CHAPTER 1

The Constitution of the United States

In This Chapter

- ★ What Is a Constitution?
- ★ The Road to Nationhood
- ★ The Making of the Constitution
- ★ Features of the Constitution
- ★ Judicial Review Comes to the Supreme Court

constitutionalism
The belief in limiting governmental power by a written charter

Chapter Objectives

The politics of a nation is given a special cast by the kind of government it has as well as by the values of its citizens. This country is no exception. The Constitution and the institutions that document summoned into being have shaped American politics mightily.

This chapter reviews the purposes of a constitution and traces the origins of our Constitution from the Revolutionary War and the first experiment with a national government under the Articles of Confederation. Attention to the Philadelphia Convention of 1787 sheds light on what the framers of the Constitution wanted to avoid as well as what they wanted to achieve. Did they want to establish a democracy? What was the significance of dividing governmental authority among legislative, executive, and judicial branches? What is the unique relationship between the Supreme Court and the Constitution? How can a piece of parchment from the eighteenth century fit American needs in the twenty-first century?

Exploring such questions is essential to understanding American government today, particularly when one considers that the Constitution of the United States is the oldest written national charter still in force.

What Is a Constitution?

"What is a constitution?" asked Supreme Court Justice William Paterson (1793–1806) two centuries ago. "It is," he answered, "the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established." Like Paterson and his contemporaries, most Americans embrace **constitutionalism:** the belief in limiting governmental power.

constitutionalism
The belief in limiting governmental power by a written charter

Constitutionalism

Constitutionalism has long been important in American politics. Each of the fifty states has a constitution. In January 2013, President Barack Obama, like all his predecessors back to George Washington (1789–1797), took an oath to "preserve, protect, and defend" the Constitution. Constitutionalism has also been contagious. Almost every country on earth has a constitution, but constitutions take different forms in different lands. Most, like the United States Constitution, are single documents, usually with amendments. A few, like the British Constitution, are made up of a series of documents and scattered major acts of Parliament (the British lawmaking body) that time and custom have endowed with paramount authority.

American-style or British-style, a constitution is more than pieces of paper. It is a living thing that embodies much more than mere words can convey—it embodies intangibles that enable it to work and to survive. Moreover, it provides clues to the political ideas that are dominant in a nation. The United States Constitution, for example, includes a cluster of values in its Preamble: "to form a more perfect *Union,* establish *Justice,* insure domestic *Tranquility,* provide for the common *defense,* promote the general *Welfare,* and secure the Blessings of *Liberty."*

Constitutional Functions

Constitutions matter because of what they do (or do not do) and what they are. First, a constitution *outlines the organization of government.* The outline may be long or short, detailed or sketchy, but it answers key questions about the design of a government. Are executive duties performed by a monarch, prime minister, president, or ruling committee? Who makes the laws? A constitution, however, will probably not answer all the structural questions about a political system. The American Constitution, for instance, makes no mention of political parties; yet a picture of American politics without them would be woefully incomplete. Thus, knowledge of a constitution may be a good starting place for a student of politics, but it is hardly the finishing point.

Second, a constitution *grants power.* Governments exist to do things; and under the idea of constitutionalism, governments need authority to act. For example, Article I of the Constitution (reprinted in the Appendix) contains a long list of topics on which Congress may legislate, from punishing counterfeiters and regulating commerce "among the several States" to declaring war.

Grants of power imply limits on power. This is the principle of constitutional government in America: Rulers are bound by the ruled to the terms of a written charter. Thus, a constitution can also be a *mainstay of rights.* Constitutions commonly include a bill of rights or a declaration of personal freedoms that lists some of the things that governments may not do and proclaims certain liberties to be so valued that a society enshrines them in fundamental law.

Finally, a constitution may serve as a *symbol of the nation,* a repository of political values. When this happens, a constitution becomes more than the sum of its parts. More than a document that organizes, authorizes, and limits, it becomes an object of veneration. Americans have probably carried constitution veneration further than people of any other nation. Such emphasis on the Constitution has had an impact on the political system that can hardly be exaggerated. Frequently, people debate policy questions, not just in terms of whether something is good or bad, wise or foolish, but whether it is *constitutional.* Debate may rage over the meaning of the Constitution, but contending forces accept the document as the fundamental law of the land. One group might argue that the Constitution bans state-sponsored prayer in public schools, for example, while another might argue just as vehemently that the Constitution permits it.

The Road to Nationhood

In order to develop a better understanding of how America came to such a relationship with its Constitution, it is important to first understand the origins of that document. American government does not begin with the current Constitution. Prior to 1787, there

were many years of British rule, followed by the turbulence of revolution and a period of government using our first constitution, the Articles of Confederation.

The Declaration of Independence: The Idea of Consent

colony
A territory under the direct control of a parent state

England first began developing **colonies** in North America in the early 1600s. By the mid-1700s, many British colonies had been established, thirteen of which were geographically contiguous along the eastern seaboard. While the colonies were profitable for Britain, there were also associated costs, such as defending British territory claims against Native American tribes and the claims of other European countries. At least thirteen years before the revolution, British leaders in London attempted to bring the American colonies under more direct control. Among other things, they wanted the colonials to pay a larger share of defense expenses and developed a series of tax and military policies to that end. These policies, however, ran head-on into colonial self-interest, revolutionary ideas, and a feeling of a new identity—an American identity as opposed to a purely British one. A series of events between 1763 and 1776 encouraged organized resistance to British authority and culminated in independence. Politics and reasoned debate within the British Empire soon gave way to armed revolt against it. Near the end of this period, colonial political leaders, meeting as the Second Continental Congress, considered a resolution moved by Richard Henry Lee of Virginia on June 7, 1776: "Resolved, that these United Colonies are, and of right ought to be, free and independent states." A declaration embodying the spirit of Lee's resolution and largely reflecting Thomas Jefferson's handiwork soon emerged from committee. Twelve states (New York abstaining) accepted it on July 2, with approval by all thirteen coming on July 4.

This is a depiction of the signing of the Declaration of Independence as seen on the backside of a two dollar bill. *(iStockphoto)*

At one level, the Declaration of Independence (reprinted in the Appendix) itemized and publicized the colonists' grievances against British rule, personified in King George III. The revolutionists felt obliged to justify what they had done. Reprinted in newspapers up and down the land, the document was one the revolutionists hoped might, with luck, rally support at home and abroad to the cause of independence, especially for the military conflict under way. There was, after all, no unanimity within the colonies in 1776 on the wisdom of declaring independence. Loyalists

were an active and hostile minority. Even among those who favored the break with England, some opposed fighting a war. Others were plainly indifferent.

In its goal of making the cause seem just and worth great sacrifice, the Declaration at another level said much about political thinking at the time. The authors of the Declaration were steeped in the thinking of English and Scottish natural rights philosophers, such as **John Locke,** who were trying to find a new source of legitimacy for political authority. Formerly, justification of authority stemmed from the belief that governments were ordained by God. Consequently, rulers governed on the basis of a covenant with the Deity, which implied limits to a power, or on the basis of "divine right," which did not. If government was to have a secular basis, however, rulers could govern only by consent—not as an agent of God, but as an agent of the people.

John Locke
English political philosopher whose ideas about political legitimacy influenced the American founders

American leaders were also aware of precedents for rebellion in British history. Tensions between the Crown and Parliament had climaxed in the Glorious Revolution of 1688, which secured the supremacy of Parliament over the monarchy. They knew also of the series of political battles, large and small, over the centuries that had won particular rights for English subjects. They were familiar with the writings of the seventeenth-century English jurist Sir Edward Coke (whose name rhymes with *look),* who maintained that even actions of Parliament had to conform to "common right and reason" as embodied in the law of the land. Ironically, Coke's ideas eventually took root in America but not in England.

The Declaration of Independence drew heavily on these traditions. At least four themes emerge from its text. First, *humankind shares equality.* All persons possess certain rights by virtue of their humanity. The Declaration called them "unalienable rights" and mentioned three specifically: "Life, Liberty, and the Pursuit of Happiness." These rights were bestowed by the Creator and were "self-evident."

Second, *government is the creation and servant of the people.* It is an institution deliberately brought into being to protect the rights that all naturally possess. It maintains its authority by consent of the governed. When government is destructive of the rights it exists to protect, citizens have a duty to revolt when less drastic attempts at reform fail. Citizens would, then, replace a bad government with a good one.

Third, *the rights that all intrinsically possess constitute a higher law binding government.* A key to "Constitutionalism" is that written constitutions, statutes, policies, and governmental practices must be in conformity with this higher law. That is, they must promote the ends that government was created to advance. Natural rights would become civil rights.

Fourth, *governments are bound by their own laws.* These laws must be in conformity with the higher law. No officer of government is above the law. *Constitutionalism* thus is often said to be a behavioral limit to governmental actions, not just a legal one; even with a written constitution, a government which violates these higher laws has no claim to legitimacy. To make this point, the authors of the Declaration detailed violations, by the king, of English law by the king in a list that consumes more than half the text.

Tea party supporter Kathleen Gudaitis of Johnston, Rhode Island, holds a sign at a rally against the health care reform bill in front of the Rhode Island Statehouse in Providence, Rhode Island. *(AP Photo)*

By eighteenth-century standards, the Declaration of Independence advanced objectives that were far removed from lived reality of the Americans. Some newspapers of 1776 reprinted the Declaration alongside advertisements for slaves. Moreover, as a statement of American ideology, the Declaration's objectives remain unattained even today.

The Articles of Confederation: The Idea of Compact

Even if the Declaration of Independence proclaimed separation from England, it did little to knit the former colonies into a nation. Central political control disappeared in 1776. Something would now have to take its place for successful execution of the war and for development of the nation once liberty was won. Only eight days after adoption of the Declaration of Independence, a committee of Congress chaired by John Dickinson placed before the entire body a plan of union. The **Articles of Confederation** became the first American national constitution. Meeting in York, Pennsylvania, a safe distance from the British who occupied Philadelphia, Congress approved Dickinson's Articles in amended form in November 1777 and referred them to the states for approval. All states, save one, gave assent by May 1779, with Maryland holding out until March 1781 because of a land dispute.

Articles of Confederation
This first plan of a national government for the thirteen American states was replaced by the Constitution. Under the Articles, the states retained most political power.

The main provisions of the Articles of Confederation are summarized in Table 1.1. Several features distinguished the document. First, *the Articles preserved state autonomy.* The document read more like a treaty between nations than a device to link component states. Describing the compact as "a firm league of friendship," the Articles stated clearly that "each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this Confederation expressly delegated to the United States in Congress assembled." The word *confederation* accurately described the arrangement: It was a loose union of separate states.

Second, *the Articles guaranteed equal representation for the states.* Congress represented the states, not the people. Whereas a state's delegation could range in size from two to seven, each state had one vote. The delegates were to be appointed "in such manner as the legislature of each state shall direct," and the states reserved the right to recall and replace their delegates at any time.

Third, *the Articles granted the central government only a few important powers.* The central government was given control over foreign affairs and military policy; however, it was

TABLE 1.1 | AN OVERVIEW OF THE ARTICLES OF CONFEDERATION

The Articles of Confederation provided for the dominance of the states in the political system and granted only a few powers to Congress.

ARTICLE I:	Name of the confederacy: the United States of America
ARTICLE II:	Guarantee of the powers of the member states, except where the states expressly delegated powers to Congress
ARTICLE III:	Purposes of the confederation; defense and protection of the liberties and welfare of the states
ARTICLE IV:	As they traveled from state to state, citizens of the several states to enjoy the privileges each state accorded its own citizens; freedom of trade and travel between states
ARTICLE V:	Selection by state legislatures of delegates to Congress; voting by states in Congress
ARTICLE VI:	States prohibited from engaging in separate foreign and military policies or using duties to interfere with treaties; recognition that each state would maintain a militia and a naval force
ARTICLE VII:	Appointment by state legislatures of all militia officers of or under the rank of colonel
ARTICLE VIII:	National expenses to be paid by states to Congress, in proportion to the value of the land in each state; states retained sole power to tax citizens
ARTICLE IX:	Sole power to make peace and war placed in Congress; restrictions on treaty-making power; Congress designated the "last resort" in all disputes between states; procedures spelled out for settling such disputes; power to establish a postal system and to regulate the value of money issued by state and central governments given to Congress; provision made for an executive committee of Congress called a "Committee of the States" to manage the government; stipulation that most major pieces of legislation would require the affirmative vote of nine states
ARTICLE X:	Committee of the States authorized to act for Congress when Congress was not in session
ARTICLE XI:	Provision for Canada to join the United States
ARTICLE XII:	Debts previously incurred by Congress deemed to be obligations of the government under the Articles of Confederation
ARTICLE XIII:	Obligation of each state to abide by the provisions of the Articles of Confederation and all acts of Congress; amendment by consent of the legislatures of every state

denied taxing power completely, as well as the authority to regulate most trade. Revenues instead would be supplied by the states. If a state failed to make its proper payment, the Articles offered no remedy. Furthermore, most appropriations and laws of any significance required the affirmative vote of nine states.

Fourth, *the Articles provided for no separate executive branch and no national courts.* The rights of citizens lay in the hands of state courts. Congress was supposed to be the arbiter of last resort in disputes between states. Officers appointed by Congress performed the few executive duties permitted under the Articles.

Fifth, *the Articles made amendment almost impossible.* Changes in the terms of the Articles needed unanimous approval not only of Congress but also of the "legislatures of every state." For example, a single state could block any realignment of the balance the Articles struck between central direction and local autonomy. The states seemed destined to hold the dominant position for a long time to come.

Why did the founders call for a *constitutional convention?*

See for yourself by comparing the Constitution printed at the back of this text to this web version of the Articles of Confederation.

http://avalon.law.yale.edu/18th_century/artconf.asp

The Making of the Constitution

Defects in the Articles of Confederation soon became apparent. Citizens who wanted change built their case on either of two deficiencies, and often on both. First was *an absence of sufficient power in the central government.* Absence of national taxation meant that Congress was hard-pressed to carry out even the limited responsibilities it had, such as national defense. Absence of control over interstate commerce meant trade wars between the states, with some states prohibitively taxing imports from others. Congress could do little to promote a healthy economic environment. Absence of power to compel obedience by the states meant that foreign countries had no assurance that American states would comply with treaties agreed to by the national government. Nothing in this constitution prohibited a state from making treaties with another nation, and nothing compelled the states to support any Federal action with either money or personnel.

The second deficiency often mentioned was *the presence of too much power in the hands of the state governments.* Local majorities, unchecked by national power, could infringe on an individual's property rights. Of particular concern were the "cheap money" parties that had been victorious in some of the states. The decade of the 1780s was generally one of economic depression. In the wake of the ravages of war and the loss of British markets, times were hard. In response, state legislatures suspended debts or provided for payment of debts in kind, not cash. Added to this was the circulation of different currencies issued by many states, (even though the national government was supposed to have the monetary power, nothing prohibited a state from also making its own coins and bills). Printing additional money drove down its value, aiding debtors and hurting creditors. The famous phrase "not worth a continental" arose from the continually decreasing value of the national currency, *the Continental*. The economic picture of the new Union was unsettled at best, chaotic at worst.

Shays' Rebellion

The rebellion, a revolt by farmers from Massachusetts in 1786–1787 over the lack of economic relief, led many to believe that a stronger central government was necessary.

Prelude to Philadelphia

A revolt of farmers led by Daniel Shays in Massachusetts in 1786–1787, known as **Shays' Rebellion,** was one of many events that heightened the concerns over the Articles of Confederation. When farmers in the Berkshire Hills failed to get the debt relief they had demanded from the legislatures, they closed local courts and forced the state supreme court at Springfield to adjourn before they were finally routed by a state military contingent of 4,400 men. Although it was a military failure, the rebellion demonstrated that

TABLE 1.2 | COMPARING THE ARTICLES OF CONFEDERATION AND THE U.S. CONSTITUTION

	ARTICLES OF CONFEDERATION	CONSTITUTION
Location of sovereign power	States	Federal government
Basis of representation	All states equally	Combination of state equality and population
Taxation power	States only	States and federal government
Trade regulation	States	Federal government
Approval of appropriations and other major legislation	Supermajority of states (9 of 13)	Simple majority of House and Congress, plus approval of president
Federal executive	None	President
Federal courts	None	U.S. Supreme Court and federal court system
Revision/amendment	Unanimous state approval	Three-quarters of states' approval

Annapolis Convention

The meeting of delegates from five states in Annapolis, Maryland, in 1786 to consider a common policy for trade among the American states that resulted in a recommendation for a constitutional convention the following year

Northwest Ordinance

This major statute, enacted by Congress in 1787 under the Articles of Confederation, provided for the development and government of lands west of Pennsylvania.

the central government under the Articles was powerless to protect the nation from domestic violence. Other issues, such as the refusal of states to provide the national government with the funds it needed to pay debts, further emphasized the shortcomings of the Articles.

In September 1786, on the eve of Shays' Rebellion, delegates from five states attended the **Annapolis Convention** in Maryland to consider suggestions for improving commercial relations among the states. Alexander Hamilton was a delegate from New York. Along with Virginia's James Madison, Hamilton persuaded the gathering to adopt a resolution calling for a convention of all the states in Philadelphia the following May to "render the Constitution of the Federal Government adequate to the exigencies of the Union." In February 1787, Congress authorized the convention. All the states except Rhode Island selected delegates; those delegates, however, were limited to considering amendments to the Articles of Confederation.

Even though the Constitution soon replaced the Articles, the nation's first experiment with central government was not a complete failure. In June 1787, in one of its last actions, the Congress established by the Articles enacted the **Northwest Ordinance**. This statute provided for the government and future statehood of the lands west of Pennsylvania, laid the basis for a system of public education, and banned slavery in that territory. Indeed, it is noteworthy that many Americans, particularly those in the "Tea Party" wing of the Republican party, seek to bring back many aspects of the Articles in-

cluding a State's Right to nullify provisions of the Constitution, protect its borders, and regulate citizen activities.

The Philadelphia Convention

To appreciate fully what happened in Philadelphia in 1787, one must visualize America two centuries ago. Doing so may not be easy. Today our nation is a global power—economically, militarily, and politically—with a population exceeding 313 million people in fifty states, stretching from the Atlantic into the Pacific.

By contrast, the America of 1787 was a sparsely settled, weakly defended, and internationally isolated nation of thirteen coastal states with a combined population of under 4 million. Philadelphia boasted a population of 30,000, making it the largest city in the land. Virginia and Massachusetts were the most populous states, with 747,000 and 473,000 inhabitants, respectively. Rhode Island and Delaware were the smallest, with populations of only 68,000 and 59,000, respectively. Three other states had fewer than 200,000 inhabitants. The slave population, found mostly in the states from Maryland southward, numbered 670,000, or about 17 percent of the total.

It was in this context that the Philadelphia Convention assembled. By modern standards, the convention was not a large body: the legislatures of twelve states had selected seventy-four delegates, and fifty-five eventually took their seats. Of these, fewer than a dozen did most of the work. Quality amply compensated for numbers, however. Probably no other American political gathering has matched the convention in talent and intellect.

Who were the framers? Twenty-nine were college graduates, and the remaining twenty-six included notables such as George Washington and Benjamin Franklin. The youngest delegate, Jonathan Dayton of New Jersey, was twenty-six. Franklin, of Pennsylvania, was the oldest, at eighty-one. Thirty-four were lawyers; others were farmers and merchants. Some names were prominent by their absence. Thomas Jefferson was abroad. John Jay of New York was not chosen, even though he had been foreign affairs secretary for the Articles Congress. Patrick Henry of Virginia was chosen but declined because he "smelt a Rat." Richard Henry Lee, also of Virginia, and Samuel Adams of Massachusetts were likewise suspicious of what might happen and stayed away. Ten delegates were also members of the Articles Congress. Eight delegates had signed the Declaration of Independence, and the signatures of six appeared on the Articles of Confederation; but on balance, this was not a reassembling of the generation that had set the revolution in motion. Rather, the delegates came from a pool of men who were fast gaining a wealth of practical experience in the political life of the young nation. Most were also committed to making changes in the Articles of Confederation—otherwise they would not have sacrificed the time and effort to attend. Moreover, supporters of the Articles (accurately) noted that their effort was treason under the Constitution; they argued that changes to the Articles should be adopted by Constitutional processes which required unanimous approval of both the Congress and the State Legislatures. Strictly speaking, they were right, and had the Constitution not been rat-

ified it is (unknown but) possible that the signers risked execution for treason. In some ways this act was as dangerous and admirable as penning the Declaration of Independence.

The appointed day for meeting was May 14, 1787, but the ten delegates who convened that day at the Pennsylvania statehouse (now called Independence Hall) could do nothing until more arrived. Not only did the convention need its quorum of states, but each state delegation also needed a quorum because voting would be by state. Finally, on May 25, the Philadelphia Convention began its work. From then until September 17 the delegates conferred almost without pause, formally at the statehouse and informally at the City and Indian Queen taverns a short walk away (see *Rum Punch and Revolution* (Peter Thompson, 1998) for a scholarly and amusing discussion of the role played by pubs and coffeehouses in creating a consensus for revolution).

This is the historic Independence Hall in Philadelphia, Pennsylvania. *(iStockphoto)*

In one of their first actions, the delegates adopted a rule of secrecy. The delegates even closed the windows during the steamy Philadelphia summer to discourage eavesdroppers. Without secrecy, it is doubtful whether the group could have succeeded. With secrecy came the freedom to maneuver, explore, and compromise. Because no verbatim stenographic account was made at the time, knowledge of the proceedings has had to be recreated piece by piece over the years.[1] The official journal of the convention was not made public until 1818. James Madison's notes on the proceedings, which are the most extensive account of what occurred, were not published until 1840. Although other diaries and notes have become available over time we still have a quite incomplete description of discussions at the convention. This has allowed for an ever increasing role of myth and rumor in popular stories of the American founding.

Virginia Plan
The first plan of union proposed at the Constitutional Convention in 1787 called for a strong central government.

New Jersey Plan
Introduced in the Constitutional Convention in opposition to the Virginia Plan, it emphasized the dominance of the states.

On May 29, the Virginia delegation, led by Governor Edmund Randolph, seized the high ground for the discussion to follow. His fifteen resolutions, largely Madison's handiwork, made it increasingly evident that replacement, not tinkering, awaited the Articles of Confederation. Called the **Virginia Plan** and depicted in Figure 1.1, the resolutions proposed a substantially stronger national government and a Congress based on numerical representation. This plan generated a counterproposal put forward by William Paterson of New Jersey. Known as the **New Jersey Plan** (see Figure 1.1), it called for only modest change in the Articles

FIGURE 1.1 | THE VIRGINIA PLAN, THE NEW JERSEY PLAN, AND THE CONSTITUTION

In the form signed by the framers on September 17, 1787, the Constitution reflected some features of the Virginia and New Jersey plans. Other features of the two plans were discarded during the summer's debates. The Great Compromise settled the issue of representation, drawing from both plans.

of Confederation, keeping the state governments dominant. What divided the delegates the most was the issue of representation because a legislature representation translates into power. Would some states and interests have more votes than others in Congress? In late June and early July, the convention was deadlocked between delegates who favored representation in proportion to a state's population and those who wanted to keep equality between the states. Without settling this matter, the convention could not proceed.

This division is sometimes seen as the less populous states versus the more populous ones (small against large). True, a state such as Delaware would lose voting strength in the national legislature if population became the basis for representation, but the divisions of opinion were not always based solely on state size. A majority of the New York delegation, for example, opposed numerical representation in either house because other states lay claim to extensive western lands with the potential for significant population growth. Besides, the Virginia Plan meant a greatly reduced role *for states as states* in the Union. Local leaders viewed centralizing tendencies as a threat to their own influence, regardless of their state's population.

Great Compromise

Sometimes called the Connecticut Compromise, this agreement at the Constitutional Convention in 1787 to accept representation by population in the House and by states in the Senate was arranged by the delegation from Connecticut.

Credit for a breakthrough goes to Dr. William Samuel Johnson and Oliver Ellsworth, both delegates from Connecticut. Known as the **Great Compromise** or the Connecticut Compromise, their plan called for numerical representation in the lower house and equal state representation in the upper house. This compromise broke the deadlock, permitting the delegates to move along to other matters, and forms the basis of congressional representation today: by population in the House of Representatives, by states in the Senate.

three-fifths compromise

A temporary resolution to the controversy over slavery, this agreement allowed slaveholding states to count each slave as three-fifths of a person for purposes of congressional representation.

There were other compromises as well. The most notorious was the **three-fifths compromise,** which permitted slave states to count each slave as three-fifths of a person, thus enhancing these states' representation in the House while denying slaves, who were legally classified as property, the right to vote. Moreover, the Constitution let each state decide who could vote in national as well as state elections. As a result, a majority of Americans (women and all slaves) were denied basic rights of political participation for years to come. Property qualifications that existed in some states for a time barred the poorest white males from the polling places as well.

Ratification

Formal signing of the Constitution took place on September 17, 1787—109 days after the convention first met. Thirty-nine names appear on the document. Three delegates (Elbridge Gerry of Massachusetts and George Mason and Edmund Randolph of Virginia) refused to sign. Others, such as New York's Robert Yates, had gone home early because the Constitution included too many changes.

Approval by the country was surely on the framers' minds. Just as the delegates had taken liberty with their instructions to revise the Articles of Confederation, they proposed to bypass the rule of legislative unanimity for amendment. Article VII of the Constitution stipulated in revolutionary fashion that the new government would go

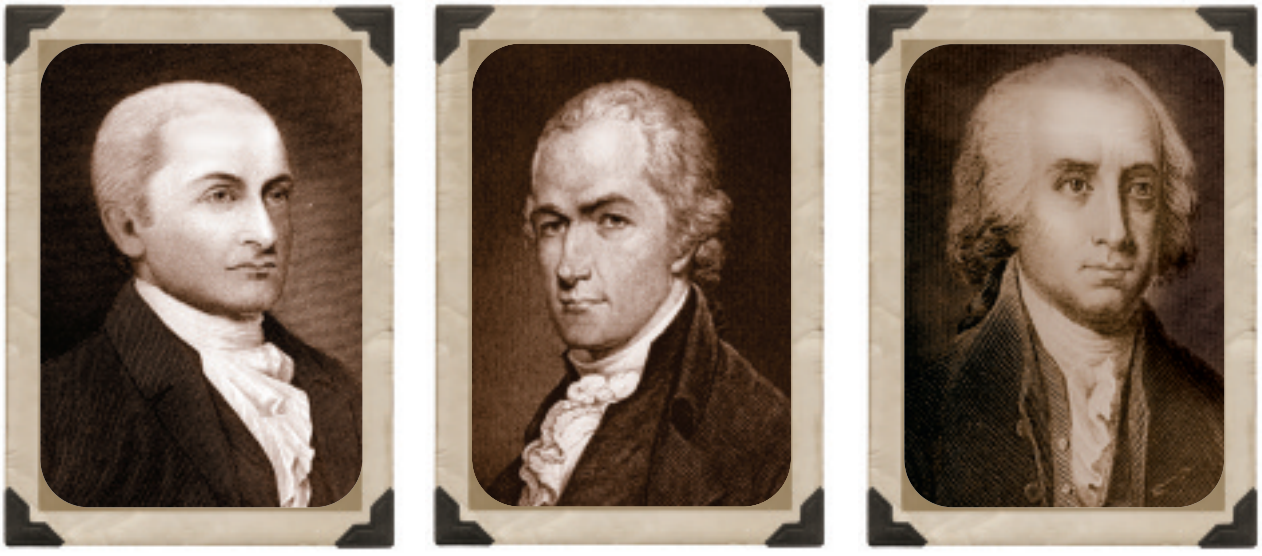
into effect when *conventions* in *nine* states gave their assent. On September 28, 1787, the Articles Congress resolved unanimously, though noncommittally, that the Constitution should be handed over to the state legislatures "to be submitted to a convention of Delegates chosen in each state by the people thereof." Ironically, approval by popularly elected conventions meant that ratification of the Constitution would be a more democratic process than adoption of either the Declaration of Independence or the Articles of Confederation.

Federalists
A term for persons who advocated ratification of the Constitution in 1787 and 1788 and generally favored a strong central government, it was also the name of the dominant political party during the administrations of Presidents George Washington and John Adams.

Antifederalists
In the first years of government under the Constitution, Antifederalists in Congress were persons who opposed ratification of the Constitution in 1787 and 1788 and opposed policies associated with a strong central government such as a national bank.

Supporters of the proposed Constitution called themselves **Federalists** and dubbed the nonsupporters **Antifederalists,** thus scoring a tactical advantage by making it seem that opponents of ratification were against union altogether. Because ratification meant persuasion, both sides engaged in a great national debate in the months after the Philadelphia Convention adjourned. Not since the eve of the revolution had there been such an outpouring of pamphlets and essays. Most prominent among the tracts was ***The Federalist,*** a collection of eighty-five essays written by Alexander Hamilton, John Jay, and James Madison under the pen name Publius, which originally appeared between October 27, 1787, and August 15, 1788, in New York State newspapers. One of the most important expositions of American political theory, *The Federalist* achieved early recognition as an authoritative commentary on the Constitution.

Who were the Antifederalists? Most were not opposed to all change in the government. Some fought ratification because the Constitution was to become the supreme law of the land in an illegal manner, replacing the Articles of Confederation in violation of the Articles' own amendment procedure. For many, the Constitution was unacceptable because it would severely weaken state governments, leading eventually to a loss of local authority. Other opponents believed that individual liberty could be preserved only in "small republics," or states. If states were subordinated in the new government, it was only a matter of time before liberty would



John Jay, Alexander Hamilton, and James Madison wrote *The Federalist*, a collection of eighty-five essays, as an authoritative commentary on the Constitution. *(AP Photos)*

The Federalist

A series of eighty-five essays written by Alexander Hamilton, John Jay, and James Madison and published in New York newspapers in 1787 and 1788 urging ratification of the Constitution

be lost, especially since the Constitution contained no bill of rights. As the governments closest to the people, states offered the best chance for self-government and so would promote, Antifederalists thought, a virtuous citizenry. Conversely, a distant government endangered not just popular rule but citizenship itself. Moreover, the Constitution seemed designed to promote a commercial empire. This prospect threatened the agrarian values many of the Antifederalists shared.

For a time, ratification by the requisite number of states was in doubt, causing John Quincy Adams to observe a half-century afterward that the Constitution "had been extorted from the grinding necessity of a reluctant nation."[2] Not until June 21, 1788, did the ninth state (New Hampshire) ratify. Practically, however, the new government could not have succeeded had the important states of Virginia and New York not signed on. These states ratified on June 25 and 26, respectively—the latter by the close vote of 30 to 27. Some states ratified only on the promise that a bill of rights would soon be added to the Constitution, which it was (see Chapter 4).

Explore the classic defense of the U.S. Constitution by reading the searchable online version of the *Federalist Papers* at:

http://avalon.law.yale.edu/subject_menus/fed.asp

Meeting on September 13, 1788, the Articles Congress acknowledged ratification, set a date in February for electors to choose a president, and designated "the first Wednesday in March next … for commencing proceedings under the said Constitution." The new House and Senate transacted their first business on April 2 and April 5, 1789, respectively, with George Washington's inauguration as president following on April 30. On September 24, Washington signed legislation creating the Supreme Court and setting February 1, 1790, as the day of its first session. Confirmation by the Senate of the first Supreme Court justices followed on September 26.

The Constitution is reprinted in the Appendix. The main provisions of the Constitution, without amendments, are summarized in Table 1.3. Amendments, including the Bill of Rights, are summarized in Table 1.4.

Features of the Constitution

Several features, implicit or explicit in the document of 1787, plus its Bill of Rights, suggest why the Constitution was important for the framers. More important, these features help to explain how the Constitution shapes American government today.

Republicanism, Divided Powers, and Federalism

republican (or representative) government

People elect representatives to make decisions in their place in republican (or representative) government.

The framers deliberately chose a **republican (or representative) government** with divided powers. They feared the excesses of democracy, or pure majority rule, that they had seen in the politics of their own states. At the same time, recalling the Declaration's insistence on "the consent of the governed," they knew that government had to be generally responsive to the people if ratification was to occur and revolution to be avoided. So, the Constitution blended democratic and antidemocratic elements: popular election—voters, as qualified by their states, directly elected only the members of the

TABLE 1.3 | AN OVERVIEW OF THE CONSTITUTION OF 1787

In the form in which it left the hands of the framers in 1787, the Constitution stressed the powers of the national government and did not include a bill of rights.

ARTICLE I:

Establishment of legislative departments; description of organizations; list of powers and restraints; election of legislators

ARTICLE II:

Establishment of executive department; powers, duties, restraints; election of the president and vice president

ARTICLE III:

Establishment of judicial departments; jurisdiction of Supreme Court and other courts established by Congress; definition of treason; appointment of judges

ARTICLE IV:

Relation of the states to the national government and to one another; guarantees of the states; provision for territories and statehood

ARTICLE V:

Amendment of the Constitution; assurance of equal representation of the states in the Senate

ARTICLE VI:

Guarantee of national debts; supremacy of the national constitution, laws, and treaties; obligation of national and state officials under the Constitution; no religious test for national office

ARTICLE VII:

Ratification of the Constitution

House of Representatives; indirect popular election—state legislatures chose members of the Senate, while specially designated electors selected the president; and appointment—the president picked the national judiciary (with the approval of the Senate).

In addition, the Constitution placed limits on what government can do. Implicit in the idea of a written constitution is that a government does not have unlimited power. As described later in this chapter, courts in the United States have assumed the role of deciding what those limits are and when they have been crossed. The Bill of Rights contains some of those restrictions. Sections 9 and 10 of Article I contain others.

The Constitution also diffused and dispersed power. Clearly concerned with the necessity of strengthening government, the framers divided power even as they added

TABLE 1.4 | AMENDMENTS TO THE CONSTITUTION BY SUBJECT

Since the Bill of Rights (Amendments 1–10) was added in 1791, only seventeen formal changes have been made to the Constitution. Most have occurred in periods of reform and have affected the manner in which officials are elected and the operation and powers of the national government.

INDIVIDUAL RIGHTS

I	(1791)	Free expression
II	(1791)	Bearing arms
III	(1791)	No quartering of troops
IV	(1791)	Searches, seizures, and warrants
V	(1791)	Criminal procedure and fair trial
VI	(1791)	Criminal procedure and fair trial
VII	(1791)	Jury trials in civil suits
VIII	(1791)	No cruel and unusual punishment
IX	(1791)	Recognition of rights not enumerated
XIII	(1865)	Abolition of slavery
XIV	(1868)	Restrictions on state interference with individual rights; equality under the law; also altered nation-state relations

POLITICAL PROCESS

XII	(1804)	Separate voting by electors for president and vice president
XV	(1870)	Removal of race as criterion for voting
XVII	(1913)	Popular election of U.S. senators
XIX	(1920)	Removal of gender as criterion for voting
XXIII	(1961)	Enfranchisement of District of Columbia in voting for president and vice president
XXIV	(1964)	Abolition of poll tax in federal elections
XXVI	(1971)	National voting age of eighteen in all elections

NATION-STATE RELATIONS

X	(1791)	Powers of the states
XI	(1798)	Restriction of jurisdiction of federal courts

OPERATION AND POWERS OF NATIONAL GOVERNMENT

XVI	(1913)	Income tax
XX	(1933)	Shift of start of presidential term from March to January; presidential succession
XXII	(1951)	Two-term presidency
XXV	(1967)	Presidential disability and replacement of vice president
XXVII	(1992)	Limitation on timing of change in congressional salaries

MISCELLANEOUS

XVIII	(1919)	Prohibition of alcoholic beverages
XXI	(1933)	Repeal of Eighteenth Amendment

it. They were aware of an old dilemma: How does one construct a government with sufficient strength without endangering freedom of individuals? Madison put it this way in *Federalist* No. 51: "In framing a government, … the greatest difficulty lies in this: you

must first enable the government to control the governed; and in the next place oblige it to control itself." The solution, thought the framers, lay in design: dividing power both horizontally among the different parts of the national government and vertically between the national government and the states.

To be avoided at all costs was tyranny, which Madison defined as "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective." This threat could take at least two forms: domination of the majority by a minority, or domination of a minority by the majority, with the latter running roughshod over the former in disregard of its rights. Ordinarily, the ballot box would give ample protection. The vote, after all, was the primary check on the rulers. Madison, however, saw the "necessity of auxiliary precautions."

Division of responsibilities at the national level among the three branches of government (Congress, President, and Supreme Court) would help, but would not be enough. What was to keep one branch from grabbing all the power from the other two? Words on paper ("parchment barriers," Madison called them) would be inadequate, especially because experience had taught that the legislature might be too responsive to the popular will. The solution lay in juxtaposing power—"Contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." Rather than counting on noble motives to ward off tyranny, the Constitution assumed the existence of less noble motives. "Ambition," wrote Madison, "must be made to counteract ambition."

checks and balances

The system of separate institutions sharing some powers that the Constitution mandates for the national government, its purpose being to keep power divided among the three branches: legislative, executive, and judicial

This is the constitutional arrangement commonly called **checks and balances.** Power is checked and balanced because the separate institutions of the national government—legislative, executive, judicial—share some powers. As depicted in Figure 1.2, no one branch has exclusive dominion over its sphere of activity.

For example, a proposed law may pass both houses of Congress only to run headlong into a presidential veto, itself surmountable only by a two-thirds vote of each house. After scaling that obstacle, the law in question might well encounter a negative from the Supreme Court using its power of judicial review. Judicial review is not mentioned in the Constitution, but it soon joined the roster of Madison's "auxiliary precautions." Even the

FIGURE 1.2 | THE CONSTITUTIONAL SYSTEM OF CHECKS AND BALANCES

The framers designed the Constitution, not just to divide governmental function among three branches, but also to create a tension among the branches by allowing each one influence over the other two. American constitutional government means not just a separation of powers but also separate institutions sharing certain powers. The objective was to safeguard liberty by preventing a concentration of power.

President

Appoints all federal judges
Enforces court decisions
Proposes legislation
May veto legislation passed by Congress
Convenes Congress
Appoints many administrative officials
Serves as commander-in-chief of armed forces
Conducts foreign relations

Congress

(Each house may veto the other.)
Has general lawmaking power
Appropriates all funds
Creates executive departments
Declares war
Approves certain executive appointments(Senate only)
Ratifies treaties (Senate only)
Removes president and judges by impeachment
Defines Supreme Court's appellate jurisdiction
Sets size of Supreme Court
Creates lower federal courts and their jurisdictions

Supreme Court

Lifetime appointment
No reduction in salary
May declare actions of president and subordinates unconstitutional
May declare acts of Congress unconstitutional

CONTEMPORARY CONTROVERSIES

America Attacked

On September 11, 2001, America changed. The most violent single foreign attack on American soil in history left over three thousand people dead and many more injured. Four domestic passenger planes took off from the East Coast to begin cross-country flights but were hijacked shortly after takeoff by terrorists wielding knives. The hijackers were believed to be connected to al Qaeda, an international terror organization headed by Osama bin Laden, a Saudi national being harbored in Afghanistan. Two of the planes crashed into New York's World Trade Center, completely destroying some of the tallest buildings in the world and an important symbol of global capitalism. Another plane crashed into the Pentagon, the nation's defense headquarters, and a fourth (possibly headed to Washington, D.C.) crashed in rural Pennsylvania. In one day the mood of the nation changed from one of security and confidence to one of grief, shock, fear, and anger.

Former President Bush stands with a firefighter in front of the World Trade Center debris on Friday, September 14, 2001. *(AP Photo)*

Our government changed as well. Nearly every aspect of American government addressed in the pages of this textbook felt the shock of September 11. The Constitution's war-making powers were given new meaning as America embarked on a military response when President George W. Bush (2001–2009) declared a "war on terrorism" (Chapter 1). The emergency relief effort that followed the attacks raised federalism questions, as it required coordination of local, state, and national agencies (Chapter 3). The protection of civil rights and liberties became a concern as government officials weighed the tradeoff between restricting freedom—through more invasive airport searches, for example—and providing Americans with a greater sense of security (Chapter 4). Political ideologies temporarily lost some significance when congressional leaders—liberal and conservative—passed nearly unanimous resolutions condemning the terrorist attacks and stating a need for armed response (Chapter 2). The public's response included a heightened concern about terrorism that continues to this day. Ten years after the attack, 58 percent of respondents indicated they believed Americans have permanently changed the way they live as a result of the 9/11 attacks. Many reported being less likely to fly on airplanes, go into skyscrapers, travel overseas, or attend large scale events (Chapter 5). Media outlets responded by changing programming to increase coverage of the ongoing and developing acts of terror and American responses (Chapter 7). Established interest groups, such as the American Red Cross, and newly created organizations, such as America's Fund for Afghan Children, collected millions of dollars from concerned Americans who wanted to show their support for victims and families (Chapter 13).

The institutions of American government responded to change as well. On November 6, 2001, less than two months after the first attacks, New York City went to the polls and elected new mayor Michael Bloomberg. Bloomberg replaced

the retiring incumbent Rudolph Giuliani, who earned acclaim for his leadership during the crisis (Chapter 6). Congress responded by drafting 123 pieces of emergency appropriation and anti-terrorism legislation in the first seven weeks following September 11; many of these bills and resolutions, including the Patriot Act, were quickly signed into law (Chapter 10). The recently elected and relatively untested president, George W. Bush, had perhaps the toughest job of all—reassuring a nation while pursuing an internationally supported military response (Chapter 8). Part of the president's response involved expanding the bureaucracy; President Bush created the Department of Homeland Security and named Pennsylvania Governor Tom Ridge as its first head (Chapter 9). The U.S. court system provided the setting for several trials of individuals charged as accomplices or conspirators in terrorist activity (Chapter 11). Finally, the nation's budget, which had started the year with a strong economy, quickly found its surpluses turning to deficits as supplemental appropriations were approved to help pay for recovery and response efforts (Chapter 14).

Indeed, just as no American was left untouched by the events of September 11, no aspect of American government emerged unscathed either. How have these events affected you, and how have they affected your interactions with the American government? What further changes do you expect in the future?

SOURCE: The Gallup Organization, "One in Four Americans Say Lives Permanently Changed by 9/11," September 8, 2011, http://www.gallup.com/poll/149366/One-Four-Americans-Say-Lives-Permanently-Changed.aspx (26 June 2012).

president's powers of appointment and treaty-making require Senate cooperation; and although the president is designated commander-in-chief of the armed forces, Congress must declare war and appropriate money to finance the president's policies.

Securing liberty was also to be helped by federalism, the vertical division between national and state governments (explained in Chapter 3). The Constitution left the states with ample regulatory or police power—that is, control over the health, safety, and welfare of their citizens. As the second justice Harlan (1955–1971) argued many years later, "We are accustomed to speak of the Bill of Rights and the Fourteenth Amendment as the principal guarantees of personal liberty. Yet it would surely be shallow not to recognize that the structure of our political system accounts no less for the free society we have." Harlan echoed Alexander Hamilton's observation in *Federalist* No. 84 that the Constitution, even without amendments, "is itself, in every rational sense, and to every useful purpose, a Bill of Rights."

Coupled with divided power at the top, federalism was useful in guarding against majority tyranny. Some of the framers worried about "factions"—today we would call them tightly knit political parties or interest groups. The most productive source of factions, Madison acknowledged in *Federalist* No. 10, was economic inequality—rich versus poor, creditors versus debtors, and so forth. The Constitution was designed, in part, to limit the influence of factions. Minority factions could be outvoted. Majority factions would, with luck, exhaust themselves trying to fuse together what the Constitution had diffused. The Constitution would ultimately not prevent the majority from attaining its objectives, but the effort would have to be both long and hard. Short of this, the Constitution would work to insulate national policy from political fads that might capture majority sentiment in one or two states. The framers were especially concerned about movements like Shays' Rebellion that threatened the rights of political minorities.

Power was divided horizontally and vertically in order to check human ambition run amok. Measured by this standard, the Constitution has been largely successful, yet the scheme is by no means foolproof. The vaccination against tyranny has had some unpleasant side effects. First, the arrangements that held off the threats to the nation that Madison feared have sometimes made dealing with threats to individual liberty in the states more difficult. As Chapter 4 describes, once the central government took a stand against continued racial and gender discrimination, fragmented powers and federalism hindered steps to alleviate existing wrongs. All checks, primary and auxiliary, failed to work for a long time. Second, the constitutional legacy of the framers has sometimes made the task of governing the nation more than 220 years later, a difficult one. Separate national institutions and federalism have contributed to weak political parties, all of which combine to tax the skills of any leader, including the president, who calls for concerted action. Sometimes power has to be amassed, it seems, in spite of the Constitution. The advantage tends to lie with those who would delay, deflect, or derail. The framers institutionalized tension within the government. Yet on balance, the benefits of fragmented power have been worth the costs. American constitutional government is now in its third century.

A Single and Independent Executive

Although few doubted that the Philadelphia Convention would make provision for a legislature, controversy converged on issues such as representation and manner of selection for the legislature. What is perhaps astonishing about the Constitution is that it provided for a single *and* independently elected executive. Neither the Virginia Plan nor the New Jersey Plan offered both, as Figure 1.1 illustrates. After 1776, executive authority was understandably suspect; determining the kind of executive branch to implement in the new government was thus a topic of debate throughout the summer. State constitutions of the day typically enhanced legislative power and kept governors on a short leash. Some delegates to the Philadelphia Convention favored a plural executive or a single executive responsible to a council or to Congress.

The framers in Philadelphia finally reached a compromise about the selection of a president at the end of the convention. Their creation of the Electoral College, discussed in Chapter 6, meant that the delegates could avoid direct election by the people (a plan that allowed for too much democracy), election by Congress (a plan that would make the executive subservient to the legislature), and election by state legislatures (a plan that might make the executive a puppet of state governments). By allowing for selection of a single individual by specially chosen electors, the Constitution provided independence, strength, and eventually a popular base of power for the president.

Adaptability

The Constitution today is a living charter that plays a significant role in government. Yet eighteenth-century men, with eighteenth-century educations, wrote the Constitution for

an obscure and fragile eighteenth-century nation. Formal amendment of the document, a process that we will discuss shortly, has taken place only seventeen times since ratification of the Bill of Rights in 1791. How, then, does a document written in a bygone era by a fledgling nation fit the needs of a world power in the twenty-first century? The answer is that the Constitution is adaptable. It is adaptable both because of particular characteristics built into it, and because of the way the document has been regarded by successive generations.

The first factor in its adaptability is *brevity.* Including all twenty-seven amendments, the Constitution of the United States contains fewer than six thousand words, resulting in a shortage of detail and an absence of reference to many things the framers could conceivably have included. (By contrast, the constitutions of the fifty states today tend to be long and detailed; many are also short-lived.) Tactically, brevity was wise in the face of the ratification debate—the less said, the less to arouse opposition. Later generations would have to flesh out the full potential of the document through interpretation and practice. For example, the "executive power" that Article II vests in the president is largely undefined.

Second, there is *elasticity* in the language of the Constitution. Some words and phrases do not have a precise meaning. Among Congress's list of powers in Section 8 of Article I is the regulation of foreign and interstate commerce. But what does "commerce" include? In the 1960s Congress prohibited racial discrimination in hotels, restaurants, and other places of public accommodation. Its authority? The power to regulate commerce.[3] Broadly speaking, to regulate commerce is to regulate the economic environment, particularly the buying and selling of goods and services. This meant a fairly narrow range of policies in the 1790s, but the **commerce clause** includes a much broader set of congressional policies today.

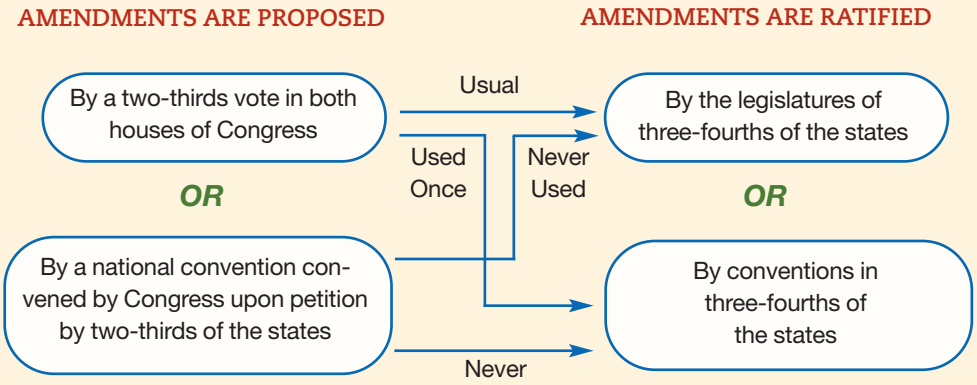
commerce clause
Found in Article I, Section 8 of the Constitution, this clause gives Congress the authority to regulate the country's economic environment.

Following the list of Congress's powers is the **necessary and proper clause,** which authorizes Congress to pass "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Thus, an indefinite reservoir of implied powers was added to the scope of Congressional authority. In different periods of American history this clause—often referred to as the "elastic clause"—has enabled government to meet new challenges and the needs of a changing nation. For instance, as explained in Chapter 3, the Supreme Court long ago relied on the elastic clause to uphold Congress's authority to charter a national bank. According to Chief Justice John Marshall (1801–1835), the Constitution was "intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs."[4] Today, Congress uses that power to extend its reach into issues of public safety, environmental protection, and social welfare that were not contemplated by the very small national government of the late eighteenth century. That being said, the necessary and proper clause is not an infinite power—laws in Figure 1.3 must be related to the prescribed authority, the legislature. When Congress attempts to stretch the elastic clause too far, the Supreme Court exercises its check of judicial review (described below) to rein in legislative overreaching.

necessary and proper clause
The "elastic clause" of Article I, Section 8, of the Constitution is the source of "implied powers" for the national government, as explained in *McCulloch v. Maryland.* [17 U.S.(4 Wheaton) 316 (1819)]

FIGURE 1.3 | FORMAL AMENDMENT OF THE CONSTITUTION

Article V of the Constitution prescribes the formal amendment procedure. The General Services Administration certifies the ratification and keeps tally of the states.



Third, the Constitution exalts *procedure* over substance, containing far more about how policies are to be made than what policies are to be chosen. The Constitution stresses means over ends. The result has been to avoid tying the Constitution, for long periods of time at least, to a certain way of life—whether agrarian, industrial, or technological—or to a certain economic doctrine.

Amendment of the Constitution

The framers knew that the Constitution must allow for change in its terms if it was to be an enduring force. The near impossibility of amending the Articles of Confederation, after all, drove the framers to scrap the rule of unanimity that the Articles required. Formal amendment is thus another means of ensuring adaptability.

Yet of the more than five thousand amendments that have been introduced in Congress, only twenty-seven amendments have been added to the document since 1789 (see Table 1.4). Article V of the Constitution mandates that only three-fourths of the states are needed to ratify an amendment to the Constitution. Compared with the Articles of Confederation, amending the Constitution is easier; however, it is still not an easy process. The national constitution is amended much less frequently than state constitutions.

As shown in Figure 1.3, the Constitution specifies two different tracks for its own amendment: initiation by Congress and initiation by state legislatures. Only the first has been employed successfully. Since 1789 Congress has submitted thirty-three amendments to the states for ratification. Until 1992, all but seven had been approved. Of those to fail, the two most recent were the District of Columbia Amendment,

which would have given the district voting representation in Congress, and the Equal Rights Amendment, which would have banned discrimination by government on the basis of gender.

On May 7, 1992, the Twenty-seventh Amendment—long known as the "lost amendment"—became part of the Constitution upon ratification by Michigan, the thirty-eighth state (two additional states ratified it later in May). The Twenty-seventh Amendment declares: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."

Ironically, this newest amendment is actually one of the oldest. It was among the twelve amendments Congress submitted to the states in 1789. (Ten of this group of amendments became the Bill of Rights. Another, dealing with apportionment of the House of Representatives, was never ratified and is obsolete.) By December 1791, when the Bill of Rights amendments were ratified, only six states had approved the pay amendment. Only one additional state ratified it during all of the nineteenth century, but a drive to revive the amendment began in the late 1970s as many people became increasingly frustrated with Congress.

Today, Congress sets a time limit for ratification, usually seven years. An amendment that fails to obtain the required three-fourths approval by the specified date then "dies." No such limit applied to the early amendments. Critics say that accepting the lost amendment as part of the Constitution is a dangerous precedent because allowing the ratification process to be spread over so long a period of time does not guarantee a contemporary national consensus. Others reply that the amendment would not have been revived had there not been such support for setting the limits on congressional powers mandated by the amendment.[5]

The second track for amendment is the closest the Constitution comes to popular initiation of amendments. As depicted in Figure 1.3, the legislatures of two-thirds of the states first make application to Congress for an amendment. Congress then calls a convention, which in turn submits the amendment for ratification by the legislatures (or

A Purdue University sophomore casts an early ballot in the 2012 election at the Marion County Clerk's office in Indianapolis. Prior to the amendment of the Constitution, not all citizens were guaranteed the right to vote. Today, anyone at least eighteen years of age, of any race, gender or class, is free to vote. (*AP Photo*)

POLITICS AND IDEAS

Whose Constitution Is It?

What standard should guide justices of the Supreme Court in deciding what the Constitution means? One approach criticizes the justices for too often substituting their own values in place of those the Constitution explicitly contains. Because the Constitution says nothing about abortion, for instance, and because there is no evidence that those who wrote either the document of 1787 or later amendments intended to include abortion as a protected liberty, they believe the Court was plainly wrong when it ruled in *Roe v. Wade* (1973) that the Constitution protects the right to abortion (see Chapter 3). In place of excessive judicial creativity, the Court relies on "original intent."[1] According to this view, the Supreme Court's task is to give the Constitution the meaning intended by those who wrote it. Whether abortions should be legal thus becomes a question for voters and legislators, not judges.

Others disagree and advance a different approach. Often the original intent is neither knowable nor clear, they argue. Even if it is, whose intent is supposed to matter most—those who wrote the words in the Constitution, those who voted on them at the Philadelphia Convention or (with respect to amendments) in Congress, or those in state ratifying conventions and legislatures? These questions aside, must the nation always be locked into an old way of thinking until the Constitution is formally amended? The Fourteenth Amendment, for example, commands that no state deny to any person the "equal protection of the laws." In its historic decision in *Brown v. Board of Education of Topeka* (1954), discussed in Chapter 3, the Supreme Court concluded that these words prohibited racial segregation in public schools. Yet the same Congress that wrote and proposed the Fourteenth Amendment almost a century earlier also mandated racially segregated schools for the District of Columbia. It is hard to argue that the framers of the Fourteenth Amendment intended to ban a practice they were themselves requiring. Does this mean that the 1954 decision was wrong? No—because the Constitution must be adaptive. According to opponents of "originalism," the Court's task should be one of applying principles, not specific intents. This approach sees in the Constitution the general principle of human dignity. One generation's understanding of human dignity will probably not be the same as another's. The question becomes not what the words meant in 1787 or 1868, but what the words mean in our own time.[2]

Even many proponents of original intent do not disagree with the result of *Brown*. Rather, they say that the Court can be faithful to the intent of the Fourteenth Amendment and still invalidate laws that require racial segregation because the framers of the Fourteenth Amendment, in laying down a command of "equal protection," did not foresee the harmful consequences of forced segregation.

If justices of the Supreme Court interpret the Constitution according to their understanding of the meaning of basic principles that the Constitution contains, how do they discover those principles? Why is their view of the values that the Constitution protects somehow superior to the views of state legislators or members of Congress? Should the fundamental law of the land be developed by elected representatives or by appointed judges?

1 Robert H. Bork, *The Tempting of America* (New York: Free Press, 1990), pp. 143–160.

2 William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification," in Alpheus T. Mason and D. Grier Stephenson, Jr., *American Constitutional Law,* 16th ed. (New York: Longman, 2011)

conventions) of three-fourths of the states. From time to time, people have attempted to amend the Constitution by campaigning for a second convention when Congress declined to propose the desired amendment in the usual way. Recently, efforts to obtain an amendment that would mandate a balanced budget for Congress proceeded along this

second and untraveled track. By 1993, thirty-two states, two short of the required number, petitioned Congress for a convention to propose such an amendment. This thrust from the states led the House of Representatives to pass a balanced-budget amendment on multiple occasions in the 1990s, most recently in March 1997. Had the proposal not fallen one vote short of a two-thirds majority in the Senate, the amendment would have been submitted to the states for ratification. Although some legislators continue to introduce a similar amendment from time to time, since 1997 bipartisan agreements to reduce spending have largely derailed the movement for the amendment. In this instance, Congress used track one of the amendment process to head off the drive along track two.

Grave doubts persist over the wisdom of summoning a second convention. Many questions understandably remain unanswered. *Must* Congress call a convention when two-thirds of the states request one? Would such a convention be limited to proposing the amendment sought by the petitioning states, or could a convention propose other changes in the Constitution? Would the delegates vote as individuals, or would they cast the vote of a state, as was done in 1787? The Constitution does not answer any of these questions.

Aside from formal amendment and judicial interpretation (which we will discuss next), the political system has also changed by custom. Even with the same words in the Constitution, the public's expectations of governmental institutions continue to evolve. Democratic values, socioeconomic conditions, industrialization, urbanization, and technology have all influenced attitudes and practices. For example, political parties, which developed early in our political history, are not mentioned in the Constitution. An even more obvious example of change by custom is the pledge of presidential electors to support their party's ticket, a practice the Constitution does not require. For a very long time members of the Electoral College have been expected to register the choice of the voters on election day, rather than to exercise an independent choice for president and vice president (voters would feel both anger and betrayal if the latter occurred).

The role of the Supreme Court in governing the nation is one of the distinguishing characteristics of the American government. *(iStockphoto)*

Judicial Review Comes to the Supreme Court

Most changes to the Constitution since its inception have resulted, not in adding or deleting words but in applying new meaning to existing words—a task that has largely fallen to the Supreme Court. Through its interpretative powers, the Supreme Court is rather like an ongoing constitutional convention. Thus, we

must often look to court cases to interpret the meaning of various parts of the Constitution. Whether the framers intended the Court to occupy a place of such prominence in the political system is uncertain. For more about the Supreme Court and its power of judicial review, see Chapter 11.

Marbury v. Madison: The Case of the Undelivered Commissions

Following the presidential election in November 1800, the nation witnessed the modern world's first peaceful electoral transfer of political power from one party to another.[6] The "out group" of Democratic-Republicans led by Thomas Jefferson (1801–1809) captured the presidency and Congress, displacing the "in group" of Federalists led by President John Adams (1797–1801). Partisan tensions ran high.

In the wake of the Adams defeat, Oliver Ellsworth (1796–1800) resigned as the third chief justice of the United States. If Adams moved swiftly, he, and not Jefferson, would be able to make the new appointment. Adams offered the job to John Jay (1789–1795), who had been the first chief justice; Jay declined because he doubted that the Court would ever amount to much. Adams turned next to his secretary of state, John Marshall, who accepted.

Several weeks before the switch in administrations, the Federalist-dominated Congress passed the District of Columbia Act, which authorized the appointment of forty-two new justices of the peace. President Adams made the appointments, much to the displeasure of the Jeffersonians waiting in the wings. This series of events was possible because Congress convened annually in December in those days, which meant that members defeated in the November election (the "lame ducks") were still on hand to make laws. The newly elected Congress would not convene until after the presidential inauguration in March of the following year, a practice that was not changed until ratification of the Twentieth Amendment in 1933.

In the waning hours of the Adams administration, John Marshall, who was still serving as secretary of state, failed to deliver all of the commissions of office to the would-be justices of the peace. Upon assuming office on March 4, 1801, Jefferson held back delivery to some of Adams' appointees and substituted a few of his own. Later that year, William Marbury and three others whom Adams had named as justices of the peace filed suit against Secretary of State James Madison in the Supreme Court. They wanted the Supreme Court to issue a **writ of mandamus** to Madison, directing him to hand over the undelivered commissions. (A writ of mandamus is an order issued by a court to a public official directing performance of a ministerial, or nondiscretionary, act.) Thus, a case was initiated that tested the power of the Supreme Court over another branch of government.

writ of mandamus
Order by a court to a public official to perform a nondiscretionary or ministerial act

Marbury v. Madison
Landmark decision [5 U.S. (1 Cranch) 137 (1803)] by the Supreme Court in 1803 establishing the Supreme Court's power of judicial review

When the Court heard arguments in the case of ***Marbury v. Madison*** in February 1803, the Jefferson administration displayed its hostility to Marshall and the other Federalist justices by boycotting the proceeding.[7] By then it was apparent that Marshall and the five associate justices were in a predicament. If the Court issued the writ, Jefferson

and Madison would probably disregard it. There would be no one to enforce the order, and the Court would seem powerless and without authority. For the Court to decide that Marbury and the others were not entitled to their judgeships would be an open acknowledgment of weakness and error.

Marshall's decision skillfully avoided both dangers and claimed added power for the Supreme Court, even though Marbury walked out the door empty-handed. First, in a lecture on etiquette to his cousin the president, Marshall made it clear that Marbury was entitled to the job. Second, he ruled that courts could examine the legality of the actions of the head of an executive department. Third, and dispositive, Marshall announced that Marbury was out of luck because the writ of mandamus he requested was not the proper remedy.

Why? Marshall acknowledged that Section 13 of the 1789 Judiciary Act gave the Supreme Court authority to issue a writ as part of the Court's original, as opposed to appellate, jurisdiction. (A court has **original jurisdiction** when a case properly starts in that court, and **appellate jurisdiction** when the case begins elsewhere and comes to a higher court for review.) Marshall pointed out that the Supreme Court's original jurisdiction was specified in Article III of the Constitution and included no mention of writs of mandamus. By adding to the Court's original jurisdiction, Section 13 appeared unwarranted by the Constitution. Was the Court to apply an unconstitutional statute? No. To do so would make the statute (and Congress) superior to the Constitution. Section 13, therefore, was void; and the Court was obliged to say so.

original jurisdiction
Authority of a court over cases that begin in that court—Courts of general jurisdiction have original jurisdiction over most criminal offenses. The original jurisdiction of the U.S. Supreme Court is very small.

appellate jurisdiction
Includes cases a court receives from lower courts—Congress defines the appellate jurisdiction of the U.S. Supreme Court.

judicial review
The authority of courts to set aside a legislative act as being in violation of the Constitution

Kentucky and Virginia Resolutions
A challenge to national supremacy, these state documents declared states to be the final authority on the meaning of the Constitution.

The Significance of *Marbury*

Marbury v. Madison remains important because of what Chief Justice Marshall said about the Constitution and the Supreme Court. First, officers of the government were under the law and could be called to account in court. Second, statutes contrary to the Constitution were not valid laws. Third, the Court claimed for itself the authority to decide what the Constitution means and to measure the actions of other parts of the government against that meaning. This is the power of **judicial review**: judges holding lifetime appointments can block an electorally responsible agency of government. Alternatively, the lawmaking body (Congress) would be the judge of its own authority. Fourth, Marshall was answering the rumblings of dissent heard in the **Kentucky and Virginia Resolutions** of 1798. Written, respectively, by Jefferson and Madison (the latter had by now become a foe of strong central government) as an attack on Federalist Party policies, these resolutions claimed for the states final authority to interpret the Constitution. In their words lay the seeds for dismemberment of the Union. Marshall's reply was that the Court would have the final say on the meaning of the Constitution.

Judicial Review and the Framers

The novelty of the *Marbury* case is that it marked the first instance in which the Supreme Court declared an act of Congress to be in violation of the Constitution. Did

the framers intend the Court to have such power? The question cannot be answered with certainty. Some members of the Philadelphia Convention seemed to assume that the Court could set aside laws that ran counter to the Constitution. In *Federalist* No. 78, Alexander Hamilton made an argument in support of judicial review that Marshall followed closely in his *Marbury* ruling. References to judicial review abound in the records of the state ratifying conventions, and some state courts made use of the power well before Marshall did. Moreover, several Supreme Court decisions prior to *Marbury* assumed the existence of judicial review but neither explained nor applied it. Still, if the Court was to possess such a potentially important power, it is strange that the Constitution would not mention such powers. Neither does the Constitution say anything about how its words are to be interpreted—a question that still divides political leaders and legal scholars. (See "Politics and Ideas: Whose Constitution Is It?")

It is probably safe to say that Marshall's opinion in *Marbury* would not have come as a great surprise to the authors of the Constitution; however, it is also probably true that they did not envision the Court's becoming a major policymaker, a role that the doctrine of judicial review makes possible and that the Court enjoys today, as Chapters 4 and 11 show. In fairness to Marshall, he viewed judicial review as a modest power. Whereas Marshall was not hesitant to strike down state laws that he felt conflicted with the Constitution, it was not until the infamous *Dred Scott* case in 1857, twenty-two years after Marshall's death, that the Supreme Court again set aside an act of Congress as violating the Constitution.[8] (Inflaming abolitionist sentiment on the eve of the Civil War, this decision denied congressional authority to prohibit slavery in the territories and asserted that African Americans were not intended to be citizens under the Constitution.)

Because of judicial review, the changes wrought by custom and formal amendment, and the needs of an expanding nation, what Americans mean by "the Constitution" today is vastly different from the document that emerged from the Convention in Philadelphia in 1787. Yet the Constitution, coupled with a commitment to constitutionalism, continues to play a vital part in the life of the third century of American government.

CHAPTER REVIEW

Wrapping it up

1. The Constitution of the United States is a living document, the charter of the nation, and thus has a presence that gives it a special place in American government.
2. The Declaration of Independence attempted to justify revolution against Great Britain by explaining the purposes of government. The Articles of Confederation represented the first effort at establishing a central government for the newly independent states, but the plan proved to be defective.
3. The Philadelphia Convention in 1787 produced a plan for a new national government that had to be approved by conventions in nine states before going into effect.
4. The Constitution was designed to achieve both effective and limited government: effective by granting powers sufficient for a strong union and limited by restraining and arranging those powers to protect liberty.
5. The possibility of amendment helps to explain how the Constitution remains current in its third century. The Constitution has also been remade through interpretation by the courts and through custom and usage.
6. *Marbury v. Madison* brought judicial review to the Constitution in 1803. As a result, the Supreme Court sits as the final authority on the meaning of the Constitution.

KEY TERMS

Readings for Further Study

A Machine That Would Go of Itself, by Michael Kammen (Piscataway, NJ: Transaction, 2006), explores the role of constitutionalism in American life.

Decisions of the Supreme Court interpreting the Constitution are readily found in edited form in casebooks such as Lee Epstein, *Constitutional Law for a Changing America,* 7th ed. (Washington, D.C.: CQ Press, 2010).

An explanation of the Constitution, section by section, appears in Sue Davis and J. W. Peltason, *Corwin and Peltason's Understanding the Constitution,* 17th ed. (Belmont, CA: Wadsworth, 2008).

Useful insight into American political thought in the founding era can be gleaned from Gordon S. Wood, *The Creation of the American Republic,* 1776–1787, (Chapel Hill, NC: University of North Carolina Press, 1998).

The Federalist essays are widely available in several editions.

The best collection of antifederalist literature is Herbert J. Storing, ed., *The Complete Anti-Federalist,* 3 vols. (Chicago: University of Chicago Press, 2007).

A wide range of writings from the founding era is collected in Bruce Frohnen, ed., *The American Republic: Primary Sources,* (Indianapolis: Liberty Fund, 2002).

Constitutional development since colonial days is the subject of Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution,* 7th ed., 2 vols. (New York: Norton, 1991).

Notes

1. See Max Farrand, *The Records of the Federal Convention of 1787,* 4 vols. (New Haven, CT: Yale University Press, 1911).
2. John Quincy Adams, *The Jubilee of the Constitution* (New York: Samuel Colman, 1839), p. 55.
3. *Heart of Atlanta Motel v. United States,* 379 U.S. 274 (1964). This is a citation to a Supreme Court decision. "U.S." stands for the *United States Reports,* the official publication containing decisions by the Supreme Court. The number 379 preceding "U.S." and the number 274 following "U.S." indicate the volume and page, respectively, of the *Reports* in which the case can be found. For more information about Supreme Court decisions, see Chapter 11.
4. *McCulloch v. Maryland,* 17 U.S. (4 Wheaton) 316, 415 (1819) (emphasis deleted). "Wheaton" was the name of the Supreme Court's reporter of decisions at this time. Until 1875, when the use of "U.S." became the rule, citations to Supreme Court decisions contained the reporter's name. Hence, this case was in volume 4 of the reports published by Henry Wheaton.
5. Marcia Coyle, "No Set Procedure for Amendments," *National Law Journal,* June 1, 1992, p. 10.
6. Richard Hofstadter, *The Idea of a Party System* (Berkeley: University of California Press, 1969), p. 128.
7. 5 U.S. (1 Cranch) 137 (1803).
8. *Scott v. Sanford,* 60 U.S. (19 Howard) 393 (1857).