House of Representatives. In contrast, those "abolitionists" who identified with the growing antislavery sentiments of the time found those same provisions reprehensible.

In the eyes of those who wanted a stronger national government to deal with the economic problems of the former colonies, the proposed Constitution did not go far enough in clearly establishing the authority of a central government. For those who feared too much power in the newly formed national government, the proposed Constitution seemed to take too much authority away from the states and failed to protect the rights of the people.

Given all these shortcomings, it is little wonder that Levinson—and many of the Framers—was hesitant to endorse that draft. How did such a flawed document get the support of enough delegates attending the convention to be sent forward to the states for ratification? And how was such a controversial and

imperfect arrangement eventually ratified by enough states to become the supreme law of the land? More important, how has such a flawed constitutional system remained an effective foundation for governing the United States for more than 225 years?

The Setting for Constitutional Change

Part of the answer is that the so-called flaws and imperfections we see in the Constitution reflect the fact that the Framers were politicians engaged in a political act that required striking bargains and devising workable compromises. Such a process leaves no one completely satisfied with the result. Thus, we can make sense of the Constitution as a reasonable (albeit flawed) product generated by reasonable individuals engaged in a very challenging political process. But what were the conditions that brought them to Philadelphia, and who exactly were the individuals we venerate as the country's "Founding Fathers?"

The Articles. Why the Framers of the U.S. Constitution undertook the task of constitution writing is not clearly or simply answered. When they met in Philadelphia in May 1787, a constitution was already in place. The **Articles of Confederation** were written in 1777 by the same Continental Congress that had issued the Declaration of Independence one year earlier. It was ratified in 1781—in the midst of rebellion against Britain—as America's first national constitution, as each colonial legislature debated the pros and cons of joining together to form a government where none had existed before. The result was a loose union of states built around a relatively weak national congress.

Articles of Confederation
The first constitution of the United States, ratified in 1781. They established a loose union of states and a congress with limited powers.

The national congress under the Articles consisted of a single body in which each state had one vote. That body could exercise significant powers if it could muster the nine-thirteenths majority that was needed to pass any major legislation. For instance, under the Articles, the congress was empowered to make war and peace, send and receive foreign ambassadors, borrow money and establish a monetary system, build a navy and develop an army in cooperation with the states, fix uniform standards of weights and measures, and even settle disputes among the states. However, it was powerless to levy and collect taxes or duties, and it could not regulate foreign or interstate commerce. No executive was appointed to enforce acts of the congress, and no national court system existed to hear disputes that might arise under the Articles. As for amending the Articles themselves, it would take a unanimous vote of all thirteen member states to make such fundamental changes in the national government.

The 1787 meeting at Philadelphia was convened, in part, because many of the country's political leaders believed that the national government under the Articles lacked the strength to cope with the young republic's problems. For example, by 1787 it was clear to many officials that the national government under the Articles could not conduct an effective foreign policy. Despite the colonists' victory in the American Revolution, the British had not relinquished the

Northwest Territories along the Great Lakes, as they had promised. Furthermore, the Spanish remained a hostile presence in Florida and what was then the Southwest. Encouraged by both Britain and Spain, Native American tribes harassed settlers all along the new nation's frontier.

Even more troubling to many was the Articles' inability to deal with the nation's financial problems. Lacking the power to tax, the national congress had to rely on funds provided by the states. However, its requests for funds from the states were increasingly ignored. The country had accumulated a large public debt during and immediately after the Revolutionary War, and much of it remained unpaid. Because they were not prohibited from doing so under the Articles, some states began to print worthless paper money to pay off their debts, and as a result, spiraling inflation hit the economy.

Economic conditions under the Articles were not good. Within the states, many small farmers faced bankruptcy and the loss of their farms. In western Massachusetts, where the situation was particularly bad, a group of farmers, led by a former Revolutionary War officer, Daniel Shays, disrupted court foreclosure proceedings in September 1786 and several months later tried unsuccessfully to seize a national government arsenal. That incident, known as Shays's Rebellion, convinced some of the country's most politically influential leaders that changes had to be made in America's system of government.[4] Several of those leaders were no doubt motivated by a genuine concern for the future of the young republic. Others, however, were stirred to action by fear and anxiety about their own economic future.

The Framers. We can better understand the Constitution if we know more about the individuals who wrote it and their motivations.[5]

What we know for certain is that the fifty-five people who came to Philadelphia in 1787 were all white males. Women and African Americans, as well as other racial minorities, were excluded. Among their number were merchants, physicians, bankers, planters, and soldiers. More than half of them were trained in law, and more than two-thirds had served in the Continental Congress, which had governed the new nation during the Revolutionary War. That summer they took part in a rare moment of "decisive political creation": They applied their knowledge and experience of government to the design of a new constitution.[6]

At least two individuals who played important roles in the American Revolution and the writing of the Declaration of Independence were not in attendance. Both Thomas Jefferson and John Adams were in Europe at the time, where they were serving as the American ambassadors to France and England, respectively. One individual who played a central role in the convention's work was James Madison. Madison not only engaged in the debates and political bargains that shaped the Constitution but also led the fight for its approval. He played such a significant role that today he is often called the "Father of the Constitution."

The delegates included at least two men of international reputation at the time: George Washington and Benjamin Franklin.[7] Washington, a popular and

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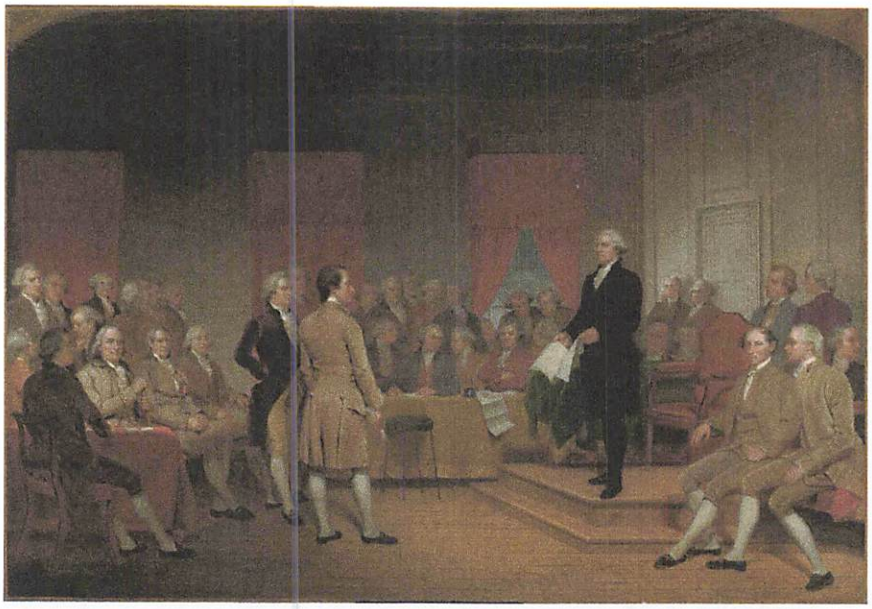


The Constitution was shaped by several compromises reached through the debates at the 1787 convention.

imposing figure, was unanimously elected to chair the meeting. Franklin was well regarded by the other delegates, and many constantly sought his opinions. At eighty-one years of age, however, his physical powers were failing him. He was so ill at times that prisoners from the city jail were assigned the task of carrying him from his home to the nearby sessions. Nevertheless, he was influential in the eventual adoption of the document. During the final days of the convention, he expressed his support by noting that whenever a group of men are gathered to write a constitution, "you inevitably assemble with those men all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views." One can hardly expect, he argued, that any such gathering would produce a "perfect" government. "It therefore astonishes me," he continued, "to find this system approaching so near to perfection as it does. . . . Thus I consent . . . to this Constitution, because I expect no better, and because I am not sure that it is not the best."[8]

The Roots of the Constitution

> **What were the important traditions underlying the Constitution?**

The Framers of the Constitution were hardly as diverse in their "prejudices" and "passions" as Franklin thought. Despite many disagreements and debates over specifics, the Framers shared a common legal and intellectual heritage. In that sense, the roots of the Constitution run deep. To understand the unique circumstances that led to its creation, we must explore the traditions that guided its authors.[9]

The Colonial Heritage

Most British colonies in North America[10] were established under royal charters that allowed settlers to govern themselves in many matters. In several colonies, the settlers modified or supplemented these agreements. For example, the **Mayflower Compact**, which the Pilgrims wrote, set forth several major principles for the Plymouth Colony's government. That agreement and similar ones existing throughout the colonies became part of the colonial heritage that helped shape the Constitution.

Mayflower Compact A document, composed by the Pilgrims, that set forth major principles for the Plymouth Colony's government.

When we think about colonial rule, we often picture an oppressed people who are dominated by foreign rulers. We rarely think of colonial government as a breeding ground for self-government and openness. Yet, from the 1630s until the American Revolution, England let its North American colonies govern themselves, making no major effort to establish a central administration for its growing empire.[11]

Each of the colonies remained primarily a self-governing entity, and by the early 1700s most of them had developed similar governmental structures. A typical colony had three branches of government: (1) a governor appointed by the king, (2) a legislature, and (3) a relatively independent judiciary. Local government consisted of self-governing townships and counties. The future leaders of the American Revolution gained political experience and an understanding of how governments operate through participation in these colonial institutions.[12]

The Intellectual Background

The intellectual atmosphere of the time also influenced the Framers of the Constitution.[13] Raised in a society that took its religion seriously, they grew up with such concepts as equality before God and the integrity of each human life—concepts rooted in their Judeo-Christian religious traditions. The idea of a covenant, or contract, among members of society developed from those traditions, as did the distrust of the monarchy and the perception of a need for a system of laws to protect individual rights.[14]

The Framers were also children of the **Enlightenment**.[15] Usually dated from the 1600s through the 1700s, that period in European intellectual history was dominated by the idea that human reason, not religious tradition, was the primary source of knowledge and wisdom. On issues related to government and politics, a number of writers set the tone for the discussions among the Framers and their peers in the colonies.[16]

Enlightenment The period from the 1600s through the 1700s in European intellectual history. It was dominated by the idea that human reason, not religious tradition, was the primary source of knowledge and wisdom.

Among the most controversial of Enlightenment writers was Thomas Hobbes. In his most famous work, *Leviathan* (1651), Hobbes contended that governments were formed by an agreement among rational individuals who, living without government in a brutish state of nature, realized that it was in their self-interest to subject themselves to an all-powerful ruler. Thus, Hobbes argued that government depended on the consent of the governed. Although he was no advocate of democracy (he wrote in defense of the British monarchy), his views proved helpful in establishing the rational basis of government.[17]

Another British political philosopher, John Locke, was perhaps the most influential of the Enlightenment authors among the colonists. He offered an

explanation of political life that carried Hobbes's argument further by asserting that people possess an inherent right to revolution. In *Two Treatises on Government* (1690), Locke argued that individuals form governments as a matter of convenience to deal with the depraved behavior of some individuals. Thus, a government can continue to exist as long as it proves convenient to its citizens and does not interfere with their pursuit of life, liberty, and property. But, if the government violates this arrangement, the citizens have a right to emigrate or resist. Ultimately, this view sanctions the right of citizens to replace a government that does such things to them.[18]

The work of French aristocrat Charles de Montesquieu clearly influenced the writers of the Constitution. The Framers relied especially on his book *The Spirit of the Laws*, which was first published in Paris in 1748. In that work, Montesquieu argued that the best government is designed in such a way that no person or group can oppress others. This end is best achieved, Montesquieu wrote, by separating the legislative, executive, and judicial functions into three distinct branches of government.[19]

Finally, just as the seeds of the American Revolution were being planted in the 1750s and 1760s, Swiss-born philosopher Jean-Jacques Rousseau published several works arguing for a more extreme version of **popular sovereignty** than that offered by Locke. According to Rousseau, the best form of government is one that reflects the general will of the people, or popular sovereignty, which is the sum total of the interests that all citizens have in common. He was read widely in Europe and had many followers in the American colonies. Among them was Thomas Paine, a British-born American revolutionary whose pamphlets had enormous influence during the American Revolution. His best-known work, *Common Sense* (1776), is among the most often cited of the writings that came out of the American Revolution.[20]

Popular sovereignty The concept, first described by Jean-Jacques Rousseau around the time of the American Revolution, that the best form of government is one that reflects the general will of the people, which is the sum total of those interests that all citizens have in common.

The Onset of Revolution

In the 1760s, British policies toward the North American colonies changed. After nearly 150 years of relative freedom from direct interference from England, some of the colonists found themselves under increasing pressure from London. Britain needed men and resources to fight the French and so began to impose demands and commercial restrictions on the American colonies.

In 1765, the British passed the Stamp Act—the first tax levied directly on the colonists by Parliament. Relying on their view of the rights granted to all British subjects under English law, various colonial leaders protested against this "taxation without representation." The British Parliament repealed the Stamp Act within a few months, but other controversies soon arose. For instance, the British granted and enforced a monopoly on the sale of tea to a British firm, thus interfering with the interests of the colonial merchants who had developed lucrative business trading in that important commodity. In 1773, a group of Boston citizens responded by raiding a ship loaded with tea and dumping its contents overboard. That incident, now known as the Boston Tea Party, caused the British to close Boston Harbor and tighten control over the colonial government in Massachusetts. The events leading to rebellion soon escalated, and by

1774 even some of the previously moderate voices in colonial politics were calling for change.

Representatives from the colonies gathered as the First Continental Congress in Philadelphia in September 1774. After passing resolutions protesting the recent British actions, the delegates set a date for reconvening the next year and adjourned. By the time they met again, as the Second Continental Congress in May 1775, rebellious colonists and British troops had exchanged gunfire at Concord and Lexington.

The Second Continental Congress took a number of steps that officially launched the American Revolution. It organized itself as a provisional government, and in June 1775 it created a continental army, to be headed by George Washington. In May 1776, the congress voted to take the final step of drawing up a statement declaring the colonies free and independent states. Realizing the need to make their case for independence as strong as possible to potential supporters at home and abroad, on July 2, 1776, the congress adopted the **Declaration of Independence** drafted by a committee composed of Thomas Jefferson, John Adams, and Benjamin Franklin. Two days later, the congress formally declared independence.

Declaration of Independence A document declaring the colonies to be free and independent states and also articulating the fundamental principles under which the new nation would be governed, which was adopted by the Second Continental Congress in July 1776.

The Declaration of Independence achieved several objectives. In the short term, it denounced the British for abusing the rights given the colonists under the British constitution and for disrupting the long-standing traditions of self-government. It also proclaimed the intention of the colonial revolutionaries to sever their ties with England and explained the reasons for such drastic action. More important, in the long term, it articulated two fundamental principles under which the newly formed nation should be governed, and these have become central to what is known as the "American creed."

1. The Declaration held that governments have one primary purpose: to secure the "unalienable rights" of their citizens, among which are "life, liberty, and the pursuit of happiness."
2. It stated that governments derive their powers and authority from the "consent of the governed." The signers of the Declaration asserted that when any government violates the rights it was established to secure, "it is the Right of the People to alter or to abolish it" and to create a new government in its place.[21]

What the Framers Did

> **What do the various provisions of the Constitution accomplish?**

As noted earlier, the new government created in the immediate aftermath of the American Revolution—the Articles of Confederation—had developed some significant flaws by 1787, leading to the Philadelphia meeting. Although originally charged with just recommending changes to the Articles, the delegates soon assumed the broader task of constructing an entirely new set of institutions and rules.

To shape a viable national government, the Framers needed to establish its legitimacy and work out its basic structures. Through the Constitution, they created the three branches of government and defined and limited their powers. They also devised formal procedures by which the Constitution itself could be amended.

Establishing Legitimacy

A government cannot be effective unless it possesses power—that is, unless it has the ability to carry out its policies and enforce its laws. Even more important, its citizens must believe that the government has the ability to exercise authority and power (see the discussion in Chapter 1).

The power and authority of any government are enhanced by the willingness of its citizens to obey governmental officials. A government is most effective when its citizens believe that those officials have a right to pass and enforce laws. That is why the establishment of government **legitimacy** is so important. It provides government with the effective authority that it needs if it is to govern.

Legitimacy The belief of citizens in a government's right to pass and enforce laws.

The legitimacy of the U.S. government is rooted in the Preamble to the Constitution. In the beginning of the Preamble, the Framers make clear the source of authority for the republic: "We the People." The choice of words is of extreme importance. The government created under the Articles of Confederation in 1777 was called a "firm league of friendship" among the states. Ultimately, all authority was retained by the states. The Constitution, in contrast, leaves no doubt that the national government's right to exercise authority—its legitimacy—comes directly from the people and not from the states (see Table 2.1).[22]

TABLE 2.1 Comparing America's Two Constitutions

	Articles of Confederation	Constitution of the United States
Establishing legitimacy	Through a "firm league of friendship" among the states	Through "We the People"—all citizens of the nation
Structuring authority	Through a confederacy, with ultimate authority residing in the states Within the national government, in a single body—the congress	Through a federal arrangement, with national and state governments dividing and sharing authority In three distinct branches of government: legislative, executive, and judicial
Describing and distributing powers	A number of foreign and domestic powers listed in Article IX, many limited so as not to interfere with state authority	Delegated and implied powers for national government in Article I Concurrent and reserved powers for states
Limiting powers	Many limitations on national powers, with deference to states	Provision in Article I Bill of Rights
Allowing for change	An amendment process requiring unanimous vote of states No national courts to interpret the meaning of the Articles	An elaborate amendment process requiring significant majorities rather than unanimity Judicial review implied

Structuring Authority

In deciding how to structure the authority of the new government, the Framers of the Constitution faced these two challenges:

1. They had to create a stronger national government while at the same time allowing the states to retain their authority.
2. They had to deal with the issue of how to allocate authority within the national government itself.

Balancing National and State Authority. Under the Articles, ultimate governmental authority rested with the states. Whatever power the national government had was the result of the states' willingness to give up some of their authority to a central government. Such an arrangement is called a **confederation**—hence the title of the Articles.

In considering alternatives, the Framers could have proposed a constitution based on a **unitary system** of government. In a unitary government, the ultimate authority rests with the national government, and whatever powers state or local governments have are given to them by the central government. The Framers would not have had to look far for examples because each of the thirteen states was in fact a unitary government. Although each state contained towns, counties, and boroughs, those local governments exercised only such powers as were granted to them by a charter issued by the state government.

Although they sought to move toward a stronger national government, the Framers realized that their new constitution would not be ratified if it called for a unitary form of government. In the end, they created a hybrid: a mixture of confederation and unitary system that is now called a **federation**. In a federation, the authority of government is shared by both the national and the state governments. In its ideal form, a federal constitution gives the national government exclusive authority over some governmental tasks, while giving the states exclusive authority over other governmental matters.[23] In some areas, the two levels of government share authority. We discuss which areas of government were given to the national government and which to the states later in this chapter as well as in Chapter 3.

Structuring Authority Within the National Government. Having established a national government with authority, the Framers also had to develop structures of authority within the national government so it could exercise its powers. Under the Articles of Confederation, whatever powers the national government possessed were exercised by a single body: the congress. In contrast, the Framers created three branches of government: Congress, the presidency, and the courts.

The basic structure of American government was the result of a series of compromises reached among the delegates to the Constitutional Convention. The delegation from Virginia offered a series of resolutions for the meeting to consider. Under the Virginia Plan, a **bicameral** (two-house) congress would be established, in which each state's representation would be based on its population relative to that of other states. Under the Articles of Confederation, a state could send several representatives to the congress, but each state had only a single vote. The Articles of Confederation also did not provide for a separate

Confederation An arrangement in which ultimate governmental authority is vested in the states that make up the union, with whatever power the national government has being derived from the states' willingness to give up some of their authority to a central government.

Unitary system A form of government in which the ultimate authority rests with the national government, with whatever powers state or local governments have being given to them by the central government.

Federation (federal system) A system in which the authority of government is shared by both national and state governments. In its ideal form, a federal constitution gives the national government exclusive authority over some governmental tasks, while giving the states exclusive authority over other governmental matters; in some areas the two levels of government share authority.

Bicameral Refers to a legislature that is divided into two separate houses, such as the U.S. Congress.

executive or judicial branch of government at the national level; the Virginia Plan called for both.

Delegates from states with larger populations welcomed the provisions of the Virginia Plan. However, some delegates from the smaller states put forward a counterproposal. Known as the New Jersey Plan, it called for strengthening the existing Articles by adding executive and judicial offices. It also increased the powers of the Articles' **unicameral** (one-house) congress, especially its ability to force reluctant states to cooperate with the national government.

Unicameral Refers to a legislature that has only one house.

The delegates voted to reject the New Jersey Plan. However, the discussions about it drew attention to the many delegates who remained uncomfortable with key provisions of the Virginia Plan, especially the question of representation. To avoid a stalemate, the delegates adopted what has become known as the **Great Compromise**. That proposal, offered by the Connecticut delegation (and therefore sometimes called the Connecticut Compromise), led to the structure of the American national government as we know it today. It called for the establishment of a bicameral congress consisting of a house of representatives, in which states would be represented according to their population size, and a senate, in which each state would have an equal voice. Furthermore, the Great Compromise also contained provisions for executive and judicial branches of government. The Great Compromise was just one of many agreements among the Framers to resolve the complex issues that they faced (see Table 2.2). Out of such compromises came major provisions of the Constitution.

Great Compromise The proposal offered by the Connecticut delegation to the Constitutional Convention in 1787. It called for the establishment of a bicameral congress, consisting of a house, in which states were represented according to their population size, and a senate, in which each state had an equal voice.

TABLE 2.2 The Major Compromises

Demands	Compromises	Demands
	GREAT COMPROMISE	
States to have equal representation in Congress (New Jersey Plan)	A bicameral Congress with equal representation in the Senate and population-based representation in the House	States to be represented in Congress on the basis of population (Virginia Plan)
	THREE-FIFTHS COMPROMISE	
Slaves to be counted for representation purposes, but not for taxation purposes	All slaves to be counted as three-fifths of a person for both representation and taxation purposes	Slaves not to be counted for representation purposes, but to be counted for taxation purposes
	COMMERCE/SLAVE TRADE COMPROMISE	
National government not to regulate slave trade or exports	Congress given the power to regulate interstate and foreign commerce but not to impose a tax on exports from any state; Congress not to act on slave trade until 1808	National government to have authority over all interstate and foreign trade
	FEDERALISM	
States to retain their legitimate authority in the governmental system	Division of legitimate authority between the states and national government	An effective national government to be established

The Case of the Electoral College. Of all the compromises developed by the Framers, perhaps none has proved more troublesome—for them as well as for many generations of Americans—than the decision to establish the **Electoral College** as the means for selecting the president and vice president of the United States.

Unlike most of the other issues faced by the Framers, the presidential selection issue did not have two clear sides pitted against each other. It was not a matter of deciding between direct election and indirect election of the president and vice president. Instead, it was a question of how to design a selection system that would fit into the complex arrangements for balancing national and state interests that had already been agreed on, while at the same time making certain that the presidency would not be beholden to either chamber of Congress. The Framers established the special Committee of Eleven to deal with several "postponed matters," including how to select the president. Out of the committee came the basics of the Electoral College proposal. Its flaws became evident in the elections of 1796 and 1800,[24] when it was put through its first real tests and was found wanting. Despite efforts over the decades to change the system, nothing was done to modify its basic structure. Then came the presidential election of 2000, and again the Electoral College compromise of 1787 became a critical issue that drew the attention of Americans for six frantic weeks.[25]

Electoral College The constitutional body designed to select the president. This system is described in Article II of the Constitution.

Distributing and Describing Governmental Powers

Having established a two-level structure of authority in the federal system and having created the three branches within the national government, the Framers next faced the task of dividing up the powers among the various institutions.

Powers in the Federal System. The history and present-day operations of the federal system are discussed in greater detail in Chapter 3. It is important at this juncture to understand how the Framers allocated governmental authority between the national government and the states. The powers given to Congress in Article I are central to the operation of the national government. The article includes a detailed list of these powers, such as the authority to tax, borrow money, regulate interstate commerce, coin money, declare war, and raise and support an army and navy. These and other powers identified in Section 8 of Article I constitute the **delegated powers** of the American national government (see Figure 2.1). Many of these powers—such as the power to coin money and make treaties—are granted exclusively to the national government; that is, they are denied to the states. Other delegated powers, however, are granted to the national government but not denied to the states—for example, the power to assess and collect taxes and the power to define criminal behavior and set punishments. These are called **concurrent powers**.

Article I, Section 8, of the Constitution also provides Congress with the authority "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States." This **necessary and proper clause**, found in paragraph 18 of Section 8, establishes **implied powers** for Congress that go beyond those powers listed elsewhere in the Constitution. In

Delegated powers The powers the Constitution gives to Congress that are specifically listed in the first seventeen clauses in Section 8 of Article I; they are sometimes referred to as "enumerated powers."

Concurrent powers Those powers that the Constitution grants to the national government but does not deny to the states—for example, the power to lay and collect taxes.

Necessary and proper clause The eighteenth clause of Article I, Section 8, of the Constitution, which establishes "implied powers" for Congress that go beyond those powers listed elsewhere in the Constitution.

Implied powers Those powers given to Congress by Article I, Section 8, clause 18, of the Constitution that are not specifically named but are provided for by the necessary and proper clause.

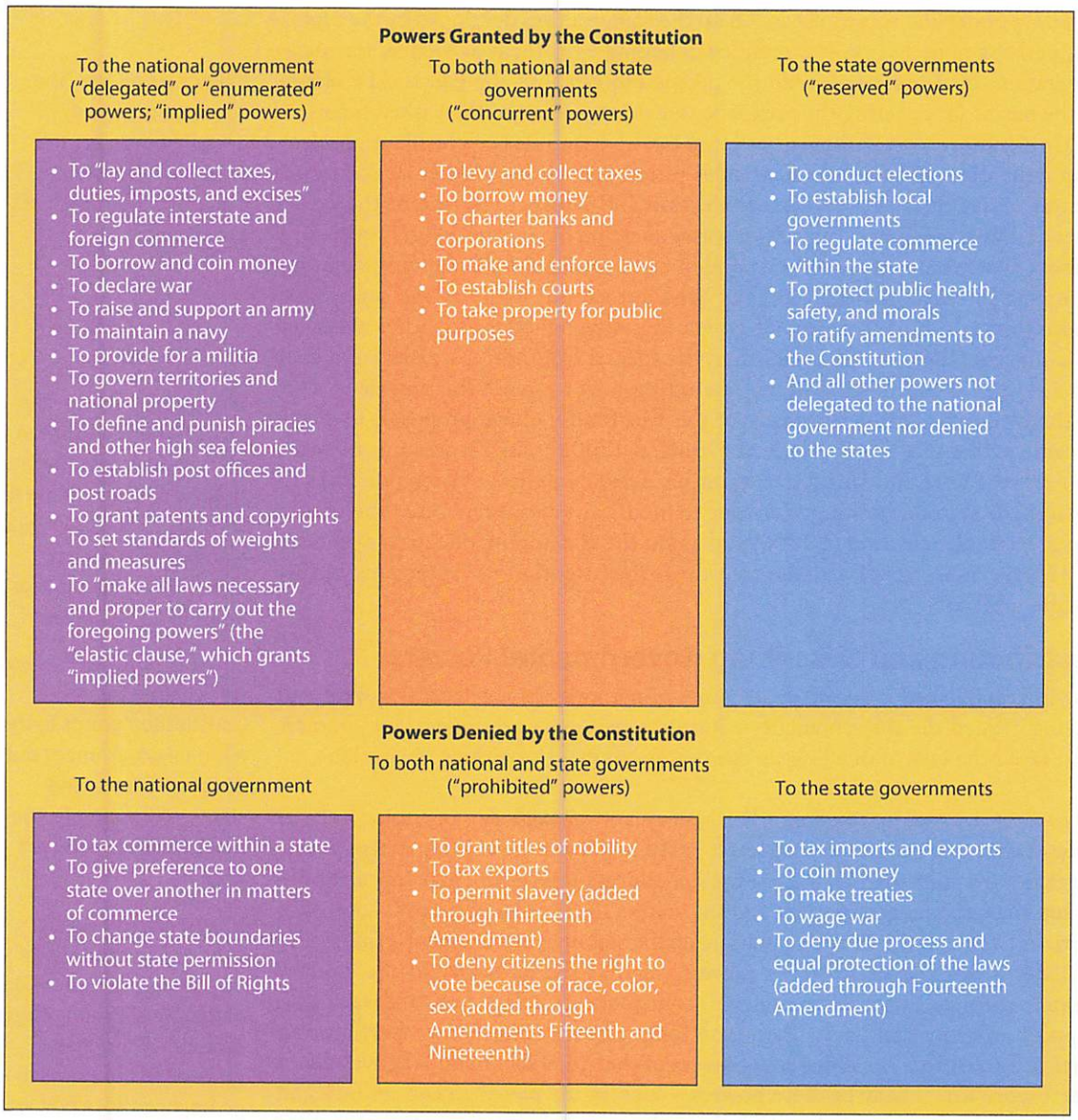


FIGURE 2.1 Constitutional Basis of the Federal System

The top-center box lists powers shared by the two levels of government; the bottom-center box shows powers denied to both. Powers on the upper left belong to the national government exclusively; those on the upper right belong to the states.

McCulloch v. Maryland (1819), the U.S. Supreme Court resolved the issue of the constitutionality of implied powers.

In that case, the Court considered whether Congress had the right to charter a bank of the United States. The national bank was a controversial institution

from the moment it was created by the first Congress, especially in the South and along the young nation's western frontier, where bank policies were blamed for the nation's economic woes. Several states decided to challenge the constitutionality of the bank by imposing a tax on its local branches. When Maryland officials assessed a tax on the bank's Baltimore branch, the head cashier took state officials to court, charging that they did not have the authority to tax an agency of the national government. Maryland countered that the Bank of the United States was not a legally constituted agency of the federal government, because no provision in the Constitution explicitly gives Congress the power to establish a national bank. The bank's lawyers, however, insisted that the power to charter a bank was implied in the constitutional authority to collect taxes, borrow money, and regulate commerce.

The Supreme Court unanimously sided with the national government. "Let the end be legitimate," stated chief justice John Marshall, "let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."[26] In that decision Marshall was agreeing with the national government that by giving Congress the explicit power to regulate commerce, the Framers of the Constitution implicitly granted Congress the right to charter a bank. This broad interpretation of the necessary and proper clause (also called the "elastic clause") altered the position of the states by greatly expanding the potential powers of the national government. The Bank of the United States survived until the 1830s, when opposition by president Andrew Jackson caused it to close. In 1913, Congress once again set up an agency for managing the banking system. That agency, the Federal Reserve System, still regulates the nation's major banks.[27] The right of Congress to establish such an agency is implied in the necessary and proper clause.

The Constitution does not provide a specific list of the powers left to the states. The Framers felt that there was no need for this, because the only powers given to the newly formed national government were those "enumerated" in the body of the Constitution. This approach left to the states the power over "all other objects."[28] This position was made explicit in the Tenth Amendment, which was added to the Constitution in 1791. That amendment declares that "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." Historically, these **reserved powers** have included such responsibilities as providing for public education, building local roads and highways, and regulating trade within a state's borders.

Reserved powers The powers that the Constitution provides for the states, although it does not list them specifically; they are sometimes called "residual powers." As stated in the Tenth Amendment, these include all powers not expressly given to the national government or denied to the states.

Powers Within the National Government. The Framers gave each of the three branches of the national government a distinct part of the functions that any government must perform: (1) pass laws (legislate), (2) enforce those laws (execute), and (3) settle disputes or controversies that arise from application of the laws (adjudicate).

In Article I of the Constitution, the Framers established Congress as the legislative branch (see Chapter 11). It is notable and important that they also chose Article I as the place to locate the delegated powers of the national government.

That placement reflects the Framers' desire to make certain that the representative parts of the national government—the House of Representatives and the Senate—would be the primary fount of authority at the national level.

In contrast, the description of executive power in Article II takes the form of noting what roles the president will play and what duties he will carry out. Chapter 12 describes in greater detail how those roles and duties have expanded since the Constitution was written.

Article III says little more than that the "judicial power of the United States shall be vested in one Supreme Court" and in whatever lower courts Congress establishes. As we discuss in more detail in Chapter 14, the meaning of judicial power was articulated in the landmark case of *Marbury v. Madison* in 1803.

Limiting Governmental Powers. The Constitution also sets limits on the powers of both the national and the state governments. For example, Section 9 of Article I forbids Congress to suspend the privilege of a **writ of habeas corpus** except in times of rebellion or invasion. A writ of habeas corpus is a court order that individuals can seek to protect themselves against arbitrary arrest and detention. By issuing such a writ, a court can order public officials to bring a suspect or detainee before a judge to determine whether he or she is being held on legal grounds. But the fact that the Constitution permits its suspension in time of war ("rebellion or invasion") has made it the focus of debate since the events of September 11, 2001.[29]

Writ of habeas corpus A court order that protects people against arbitrary arrest and detention by requiring officials to bring the "body" (i.e., the person) before the court.

Another provision prohibits the national government from passing a bill of attainder or an ex post facto law. A **bill of attainder** is a legislative act that declares a person guilty of a crime and sets punishment without the benefit of a formal trial. An **ex post facto law** makes an action criminal although it was legal when it was performed.

Bill of attainder A legislative act declaring a person guilty of a crime and setting punishment without the benefit of a formal trial.

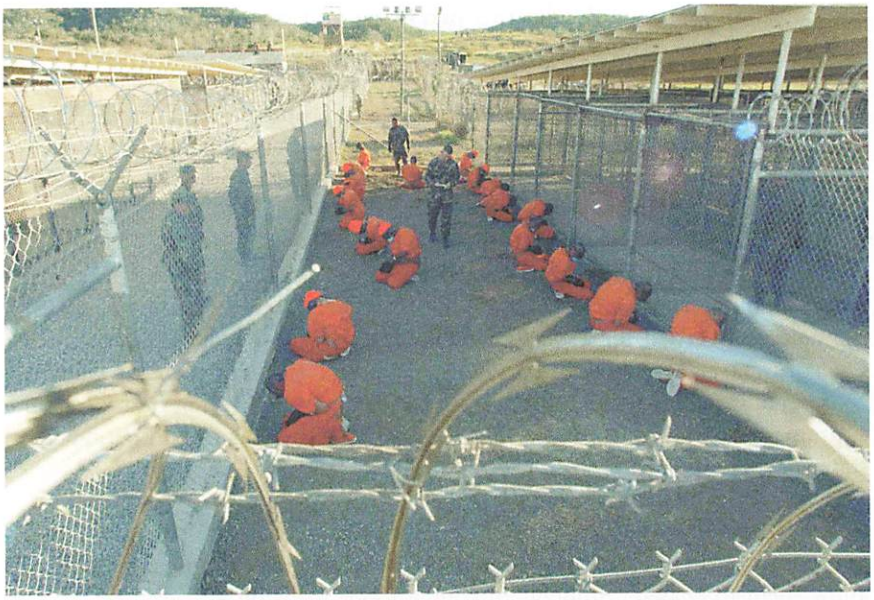
Ex post facto law A law declaring an action criminal even if it was performed before the law making it illegal was passed.

Perhaps the best-known limits on the powers of the national government are provided in the **Bill of Rights**, a term usually applied to the first ten amendments to the Constitution, which were added in 1791 (see Table 2.3). Most of these amendments guarantee the fundamental liberties of citizens. They were appended to the Constitution to satisfy the demands of critics who complained during the ratification process that the original document did not adequately protect individual rights.[30]

Bill of Rights In the United States, the first ten amendments to the Constitution, which collectively guarantee the fundamental liberties of citizens against abuse by the national government.

The Constitution also places limits on the powers and actions of the states. Section 10 of Article I, for instance, contains a list of powers denied to the states. Other sections set limits on the power of the states in relation to one another and to the national government. Article IV, for example, requires that each state give **full faith and credit** to the "Acts, Records, and judicial Proceedings of every other state." Thus, a divorce granted in Nevada must be honored in New York and vice versa. During the 1990s, this provision emerged as a major constitutional issue when several states began to consider liberalizing their laws regarding same-sex marriages, thus raising the question of whether same-sex marriages performed in one state must be honored in all other states under provisions of the full faith and credit clause. But the issue was resolved in a 2015 decision of the U.S. Supreme Court when it declared that all state laws prohibiting same-sex marriages were discriminatory and therefore unconstitutional—and the question of giving full faith and credit to same-sex marriages performed in other states

Full faith and credit The requirement, found in Article IV of the Constitution, that each state respect in all ways the acts, records, and judicial proceedings of the other states.



After 9/11, hundreds of suspected terrorists and "enemy combatants" were held at the U.S. naval base at Guantanamo Bay, Cuba, without any right of habeas corpus. In June 2008, however, the U.S. Supreme Court noted that the remaining detainees had a right to seek a writ of habeas corpus in federal courts. The first detainee petitions were heard on November 6, 2008, and more than half of those filed were granted in the first year after the ruling. After July 2010, all but one of the petitions filed for the remaining detainees were rejected.

was no longer relevant. But a year later, when the Supreme Court of Alabama refused to recognize an adoption decree issued by the state of Georgia to a same-sex couple, the U.S. Supreme Court cited the full faith and credit clause in overruling the Alabama decision.[31]

The Constitution also mandates that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States." For example, before 1984, when the federal government passed legislation that required all states to limit the sale and public possession of alcohol to individuals age twenty-one and older, state laws differed on the minimum age for purchasing

TABLE 2.3 The Bill of Rights Adopted in 1791

Rights Addressed	Amendment
Freedom of expression Personal security	**1.** Freedom of religion, speech, press, assembly, and petition **2.** Right to bear arms **3.** No quartering of troops without consent **4.** Protection against unreasonable searches and seizures
Fair treatment under the law	**5.** Right to presentation of indictment; guarantee against double jeopardy and self-incrimination; guarantee of the due process of law and just compensation **6.** Right to a speedy and public trial **7.** Right to a jury trial in civil cases **8.** Guarantees against excessive bail, fines, and punishments
Reserved rights and powers	**9.** Powers reserved to the people **10.** Powers reserved to the states

Privileges and immunities A provision in Article IV of the Constitution requiring that the citizens of one state not be treated unreasonably by officials of another state.

and consuming alcohol. Under this **privileges and immunities** guarantee, an eighteen-year-old resident of New Jersey, who could not purchase alcohol under that state's laws, could cross over to New York and buy alcoholic beverages without fear of violating the law. New York State could not apply the law differently just because that person was a resident of New Jersey. We take these provisions of the Constitution for granted today, but they were the source of considerable debate and compromise at the convention, as the Framers sought to create a strong national government while maintaining state autonomy.

Another problem the Framers faced was how to ensure that the laws of the national government would take priority over the laws of the states. In the end, the delegates settled for a statement found in Article VI. It declares that the Constitution and all laws and treaties "made in Pursuance thereof" would be considered "the supreme Law of the Land." Commonly referred to as the **supremacy clause**, this provision was to be enforced through both national and state courts.

Supremacy clause A provision in Article VI declaring the Constitution to be the supreme law of the land, taking precedence over state laws.

Allowing for Change

If constitutions are to endure, they must include means and mechanisms that allow them to change. Students of constitutions focus on at least four ways in which constitutions can be changed: revolution, formal amendment, interpretation, and construction.

Revolution. Change through revolutionary action would involve tossing out the current system and replacing it with an entirely new one. Such a revolution does not necessarily have to involve violence, as demonstrated by the Framers when they met in Philadelphia in 1787. They were sent as delegates to a meeting that was to consider changes in the Articles of Confederation, but instead they took the revolutionary initiative of starting with a clean slate.

Amendments. The Framers included an elaborate formal amendment process, but they did not make it easy for those who wanted to change the Constitution. The procedures require action at both the state and the national levels (see Figure 2.2 and Asked & Answered feature, page 56).

Many proposed amendments are introduced in Congress but never come to a vote in either body. Some come to a vote in Congress but fail to get the required two-thirds majority in each chamber. Other proposals are not adopted because they fail to get the required number of states to ratify them. The Constitution has been successfully amended seventeen times since the Bill of Rights (see Table 2.4).[32]

Interpretations and Constructions. Although they made the formal amendment process difficult, the Framers left the door open to changes that might occur by other means.[33] As a document built through many compromises, the Constitution leaves a great deal of room for elaboration.[34] One of the Framers, Alexander Hamilton, stated that a constitution "cannot possibly calculate" the effects of changing conditions and must therefore "consist only of general provisions."[35] Giving meaning to those general provisions can be accomplished through constitutional interpretation and constitutional construction.[36]

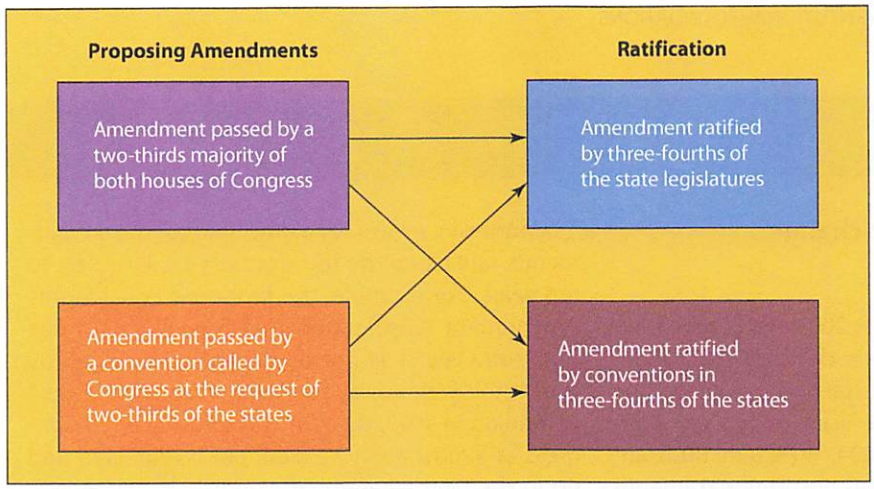


FIGURE 2.2 How the Constitution Can Be Amended The Framers created four methods for amending the Constitution. With the exception of the Twenty-First Amendment, all amendments so far have used the Congress/state legislature route (at top).

TABLE 2.4 Amendments Eleven to Twenty-Seven to the Constitution

Amendment	Year Proposed by Congress	Year Adopted	What It Does
11	1794	1798	Gives states immunity from certain legal actions
12	1803	1804	Changes the selection of the president and vice president through the Electoral College
13	1865	1865	Abolishes slavery
14	1866	1868	Defines citizenship and citizens' rights; provides due process and equal protection of the laws
15	1869	1870	Extends the right to vote to African American males
16	1909	1913	Gives Congress the power to impose an income tax
17	1912	1913	Provides for direct election of U.S. senators
18	1917	1919	Outlaws alcoholic beverages
19	1919	1920	Extends the right to vote to women
20	1932	1933	Changes the dates for the start of congressional and presidential terms
21	1933	1933	Repeals the Eighteenth Amendment
22	1947	1951	Limits presidential tenure in office
23	1960	1961	Extends the right to vote in presidential elections to residents of the District of Columbia
24	1962	1964	Prohibits the use of tax payment (poll tax) as a basis for the eligibility to vote
25	1965	1967	Establishes procedures for presidential succession, for determining presidential disability, and for filling a vacancy in the vice presidency
26	1971	1971	Lowers the voting age to eighteen
27	1789	1992	Limits Congress's ability to change its own compensation

ASKED & ANSWERED

ASKED: So you want to change the Constitution?

ANSWERED: In November 2003, the Supreme Judicial Court of Massachusetts declared that, under that state's constitution, Massachusetts officials are required to offer marriage licenses for same-sex unions. On February 24, 2004, President Bush announced that he supported a constitutional amendment that would define marriage in the United States as a union only between a man and a woman. What would have to happen for such an amendment to become part of the U.S. Constitution?

Formally amending the U.S. Constitution is no easy task, as many advocates of such changes have learned over the years. In one form or another, literally thousands of amendments have been proposed in Congress, but only thirty-three have made it through the congressional part of the process, and thus far only twenty-seven have actually been ratified and have become part of the Constitution. Of that number, twelve were sent out to the states by the first Congress in 1789, and ten of those made it into the Constitution as the Bill of Rights. In short, the odds against changing the Constitution through the amendment process are considerable.

What is that process? Amendments can be formally proposed in two ways: either by members of Congress who submit resolutions to be considered in their respective chambers or by two-thirds of the state legislatures who request that a constitutional convention be convened to consider their proposals (this process has never been used). In the case of a proposal made in Congress, a two-thirds vote of both houses of Congress is required for the proposed amendment to be sent to the states for ratification. Congress decides how the amendment will be ratified: by three-fourths of the legislatures or by ratifying conventions in three-fourths of the states (a method used for only one of the Constitution's twenty-seven amendments—the single exception was the Twenty-First Amendment, which repealed the Eighteenth; see Figure 2.2 on p. 55).

Congress can also set a time limit for the amendment's ratification by the states, typically seven to ten years. For example, the proposed Equal Rights Amendment (ERA) stated that "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Beginning in 1923, the ERA was introduced in Congress at almost every session, but it remained tied up in the legislative process until 1972, when it finally received the approval of both the House and the Senate. As proposed, the ERA needed to be ratified by thirty-eight states by June 30, 1982,* to become an amendment to the Constitution. Thirty-five states had given their approval of the ERA by 1978, but supporters could not muster enough votes in three other state legislatures to pass the proposed amendment. Despite that defeat, the ERA has been reintroduced into Congress at each session since 1983.

But in some cases, no time limit is set. In the case of the Twenty-Seventh Amendment, it took 203 years for it to receive the ratification of enough states to become part of the Constitution. Originally proposed as part of the Bill of Rights in 1789, that amendment set limits on the power of sitting members of Congress to increase their own compensation. Unlike the ERA, the original proposal sent to the states had no set deadline for ratification. By the end of 1791, only six of the ten states needed for adoption at that time had voted to ratify the proposal. The proposal languished until the effort to pass the amendment was revived in the 1980s, when it became the pet project of a political science graduate student at the University of Texas who had stumbled on the proposal. On May 7, 1992, the Michigan legislature formally ratified the amendment, giving it the support of the thirty-eight states required for adoption.

As for the role of the White House in all this, despite President Bush's announced support for the definition-of-marriage amendment, he actually would have had no formal role in the process. Although some presidents in the past have added their

signature to the thirty-three congressional resolutions proposing amendments for ratification, such an action was legally meaningless.

As it turned out, the effort to pass a definition-of-marriage amendment through Congress failed, and in 2013 the Supreme Court decided that federal legislation that attempted to define marriage (the 1996 Defense of Marriage Act) for legal purposes was an unconstitutional.

**The deadline, originally set for 1979, was later extended for thirty-nine months by congressional action.*

Constitutional interpretation involves attempts to discover the meaning of the words used in the different provisions. Consider the phrase "necessary and proper", found in Article I, Section 8. The meaning of that phrase was subject to controversy even among the Framers once they took office. George Washington's secretary of the treasury, Alexander Hamilton, interpreted those words broadly (as an "elastic clause") and pushed for the establishment of the national bank that became so controversial during the early history of the United States. Clearly, the words can be read differently—for example, they can be read as stating that the national government could do only what was absolutely necessary and proper to carry out its functions and no more. As it turned out, in the case of *McCulloch v. Maryland*, discussed earlier in this chapter, the Supreme Court upheld Hamilton's more liberal interpretation.

Constitutional interpretation A process of constitutional change that involves attempts to discover the meaning of the words used in the different provisions of the Constitution as they might apply to specific situations.

Or consider the various interpretations we might give to the term "commerce," which is also found in Article I, Section 8: "The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Early in our constitutional history, the term commerce was strictly defined to mean real goods and services crossing real borders. That narrow view limited the authority of Congress to pass laws regulating such things as the manufacture or quality of goods and services produced within states. Thus, although there was growing public support during the late 1800s and early 1900s for federal laws regarding child labor or the quality of agricultural production, Congress could do nothing. However, as the courts began to define commerce more broadly, the arena for national governmental actions broadened considerably.

This was most clearly demonstrated by passage of the 1964 Civil Rights Act, which included provisions that prohibited racial discrimination in all "public accommodations," such as restaurants and hotels. What made that landmark legislation possible was a broad interpretation of the term commerce so that it applied to any product or activity that was involved in the flow of commerce across state lines. Thus, the fact that a Heinz ketchup bottle manufactured in Pennsylvania sat on the table of an Alabama diner meant that the owners of that diner could not refuse to serve anyone on the basis of race—a blow to the segregationist behavior that was prevalent in the South in those days (see the discussion of civil liberties and civil rights in Chapters 4 and 5).

Constitutional construction involves actions taken by public officials to fill in the institutional "blank spaces" left by the Constitution. For example, the term

Constitutional construction A form of constitutional change that occurs as public officials fill in the institutional "blank spaces" left by the Constitution.

"executive privilege" is applied to a president's assumed right to refuse to provide Congress with information that the White House claims the legislators have no right to see. The privilege was first asserted by George Washington in a disagreement with the House of Representatives over details involving the negotiation of a controversial treaty. President Obama asserted it when attorney general Eric Holder refused to honor a subpoena from a committee for documents related to a failed policy initiative.

Many other constructions play an important role in our constitutional system, from judicial review and the creation of congressional committees to the creation of the U.S. Postal Service and the opening prayer at each daily session of the U.S. House of Representatives. Some of these emerge from custom and practice over time, whereas others are the result of congressional action or executive orders.

The Five Principles

> **What are the major principles of American constitutionalism?**

Having reviewed the various ways the Constitution can and has changed, we need also consider some things that do not seem to change in the living constitution. If there is a point of agreement among those alternative views of the Constitution, it is that, over the years, the Framers' work has been associated with several basic principles that are central to any understanding of the American constitutional system: rule of law, republicanism, separation of powers, checks and balances, and national supremacy.

Principle 1: The Rule of Law

Rule of law The principle that a standard of impartiality, fairness, and equality against which all governmental actions can be evaluated exists. More narrowly, this includes the concept that no individual stands above the law and that rulers, like those they rule, are answerable to the law.

Although the words **rule of law** are never used in the Constitution, this idea is one of the most important legacies of the Framers. As a general concept, the rule of law has its roots deep in Western civilization, but it emerged in its modern form in Europe during the 1600s. According to the rule-of-law concept, there exists "a body of rules and procedures governing human and governmental behavior that have an autonomy and logic of their own." Under such rules and procedures, government and public officials are bound by standards of fairness, impartiality, and equality before the law.[37]

The rule-of-law principle, found in a number of constitutional provisions, implies that those provisions limit the powers of both national and state governments. The Bill of Rights added strength to the rule-of-law principle through the Fifth Amendment by requiring "due process of law" and "just compensation" whenever government initiates adverse actions against a citizen. The "equal protection of the laws" clause in the Fourteenth Amendment is further evidence of how important this principle has been throughout our history.[38]

Another way of thinking about the rule-of-law principle is that in American government, the rulers, like those they rule, are answerable to the law. No individual stands above the law, regardless of that person's background or the office that he or she holds. Just as there are laws that address the behavior of general citizens, so there are laws that focus on the behavior of public officials. Those laws generally set limits on the powers of these officials or prescribe the procedures

they must use in carrying out their duties. Under the rule-of-law principle, those limits and prescriptions must be adhered to if the American constitutional system is to function properly.

No one is exempt from the rule-of-law principle. In August 1974, for example, president Richard M. Nixon resigned in the face of charges that he took part in a criminal cover-up of White House involvement in a break-in at the Democratic Party's national headquarters at the Watergate office complex in Washington, DC. Although Nixon and many of his supporters perceived the Watergate cover-up as a relatively minor offense, the president's attempt to circumvent the law resulted in enough political pressure to bring about the first presidential resignation in American history. Nixon and others learned that no public official, not even the president, stands above the law.

Principle 2: Republicanism

Despite the phrase "We the People," the Framers questioned the ability of the American people to rule themselves directly. In turning to **republicanism**, the Framers created a government in which decisions are made by elected or appointed officials who are ultimately answerable to the people. The Framers opposed establishing a direct democracy because they distrusted human nature and the capacity of ordinary citizens to govern themselves.

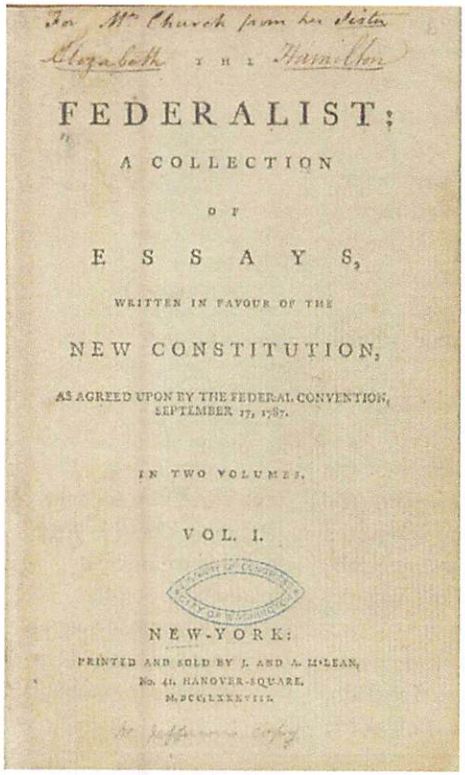
Republicanism A doctrine of government in which decisions are made by elected or appointed officials who are answerable to the people, not directly by the people themselves.

We know something about the Framers' views on democracy thanks to documents such as ***The Federalist Papers***, a series of editorials that James Madison, Alexander Hamilton, and John Jay wrote in 1788 in support of ratification of the Constitution. In "Federalist No. 10," Madison argued that democracies "have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have ever been as short in their lives, as they have been violent in their deaths."[39]

The Federalist Papers A series of editorials written by James Madison, Alexander Hamilton, and John Jay in 1788 to support the ratification of the Constitution in New York State. This collection is now regarded as a major source of information on what the Framers were thinking when they wrote the Constitution.

What did the Framers see in republicanism that they did not see in direct democracy? Again, we turn to "Federalist No. 10," in which Madison argued that the problems of government could be traced to the "mischiefs of faction." He defined a faction as a group that puts its shared interests ahead of the rights of others or the interests of the community as a whole. These self-serving factions can be small or large; they can even include a majority of the people. According to Madison, all factions pose a threat to the general well-being of society. Because the causes of faction are basic to human nature, eliminating them is impossible. Thus, if any government is to serve the general interest of the people, it must be designed so that the potentially destructive power of factions can be eliminated or controlled.[40]

Madison and the Framers favored a republican form of government in which the people had some voice, but that voice was filtered through their representatives. The community was to be governed "by persons holding their offices . . . for a limited time or during good behavior."[41] And although all officials would be answerable to the people, some would be more insulated from public pressure than others. Members of the House of Representatives were to have the most exposure: They alone would be elected directly by the American voters, and they would have comparatively brief terms: two years. Senators and the president were assigned longer terms and, under the original provisions of the Constitution, the


For Mr Church from his friend Elizabeth THE Hamilton

FEDERALIST;

A COLLECTION

OF

ESSAYS,

WRITTEN IN FAVOUR OF THE

NEW CONSTITUTION,

AS AGREED UPON BY THE FEDERAL CONVENTION, SEPTEMBER 17, 1787.

IN TWO VOLUMES.

VOL. I.

NEW-YORK:

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Little is known of what the Framers were thinking as they developed the various provisions of the Constitution. Their ideas became clearer during the ratification debate, when advocates wrote pamphlets and editorials supporting passage. *The Federalist Papers*, among the most often cited of those writings, were authored under the pen name of Publius by James Madison, John Jay, and Alexander Hamilton in their efforts to get New York to ratify.

people did not elect them directly. Instead, state legislators selected senators, and the Electoral College, with members selected by the states, chose the president. These methods were later changed by constitutional amendments and by the action of state legislatures, which effectively left the selection of the electors up to voters (see Chapter 8). Supreme Court judges received additional protection from the whims of constantly changing public opinion: They were given lifetime appointments and could be removed only through the lengthy and difficult process called impeachment (see the discussion later in this chapter).

Although the Framers felt impelled to take these precautions, they never lost sight of the basic principle of republicanism: that the ultimate responsibility of government officials is to the American public.

Principle 3: Separation of Powers

The principle of the **separation of powers** is also linked to the effort to control factions. By splitting governmental authority among several branches of government and giving each an area of primary responsibility, the Framers sought to minimize the possibility that one faction could gain control. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands," states Madison in "Federalist No. 51," "may justly be pronounced the very definition of tyranny."[42] Thus, to help avoid tyranny, the power to make, to execute, and to judge the law was divided among the three branches: Congress, the presidency, and the courts.

This principle was an important one for the Framers, who debated for many hours about the design of the national government. The idea was to distribute powers among the three branches, not to increase the efficiency of the government but to prevent efficiency, which they regarded as potentially dangerous.[43] Each branch was to be independent of the others when exercising its governmental authority. In this way, the American public would be protected against the tyranny that Madison and others so feared.

The Framers reinforced this principle in several ways beyond just giving each institution a distinct role in government. The Constitution makes certain that those holding a position in one branch will not serve in either of the other branches at the same time. Over the years, this prohibition has been both tightened and loosened in practice. During the 1960s, for example, Supreme Court associate justice Abe Fortas withdrew from his nomination to be chief justice after it was revealed that he had provided advice to his old friend Lyndon Johnson and that he had sat in on political meetings at the Johnson White House.[44] Then again, members of Congress have been allowed to serve as reserve officers in the U.S. military—a situation that places them under the command of the president while they are in uniform.[45]

Separation of powers The division of the powers to make, execute, and judge the law among the three branches of American government: Congress, the presidency, and the courts. This principle was adopted by the Framers to prevent tyranny and factionalism in the government.

The separation of powers was also reinforced by the Framers through the different constituencies and term lengths assigned to the various branches of the national government. On the one hand, the eligible voters of the respective

districts, for example, directly elect members of the House of Representatives every two years. U.S. senators, on the other hand, were originally selected by the legislatures of their states for six-year terms, implying strongly that they represented the interests of the state governments that sent them to Washington. The design of the Electoral College, which was to select the president (see the discussion earlier in this chapter and that in Chapter 8), was intended to guarantee that the winner would regard the entire nation as his constituency during a four-year term in office. Along with the lifetime appointment, the elaborate process set up for naming federal court judges—nomination by the president and confirmation by the Senate—was intended to guarantee that those positions were filled by people who were more accountable to the law than to shifting political moods.

Principle 4: Checks and Balances

Although separation of powers provides independent roles for Congress, the presidency, and the courts, the principle of **checks and balances** forces them to work together. By giving each institution the capability of counterbalancing the authority of the other branches, the Constitution makes these institutions interdependent.

Checks and balances The principle that lets the executive, legislative, and judicial branches share some responsibilities and gives each branch some control over the others' activities. The major support for checks and balances comes from the Constitution's distribution of shared powers.

The Veto. The key element in the system of checks and balances is the distribution of shared powers among the three branches of government. Each branch depends on the others to accomplish its objectives, but each also acts as a counterweight to the others (see Figure 2.3). The president's power to **veto**, or reject, legislation checks the legislative actions of Congress. The veto, in turn, can be overridden by a two-thirds vote of both chambers of Congress.

Although the veto can be a powerful presidential tool, some critics have complained that it is of limited value because it leaves the president with no alternative but to either sign or veto an entire bill. The president has had no option for dealing with a specific provision of a bill that he finds troublesome. Many state constitutions give their governors line-item veto power, which permits them to strike out a particular clause of a bill that comes before them. In 1995, Congress passed a limited version of a presidential line-item veto, but in June 1998 the U.S. Supreme Court declared the act unconstitutional.

Veto The president's power to reject legislation passed by Congress. Vetoes can be overruled by a two-thirds vote of both chambers of Congress.

Congressional Authorization. Congress can restrict presidential power in a variety of other ways. Beyond the powers granted to the president in the Constitution, presidents must have **congressional authorization** to undertake any official course of action. In recent decades, however, Congress has often allowed the White House considerable flexibility in many areas, and presidents have used their "executive" control over government agencies (see Chapters 12 and 13) to counter congressional constraints.

Congressional authorization The power of Congress to provide the president with the right to carry out legislated policies.

Confirmation and Ratification. The Senate may also check the president's power by using its right to confirm or reject presidential nominees for judicial and executive positions. Although the Senate rarely says no during these **confirmation** procedures, many such nominations have been withdrawn (or have never been submitted) because they were unlikely to get the necessary votes. The process can become very contentious, however. As noted earlier, when President Obama nominated Merrick Garland to replace Justice Scalia in March 2016, the Republican

Confirmation The power of the U.S. Senate to approve or disapprove a presidential nominee for an executive or judicial post.

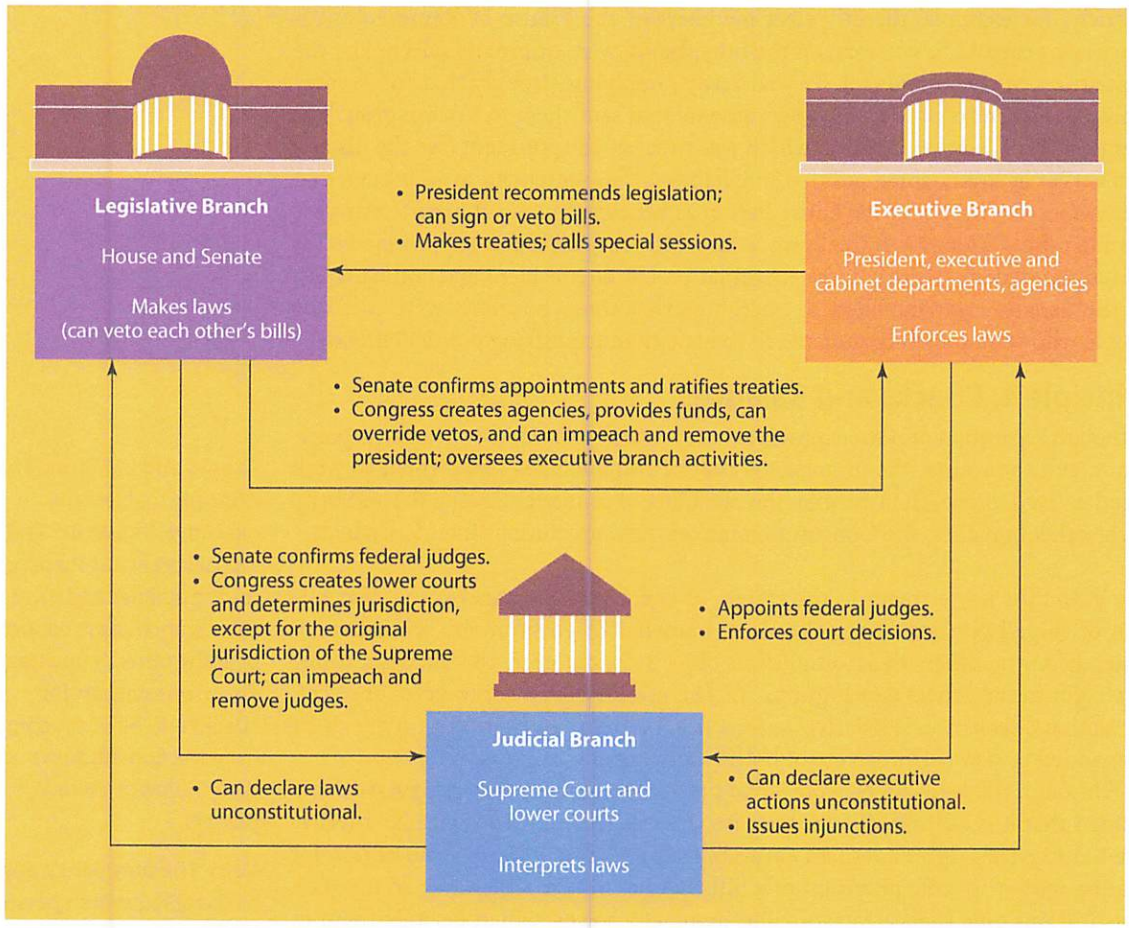

FIGURE 2.3 Separation of Powers and Checks and Balances

Under separation of powers, governmental authority is divided among the three branches: Congress exercises the power to make laws; the president exercises the power to execute laws; and the courts have the power to judge disputes that arise under the laws. A system of checks and balances provides each branch with a means to counterbalance the authority of the other two, thus making the three branches interdependent.

majority in the Senate took the unprecedented stand that it would not give consideration to any nomination until after the presidential elections later that year.[46]

Treaty ratification The power of the U.S. Senate to approve or disapprove formal treaties negotiated by the president on behalf of the nation.

The Senate also has the authority to approve or disapprove treaties through its **treaty ratification** powers. Although a president may negotiate and tentatively commit the United States to a formal treaty agreement with another country (e.g., Mexico, Japan) or international actor (e.g., the European Union), he or she is required to seek the advice and consent of the Senate in the form of a two-thirds vote. Although it may seem that this would involve an "up or down" vote on the submitted treaty, the Senate has often used the ratification process to inject "reservations" into provisions that in some cases can significantly alter the meaning and implementation of the treaty. Much depends on the subject of the treaty

(Is it an arms control agreement? A trade pact?) and whether some influential member of the Senate has a special interest in some of the treaty's provisions.[47]

Appropriations. The control of the public sector's purse strings by Congress is another powerful check on presidential power. Although the president recommends a budget for Congress to consider each year, the actual decision about how much to appropriate to agencies and programs is in the hands of the House and the Senate (see Chapter 11, on Congress).

The budget and appropriations process that has developed over the years has become slow and arduous, and as a result some agencies constantly face a "funding gap" that can lead to temporary shutdowns. Increasingly, Congress has had to pass "continuing resolutions" which allow programs to spend at last year's level until Congress completes the process. Proposals to reform the basic process have been generated by both liberals and conservatives.[48]

In recent years this process has also been a contentious one because the deep partisan divide that characterized the congressional–presidential relationship during the Obama years has led to a growing number of threatened and actual government shutdowns. Most shutdowns are temporary and technical, typically affecting a specific agency or programs that for some reason had not been funded. Other shutdowns are driven by political differences, and those typically end with short-term compromises over government spending that last until the next budget year.

Impeachment. The ultimate restraint on presidential (and also judicial) authority, however, resides in the power of Congress to remove a president or other public official from office. **Impeachment** is based on Article II, Section 4, of the Constitution, which holds that "the President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Such removals involve two steps:

1. The House of Representatives votes articles of impeachment, or formal charges, against the official.
2. Once impeached, the official is tried by the U.S. Senate. If found guilty by a vote of the Senate, the official is removed from his or her position.

The impeachment process has only been applied twice to sitting presidents—Andrew Johnson in 1868 and Bill Clinton in 1998. In both instances the Senate found them not guilty and they filled out the remainder of their terms.

Judicial Review. The most significant check that the courts have is found in their power of **judicial review**, by which they can declare acts of Congress to be in conflict with the Constitution. Although not explicitly provided for in the Constitution, the power of judicial review was established in the case of *Marbury v. Madison* (1803). (See the discussion of this concept in Chapter 14.) The power of Congress over the courts derives in part from its constitutional authority to create or abolish any court other than the Supreme Court. Congress can also impeach and remove judges.

Impeachment A formal charge of misconduct brought against a federal public official by the House of Representatives. If found guilty of the charge by the Senate, the official is removed from office.

Judicial review The power assumed by the courts in *Marbury v. Madison* to declare acts of Congress to be in conflict with the Constitution. This power makes the courts part of the system of checks and balances.

With then Chief Justice Rehnquist presiding, the U.S. Senate conducted an impeachment trial of President Clinton in 1999.

Office Terms. The principle of checks and balances is strengthened by the different methods of selecting officials, which the Framers believed would ensure that the different branches represented different public perspectives. Variations in terms of office were intended to add a further check. For example, senators, responding from the perspective of their six-year terms in office, were expected to act in a more measured and conservative way than their peers in the House, who have only two-year terms.

In setting up the elaborate system of checks and balances, the Framers pitted the three branches of government against one another. This has resulted in a slow and ponderous system that often frustrates officials who are trying to deal quickly with critical issues. Too-rapid decision making, however, was exactly what the Framers feared. More often than many of us like, the system works the way they planned it to: deliberately and with care.

Principle 5: National Supremacy

Earlier we pointed out that the U.S. Constitution provides for a federal system in which national and state governments divide the authority of American government. Such a complex arrangement can work only if there is some principle that helps government officials settle fundamental disagreements among the different levels of government. If such a principle did not exist, then "the authority of the whole society" would be "everywhere subordinate to the authority of the parts." That, argued Madison, would have created a "monster" in which the head was under the control of its member parts.[49]

National supremacy The principle—stated in Article VI, the "supremacy clause"—that makes the Constitution and those laws and treaties passed under it the "supreme Law of the Land."

In the American constitutional system, that principle is **national supremacy**. As noted earlier in this chapter, the supremacy clause of Article VI of the Constitution makes the Constitution and those laws and treaties passed under it the "supreme Law of the Land." As you will see in Chapter 3, which discusses

federalism and intergovernmental relations, that principle has been a central factor in the evolution of the American federal system. It is impossible to understand the operations of American government today without grasping the meaning of federalism and the role of the national supremacy principle in American government.

The Case for—and Against—the "Living Constitution"

There is little controversy over the assertion that the Framers fulfilled their obligations as constitution makers. They provided a foundation for the American constitutional system through the establishment of "We the People" as a source of constitutional legitimacy, and they put into place the basic structures necessary to make, enforce, and adjudicate laws. Just as important, they established an elaborate system of power that distributed the functions of governing among different branches and levels of government, while addressing the need to limit those powers or their abusive exercise. Moreover, they allowed for both formal and non-formal (e.g., through constitutional interpretation and construction) means of bringing about constitutional changes that gave the system a chance of surviving over the long haul.

Whether the Framers succeeded in establishing a constitutional system that would survive over time is an important question. Initially, this question took the form of asking whether the Framers had built governmental machinery that would operate effectively in the relatively homogeneous and stable environment that characterized pre–Civil War America. Eventually, the question became whether the Framers' handiwork would prove to be adaptable to the tumult and demands that characterized the industrialized and urbanized America that emerged in the late 1800s. As noted earlier, the myth of the living constitution was part of the response to that concern.

Those who adhere to the myth of the living constitution credit the Framers with creating more than just the machinery of government. In their view, the Framers also created a constitutional system that is endowed with the capacity to withstand all kinds of adverse conditions and challenges, including changing technologies, public values, and mores.

As noted at the outset of this chapter, those who adhere to the "originalist" perspective favored by Justice Scalia argue that the myth of the living constitution is not necessarily a good thing and that today's constitutional system has become subject to some questionable interpretations that threaten to undermine the foundations of our constitutional system. They argue that we have paid too great a price for the changes brought about through the living-constitution approach. For them, the value of the Framers' Constitution lies not in its capacity to adapt but in its ability to provide a firm foundation on which problems can be solved and controversies resolved. In advocating for viewing the Constitution as a foundational document that ought not be tampered with, Scalia and his colleagues are essentially creating a counter myth—the *myth of the enduring constitution*. The Constitution "means today not what current society and much less the Court thinks it ought to mean, but what it meant when it was adopted."[50]

Although originalism and the living constitution perspectives are central to the current debate over the meaning of the Constitution, they are not the only views on this important question. A third and more critical approach argues that the so-called living constitution has not adapted well to the demands of modern times and the changing values of the American people. For individuals with this view, the Framers' Constitution continues to reflect the antidemocratic biases and fears of its authors; it was established to limit change rather than promote adaptation to changing conditions.[51] From this perspective, the Constitution is a political document that has been used to promote the interests of those in power, and it is only through major political movements that relevant constitutional changes can be made.[52]

Still another view is represented by an approach best articulated by justice Hugo Black, who served on the Supreme Court from 1937 to 1971. Black took a position that can be described as *simple textualism*.[53] According to this approach, the meaning of the Constitution should be derived literally from a "plain reading" of the words used in the document. There was no need to try to uncover what the Framers meant or intended by the words, he would argue. Just take the words themselves for guidance. If the First Amendment states that "Congress shall make no law," then the Court should follow those words literally. At the same time, if the Constitution does not mention the term "privacy," then the Court should avoid implying that there is a right to privacy.

Others, such as Associate Justice Stephen Breyer, take a more pragmatic approach to making sense of what the Constitution means. For Breyer, the Framers established two principles regarding liberty in the Constitution. The first was "negative liberty," a principle that sets limits on the ability of government to interfere with our basic freedoms. The second principle was that of "active liberty," whereby the Constitution favors policies that result from democratic participation and civic engagement. After many years as a Supreme Court justice, Breyer regards those two rules as guiding principles for making sense of the Constitution when he is called on to decide important cases.[54]

The lesson to be drawn from this discussion is that making sense of the U.S. Constitution is not easy, and that even some of the nation's leading legal minds have taken different paths when trying to understand the country's foundational document and how it is to be applied. The myth of the living Constitution is just one among several such paths.

Conclusion

Americans have developed a complex relationship with the Constitution in their efforts to make sense of the gap between their urge for democracy and the undemocratic provisions of that document. In public opinion polls and in other forums, Americans continue to express a reverential pride in our constitutional system, and few advocate radical changes in the structure of government established by the Constitution. For most, in fact, the document represents the American people as a nation.[55]

In an important sense, what many (perhaps most) Americans have developed over the years is what Sanford Levinson has called "constitutional faith"—that is, a "wholehearted attachment to the Constitution as the center of one's (and ultimately the nation's) political life."[56] As an act of faith, this attachment does not

need to be justified with clear reasons linked to some benefits gained from it, nor can it be easily undermined by the expressed dissatisfactions with the inequalities and injustices that sometimes result from the constitutional exercise of authority. That is why sense-making myths play such a significant role in how we relate to the American constitutional system.

For many Americans, believing in a living constitution not only helps us understand how a document written more than two centuries ago is able to operate as well as it does today but also allows us to have some faith in the system's ability to deal with the uncertainties of the future. Nevertheless, it would be a mistake to give in to blind faith; this is one reason why there are powerful and credible alternatives to the myth of the living constitution. Those who see the fundamental principles of the Framers as an enduring anchor believe in a constitution that provides for sound and time-tested guidance in an era of constant turmoil and change. Their constitutional faith is not weaker; it is just based on a different myth. The same can be said of those whose constitutional faith is based on the hope that through open political deliberation, the system's rules can be used to make American government more democratic and more just in the future.

Key Terms

Articles of Confederation p. 40
Bicameral p. 47
Bill of attainder p. 52
Bill of Rights p. 52
Checks and balances p. 61
Concurrent powers p. 49
Confederation p. 47
Confirmation p. 61
Congressional authorization p. 61
Constitutional construction p. 57
Constitutional interpretation p. 57
Declaration of Independence p. 45
Delegated powers p. 49
Electoral College p. 49
Enlightenment p. 43
Ex post facto law p. 52
The Federalist Papers p. 59
Federation (federal system) p. 47
Full faith and credit p. 52
Great Compromise p. 48
Impeachment p. 63
Implied powers p. 49
Judicial review p. 63
Legitimacy p. 46
Mayflower Compact p. 43
National supremacy p. 64
Necessary and proper clause p. 49
Originalism p. 38
Popular sovereignty p. 44
Privileges and immunities p. 54
Republicanism p. 59
Reserved powers p. 51
Rule of law p. 58
Separation of powers p. 60
Supremacy clause p. 54
Treaty ratification p. 62
Unicameral p. 48
Unitary system p. 47
Veto p. 61
Writ of habeas corpus p. 52

Focus Questions Review

1. **What were the circumstances surrounding the framing of the Constitution? > > >**
   The Framers of the Constitution came together to solve fundamental problems that had arisen under the Articles of Confederation.

2. **What were the important traditions underlying the Constitution? > > >**
   The roots of the Constitution can be found in the British legal tradition, including the principles that government officials, as well as ordinary citizens, must obey the law and that there exists a higher (constitutional) standard against which laws made by legislatures can be measured. The colonial experience of self-government and the political philosophy of the Enlightenment espoused by such writers as Hobbes and Locke also helped guide the Constitution's Framers.

3. **What do the various provisions of the Constitution accomplish?** > > >
   The Constitution's Framers accomplished a number of purposes, including the following:
   - Establishing the legitimacy of the government of the United States as coming directly from the people;
   - Dividing authority within the new national government among the legislative, executive, and judicial branches of government;
   - Describing the delegated and implied powers of the national government;
   - At the same time, setting limits on both national and state power; and
   - Specifying the rules for amending the Constitution.

4. **What are the major principles of American constitutionalism?** > > >
   The Framers established in the Constitution the fundamental principles of American government: the rule of law, republicanism, the separation of powers, the system of checks and balances, and national supremacy.

   From the perspective of the myth of the living constitution, those principles have been the primary means by which the Framers' handiwork has been adapted to deal with the challenges of today's world.

   Alternatively, those principles can be regarded as enduring precepts of the Framers that should be used to guide government officials in turbulent times or as the basic rules through which the constitutional system can be made to serve the political urge for greater fairness and justice and enhanced democratic participation.

5. **What are the different approaches that can be applied to making sense of the Constitution?** > > >
   In recent years, the "living constitution" metaphor has dominated thinking about our constitutional system, but that thinking has been challenged by Justice Scalia's "originalism" approach that stressed the "enduring" principles established at the time of the Constitution's framing. Alternative perspectives, such as simple textualism, attributed to justice Hugo Black, have also played a role in how we make sense of our elaborate system of government.

Review Questions

1. **"Many of today's politicians believe 'compromise' is a dirty word. What they fail to realize is that our constitutional system was founded on the willingness of the Framers to compromise." Explain this statement in light of what you have learned about the foundations of the American Constitution. Do you agree or disagree with the opinion? Why or why not?**
2. **"The U.S. Constitution was a reflection of its times, but times change and so should our Constitution." Many Americans would agree with this statement. There can be little doubt that our constitutional system has changed over time through a process of amendment and adaptation. But has it changed enough? Is our constitutional system appropriate to deal with the demands of the twenty-first century? Do we need to consider calling a new constitutional convention to "reconstitute" our constitutional system?**

For more information and access to study materials, visit the book's companion website at www.oup.com/us/gitelson.