1998, the Congress considered whether President Bill Clinton's denial, under oath, of a sexual relationship with a White House intern, who later admitted their affair, fit the constitutional standard of impeachment for "high Crimes and Misdemeanors." Although the House of Representatives voted to impeach President Clinton, the Senate, in a trial presided over by Chief Justice William H. Rehnquist, did not convict him.

The Final Product

Once the delegates had resolved their major disagreements, they dispatched the remaining issues relatively quickly. A committee was then appointed to organize and write up the results of the proceedings. Twenty-three resolutions had been debated and approved by the convention; these were reorganized under seven articles in the draft constitution. The preamble, which was the last section to be drafted, begins with a phrase that would have been impossible to write when the convention opened. This single sentence contains four elements that form the foundation of the American political tradition:[25]

- *It creates a people:* "We the people of the United States" was a dramatic departure from a loose confederation of states.
- *It explains the reason for the Constitution:* "in order to form a more perfect Union" was an indirect way of saying that the first effort, the Articles of Confederation, had been inadequate.
- *It articulates goals:* "[to] establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity"—in other words, the government exists to promote order and freedom.
- *It fashions a government:* "do ordain and establish this Constitution for the United States of America."

The Basic Principles

In creating the Constitution, the founders relied on four political principles—republicanism, federalism, separation of powers, and checks and balances—that together established a revolutionary new political order.

Republicanism is a form of government in which power resides in the people and is exercised by their elected representatives. The idea of republicanism may be traced to the Greek philosopher Aristotle (384–322 B.C.), who advocated a constitution that combined principles of both democratic and oligarchic government. The framers were determined to avoid aristocracy (rule by a hereditary class), monarchy (rule by one person), and direct democracy (rule by the people). A republic was both new and daring: no people had ever been governed by a republic on so vast a scale.

republicanism A form of government in which power resides in the people and is exercised by their elected representatives.

The framers themselves were far from sure that their government could be sustained. They had no model of republican government to follow; moreover, republican government was thought to be suitable only for small territories, where the interests of the public would be obvious and where the government would be within the reach of every citizen. After the convention ended, Benjamin Franklin was asked what sort of government the new nation would have. "A republic," the old man replied, "if you can keep it."

Federalism is the division of power between a central government and regional governments. Citizens are thus subject to two different bodies of law. Federalism can be seen as standing between two competing government schemes. On the one side is unitary government, in which all power is vested in a central authority. On the other side stands confederation, a loose union of powerful states. In a confederation, the states surrender some power to a central government but retain the rest. The Articles of Confederation, as we have seen, divided power between loosely knit states and a weak central government. The Constitution also divides power between the states and a central government, but it confers substantial powers on a national government at the expense of the states.

According to the Constitution, the powers vested in the national and state governments are derived from the people, who remain the ultimate sovereigns. National and state governments can exercise their power over people and property within their spheres of authority. But at the same time, by participating in the electoral process or by amending their governing charters, the people can restrain both the national and the state governments if necessary to preserve liberty.

The Constitution lists the powers of the national government and the powers denied to the states. All other powers remain with the states. Generally, the states are required to give up only the powers necessary to create an effective national government; the national government is limited in turn to the powers specified in the Constitution. Despite the specific lists, the Constitution does not clearly describe the spheres of authority within which the powers can be exercised. As we will discuss in Chapter 4, limits on the exercise of power by the national government and the states have evolved as a result of political and military conflicts; moreover, the limits have proved changeable.

Separation of powers and checks and balances are two distinct principles, but both are necessary to ensure that one branch does not dominate the government. **Separation of powers** is the assignment of the lawmaking, law-enforcing, and law-interpreting functions of government to independent legislative, executive, and judicial branches, respectively. Separation of powers safeguards liberty by ensuring that all government power does not fall into the hands of a single person or group of people. However, the Constitution constrained majority rule by limiting the people's direct influence on the electoral process (see Figure 3.1). In theory, separation of powers means that one branch cannot exercise the powers of the other branches. In practice, however, the separation is far from complete. One scholar has suggested that what we have instead is "separate institutions sharing powers."[26]

Checks and balances is a means of giving each branch of government some scrutiny of and control over the other branches. The aim is to prevent the exclusive exercise of certain powers by any one of the three branches. For example, only Congress can enact laws. But the president (through the veto power) can cancel them, and the courts (by finding that a law violates the Constitution) can strike them down. The process goes on as Congress and the president sometimes begin the legislative process anew, attempting to reformulate laws to address the flaws identified by the Supreme Court in its decisions. In a "check on a check," Congress can override a president's veto by an extraordinary (two-thirds) majority in each chamber. Congress is also empowered to propose amendments to the Constitution, counteracting the courts' power to invalidate. Figure 3.2 depicts the relationship between separation of powers and checks and balances.

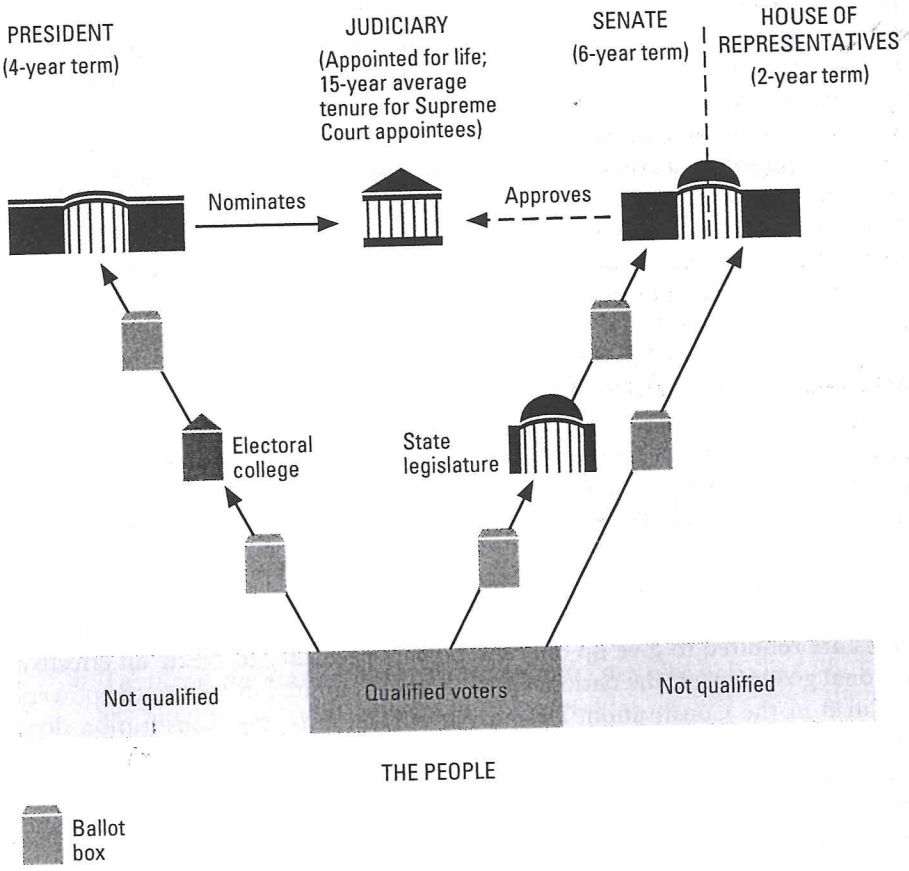
federalism The division of power between a central government and regional governments.

separation of powers The assignment of lawmaking, law-enforcing, and law-interpreting functions to separate branches of government.

checks and balances A government structure that gives each branch some scrutiny of and control over the other branches.

FIGURE 3.1 The Constitution and the Electoral Process

The framers were afraid of majority rule, and that fear is reflected in the electoral process for national office described in the Constitution. The people, speaking through the voters, participated directly only in the choice of their representatives in the House. The president and senators were elected indirectly, through the electoral college and state legislatures. (Direct election of senators did not become law until 1913, when the Seventeenth Amendment was ratified.) Judicial appointments are, and always have been, far removed from representative links to the people. Judges are nominated by the president and approved by the Senate.



The Articles of the Constitution

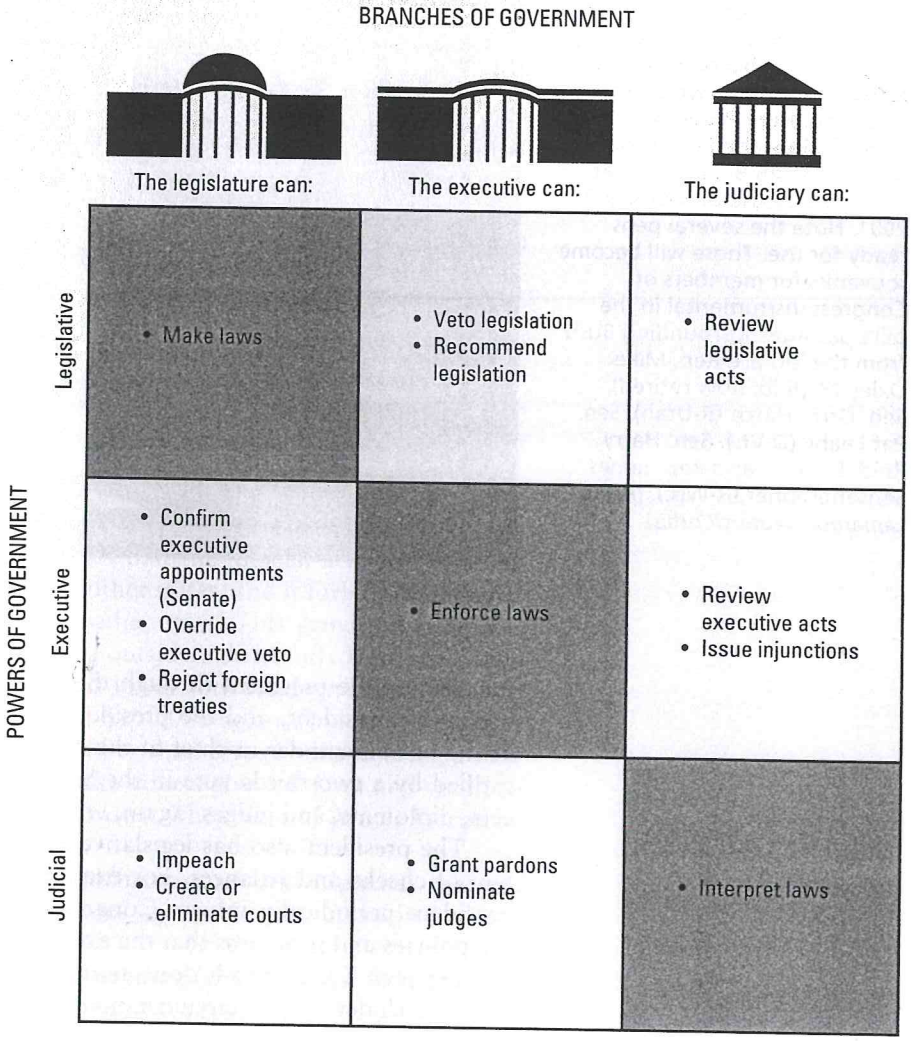
In addition to the preamble, the Constitution contains seven articles. The first three establish the separate branches of government and specify their internal operations and powers. The remaining four define the relationships among the states, explain the process of amendment, declare the supremacy of national law, and explain the procedure for ratifying the Constitution.

Article I: The Legislative Article. In structuring their new government, the framers began with the legislative branch because they considered lawmaking the most important function of a republican government. Article I is the most detailed, and therefore the longest, of the articles. It grants substantial but limited legislative power to Congress (Article I begins: "All legislative Power herein granted. . . ."). It defines the bicameral (two-chamber) character of Congress and describes the internal operating procedures of the House of Representatives and the Senate. Section 8 of Article I articulates the principle of **enumerated powers,** which means that Congress can exercise only the powers that the Constitution assigns to it. Eighteen powers are enumerated; the first seventeen are specific powers. For example, the third clause of Section 8 gives Congress the power to regulate interstate commerce. (One of the chief shortcomings of the Articles of Confederation was the lack of a means to cope with trade wars between the states. The solution was to vest control of interstate commerce in the national government.)

enumerated powers The powers explicitly granted to Congress by the Constitution.

FIGURE 3.2 Separation of Powers and Checks and Balances

Separation of powers is the assignment of lawmaking, law-enforcing, and law-interpreting functions to the legislative, executive, and judicial branches, respectively. The phenomenon is illustrated by the diagonal from upper left to lower right in the figure. Checks and balances give each branch some power over the other branches. For example, the executive branch possesses some legislative power, and the legislative branch possesses some executive power. These checks and balances are listed outside the diagonal.



The last clause in Section 8, known as the **necessary and proper clause** (or the elastic clause), gives Congress the means to execute the enumerated powers (see the appendix). This clause is the basis of Congress's **implied powers**—those powers that Congress needs to execute its enumerated powers. For example, the power to levy and collect taxes (clause 1) and the power to coin money and regulate its value (clause 5), when joined with the necessary and proper clause (clause 18), imply that Congress has the power to charter a bank. Otherwise, the national government would have no means of managing the money it collects through its power to tax. Implied powers clearly expand the enumerated powers conferred on Congress by the Constitution.

necessary and proper clause The last clause in Section 8 of Article I of the Constitution, which gives Congress the means to execute its enumerated powers. This clause is the basis for Congress's implied powers. Also called the *elastic clause.*

implied powers Those powers that Congress needs to execute its enumerated powers.

Article II: The Executive Article. Article II grants executive power to a president. The article establishes the president's term of office, the procedure

Is It a Mont Blanc?
A president gives his approval to legislation by signing it into law. Since the 1960s, the bill-signing ceremony has become an art form, garnering much press attention. Here President George W. Bush signs the Patriot Act Anti-Terrorism Bill into law at the White House on October 26, 2001. Note the several pens ready for use. These will become souvenirs for members of Congress instrumental in the bill's passage. Surrounding Bush from the left are Rep. Mike Oxley (R-Ohio; now retired), Sen. Orrin Hatch (R-Utah), Sen. Pat Leahy (D-Vt.), Sen. Harry Reid (D-Nev.), and Rep. James Sensenbrenner (R-Wis.). *(Kevin Lamarque/Reuters/Corbis)*

for electing the president through the electoral college, the qualifications for becoming president, and the president's duties and powers. The last include acting as commander in chief of the military; making treaties (which must be ratified by a two-thirds vote in the Senate); and appointing government officers, diplomats, and judges (again, with the advice and consent of the Senate).

The president also has legislative powers—part of the constitutional system of checks and balances. For example, the Constitution requires that the president periodically inform Congress of "the State of the Union" and of the policies and programs that the executive branch intends to advocate in the coming year. Today, this is done annually in the president's State of the Union address. Under special circumstances, the president can also convene or adjourn Congress.

The duty to "take Care that the Laws be faithfully executed" in Section 3 has provided presidents with a reservoir of power. President Nixon tried to use this power when he refused to turn over the Watergate tapes despite a judicial subpoena in a criminal trial. He claimed broad executive privilege, an extension of the executive power implied in Article II. But the Supreme Court rejected his claim, arguing that it violated the separation of powers, because the decision to release or withhold information in a criminal trial is a judicial, not an executive, function.

Article III: The Judicial Article. The third article was left purposely vague. The Constitution established the Supreme Court as the highest court in the land. But beyond that, the framers were unable to agree on the need for a national judiciary or on its size, its composition, or the procedures it should follow. They left these issues to Congress, which resolved them by creating a system of federal (that is, national) courts, separate from the state courts.

Unless they are impeached, federal judges serve for life. They are appointed to indefinite terms "during good Behaviour," and their salaries cannot be reduced while they hold office. These stipulations reinforce the separation of powers; they see to it that judges are independent of the other branches and that they do not have to fear retribution for their exercise of judicial power.

Congress exercises a potential check on the judicial branch through its power to create (and eliminate) lower federal courts. Congress can also restrict the power of the federal courts to decide cases. And, as we have noted, the president appoints, with the advice and consent of the Senate, the justices of the Supreme Court and the judges of the lower federal courts. Since the 1980s, especially, the judicial appointment process has become highly politicized, with both Democrats and Republicans accusing each other of obstructionism or extremism in several high-profile confirmation debates.

Article III does not explicitly give the courts the power of **judicial review,** that is, the authority to invalidate congressional or presidential actions because they violate the Constitution. That power has been inferred from the logic, structure, and theory of the Constitution and from important court rulings, some of which we will discuss in subsequent chapters.

The Remaining Articles. The remaining four articles of the Constitution cover a lot of ground. Article IV requires that the judicial acts and criminal warrants of each state be honored in all other states, and it forbids discrimination against citizens of one state by another state. This provision promotes equality; it keeps the states from treating outsiders differently from their own citizens. For example, suppose Smith and Jones both reside in Illinois, and an Illinois court awards Smith a judgment of $100,000 against Jones. Jones moves to Alaska, hoping to avoid payment. Rather than force Smith to bring a new lawsuit against Jones in Alaska, the Alaska courts give full faith and credit to the Illinois judgment, enforcing it as their own. The origin of Article IV can be traced to the Articles of Confederation.

Article IV also allows the addition of new states and stipulates that the national government will protect the states against foreign invasion and domestic violence.

Article V specifies the methods for amending (changing) the Constitution. We will have more to say about this amendment process shortly.

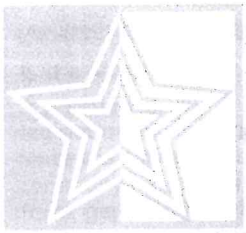
An important component of Article VI is the **supremacy clause,** which asserts that when the Constitution, national laws, and treaties conflict with state or local laws, the first three take precedence over the last two. The stipulation is vital to the operation of federalism. In keeping with the supremacy clause, Article VI requires that all national and state officials, elected or appointed, take an oath to support the Constitution. The article also mandates that religious affiliation or belief cannot be a prerequisite for holding government office.

Finally, Article VII describes the ratification process, stipulating that approval by conventions in nine states would be necessary for the Constitution to take effect.

The idea of a written constitution seems entirely natural to Americans today. Lacking a written constitution, Great Britain has started to provide written guarantees for human rights (see "Compared with What? Britain's Bill of Rights"). And the members of the European Convention charged with crafting a constitution for the European Union have their work cut out for them. The issues that animated the Constitutional Convention in 1787 seem all too familiar

judicial review The power to declare congressional (and presidential) acts invalid because they violate the Constitution.

supremacy clause The clause in Article VI of the Constitution that asserts that national laws take precedence over state and local laws when they conflict.



Compared with What?

Britain's Bill of Rights

Britain does not have a written constitution, that is, a deliberate scheme of government formally adopted by the people and specifying special processes for its amendment. In Britain, no single document or law is known as "the constitution." Instead, Britain has an "unwritten constitution," an amalgam of important documents and laws passed by Parliament (the British legislature), court decisions, customs, and conventions. Britain's "constitution" has no existence apart from ordinary law. In contrast to the American system of government, Britain's Parliament may change, amend, or abolish its fundamental laws and conventions at will. No special procedures or barriers must be overcome to enact such changes.

According to government leaders, Britain has done very well without a written constitution, thank you very much. Or at least that was the position of Prime Minister Margaret Thatcher when she was presented with a proposal for a written constitution in 1989. Thatcher observed that despite Britain's lack of a bill of rights and an independent judiciary, "our present constitutional arrangements continue to serve us well. . . . Furthermore, the government does not feel that a written constitution in itself changes or guarantees anything."

In 1995, a nationwide poll revealed that the British people held a different view. Three-fourths of British adults thought that it was time for a written constitution, and even more maintained that the country needed a written bill of rights. These high levels of public support and the election of a new government in 1997 helped to build momentum for important changes in Britain's long history of rule by unwritten law. In October 2000, England formally began enforcing the Human Rights Act, a key component of the government's political program, which incorporated into British law sixteen guarantees of the European Convention on Human Rights drafted by the Council of Europe, a group founded to protect individual freedoms. (The charter was enacted earlier in Scotland, which, along with England, Wales, and Northern Ireland, makes up Great Britain.) Thus, the nation that has been the source of some of the world's most significant ideas concerning liberty and individual freedom finally put into writing guarantees to ensure these fundamental rights for its own citizens. Legal experts hailed the edict as the largest change to British law in three centuries.

It remains to be seen whether the Human Rights Act will, in the words of one former minister in the Thatcher government, "rob us of freedoms we have had for centuries" or, as British human rights lawyer Geoffrey Robertson sees it, "help produce a better culture of liberty." Perhaps the track record of the United States and its nearly 220 years of experience with the Bill of Rights will prove useful to our British "cousins," who appear ready to alter their system of unwritten rules.

Sources: Andrew Marr, *Ruling Britannia: The Failure and Future of British Democracy* (London: Michael Joseph, 1995); Will Hutton, *The State We're In* (London: Cape, 1995); Fred Barbash, "The Movement to Rule Britannia Differently," *Washington Post,* 23 September 1995, p. A27; "Bringing Rights Home," *The Economist,* 26 August 2000, pp. 45–46; Sarah Lyall, "209 Years Later, the English Get American-Style Bill of Rights," *New York Times,* 2 October 2000, p. A3; Suzanne Kapner, "Britain's Legal Barriers Start to Fall," *New York Times,* 4 October 2000, p. W1.

to us on this side of the Atlantic. Balancing power between a central government and the individual nation-states and agreeing to the core powers of the central government are but two of the big issues that are bound to make European constitutionalism a challenge for democracy.

The Framers' Motives

Some argue that the Constitution is essentially a conservative document written by wealthy men to advance their own interests. One distinguished historian who wrote in the early 1900s, Charles A. Beard, maintained that the delegates had much to gain from a strong national government.[27] Many held government securities dating from the Revolutionary War that had become practically worthless under the Articles of Confederation. A strong national government would protect their property and pay off the nation's debts.

Beard's argument, that the Constitution was crafted to protect the economic interests of this small group of creditors, provoked a generation of historians to examine the existing financial records of the convention delegates. Their scholarship has largely discredited his once-popular view.[28] For example, it turns out that seven of the delegates who left the convention or refused to sign the Constitution held public securities worth more than twice the total of the holdings of the thirty-nine delegates who did sign. Moreover, the most influential delegates owned no securities. And only a few delegates appear to have directly benefited economically from the new government.[29] Still, there is little doubt about the general homogeneity of the delegates or about their concern for producing a stable economic order that would preserve and promote the interests of some more than others.

What did motivate the framers? Surely economic considerations were important, but they were not the major issues. The single most important factor leading to the Constitutional Convention was the inability of the national or state governments to maintain order under the loose structure of the Articles of Confederation. Certainly, order involved the protection of property, but the framers had a broader view of property than their portfolios of government securities. They wanted to protect their homes, their families, and their means of livelihood from impending anarchy.

Although they disagreed bitterly on the structure and mechanics of the national government, the framers agreed on the most vital issues. For example, three of the most crucial features of the Constitution—the power to tax, the necessary and proper clause, and the supremacy clause—were approved unanimously without debate; experience had taught the delegates that a strong national government was essential if the United States were to survive. The motivation to create order was so strong, in fact, that the framers were willing to draft clauses that protected the most undemocratic of all institutions: slavery.

The Slavery Issue

The institution of slavery was well ingrained in American life at the time of the Constitutional Convention, and slavery helped shape the Constitution, although it is mentioned nowhere by name in it. (According to the first national census in 1790, nearly 18 percent of the population—697,000 people—lived in slavery.) It is doubtful, in fact, that there would have been a Constitution if the delegates had had to resolve the slavery issue, for the southern states would

have opposed a constitution that prohibited slavery. Opponents of slavery were in the minority, and they were willing to tolerate its continuation in the interest of forging a union, perhaps believing that the issue could be resolved another day.

The question of representation in the House of Representatives brought the slavery issue close to the surface of the debate at the Constitutional Convention, and it led to the Great Compromise. Representation in the House was to be based on population. But who counted in the population? States with large slave populations wanted all their inhabitants, slave and free, counted equally; states with few slaves wanted only the free population counted. The delegates agreed unanimously that in apportioning representation in the House and in assessing direct taxes, the population of each state was to be determined by adding "the whole Number of free Persons" and "three fifths of all other Persons" (Article I, Section 2). The phrase "all other Persons" is, of course, a substitute for "slaves."

The three-fifths formula had been used by the 1783 congress under the Articles of Confederation to allocate government costs among the states. The rule reflected the view that slaves were less efficient producers of wealth than free people, not that slaves were three-fifths human and two-fifths personal property.[30]

The three-fifths clause gave states with large slave populations (the South) greater representation in Congress than states with small slave populations (the North). If all slaves had been included in the count, the slave states would have had 50 percent of the seats in the House, an outcome that would have been unacceptable to the North. Had none of the slaves been counted, the slave states would have had 41 percent of House seats, which would have been unacceptable to the South. The three-fifths compromise left the South with 47 percent of the House seats, a sizable minority, but in all likelihood a losing one on slavery issues.[31] The overrepresentation resulting from the South's large slave populations translated into greater influence in selecting the president as well, because the electoral college was based on the size of the states' congressional delegations. The three-fifths clause also undertaxed states with large slave populations.

Another issue centered around the slave trade. Several southern delegates were uncompromising in their defense of the slave trade; other delegates favored prohibition.The delegates compromised, agreeing that the slave trade would not be ended before twenty years had elapsed (Article I, Section 9). Finally, the delegates agreed, without serious challenge, that fugitive slaves would be returned to their masters (Article IV, Section 2).

In addressing these points, the framers in essence condoned slavery. Tens of thousands of Africans were forcibly taken from their homes and sold into bondage. Many died on the journey to this distant land, and those who survived were brutalized and treated as less than human. Clearly, slavery existed in stark opposition to the idea that all men are created equal. Although many slaveholders, including Jefferson and Madison, agonized over it, few made serious efforts to free their own slaves. Most Americans seemed indifferent to slavery and felt no embarrassment at the apparent contradiction between the Declaration of Independence and slavery. Do the framers deserve contempt for their toleration and perpetuation of slavery? The most prominent founders—George Washington, John Adams, and Thomas Jefferson—expected slavery to wither away. A leading scholar of colonial history has offered a defense of their

inaction: the framers were simply unable to transcend the limitations of the age in which they lived.[32]

Nonetheless, the eradication of slavery proceeded gradually in certain states. Opposition to slavery on moral or religious grounds was one reason. Economic forces, such as a shift in the North to agricultural production that was less labor intensive, were a contributing factor too. By 1787, Connecticut, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont had abolished slavery or provided for gradual emancipation. No southern states followed suit, although several enacted laws making it easier for masters to free their slaves. The slow but perceptible shift on the slavery issue in many states masked a volcanic force capable of destroying the Constitutional Convention and the Union.

Selling the Constitution

Nearly four months after the Constitutional Convention opened, the delegates convened for the last time, on September 17, 1787, to sign the final version of their handiwork. Because several delegates were unwilling to sign the document, the last paragraph was craftily worded to give the impression of unanimity: "Done in Convention by the Unanimous Consent of the States present." Before it could take effect, the Constitution had to be ratified by a minimum of nine state conventions. The support of key states was crucial. In Pennsylvania, however, the legislature was slow to convene a ratifying convention. Pro-Constitution forces became so frustrated at this dawdling that they broke into a local boardinghouse and hauled two errant legislators through the streets to the statehouse so the assembly could schedule the convention.

The proponents of the new charter, who wanted a strong national government, called themselves Federalists. The opponents of the Constitution were quickly dubbed Antifederalists. They claimed, however, to be the true federalists because they wanted to protect the states from the tyranny of a strong national government. Elbridge Gerry, a vocal Antifederalist, called his opponents "rats" (because they favored ratification) and maintained that he was an "antirat."[33] Such is the Alice-in-Wonderland character of political discourse. Whatever they were called, the viewpoints of these two groups formed the bases of the first American political parties, as well as several enduring debates that politicians have wrestled with as they have attempted to balance the tradeoffs between freedom, order, and equality.

The *Federalist* Papers

The press of the day became a battlefield of words, filled with extravagant praise or vituperative condemnation of the proposed constitution. Beginning in October 1787, an exceptional series of eighty-five newspaper articles defending the Constitution appeared under the title *The Federalist: A Commentary on the Constitution of the United States*. The essays bore the pen name Publius (for a Roman emperor and defender of the Republic, Publius Valerius, who was later known as Publicola); they were written primarily by James Madison and Alexander Hamilton, with some assistance from John Jay. Reprinted extensively during the ratification battle, the *Federalist* papers remain the best single commentary we have on the meaning of the Constitution and the political theory it embodies.

Not to be outdone, the Antifederalists offered their own intellectual basis for rejecting the Constitution. In several essays, the most influential published under the pseudonyms Brutus and Federal Farmer, the Antifederalists attacked the centralization of power in a strong national government, claiming it would obliterate the states, violate the social contract of the Declaration of Independence, and destroy liberty in the process. They defended the status quo, maintaining that the Articles of Confederation established true federal principles.[34]

Of all the *Federalist* papers, the most magnificent and most frequently cited is *Federalist* No. 10, written by James Madison (see the appendix). He argued that the proposed constitution was designed "to break and control the violence of faction." "By a faction," Madison wrote, "I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." No one has improved upon Madison's lucid and compelling argument, and it remains the touchstone on the problem of factions to this day.

What Madison called factions are today called interest groups or even political parties. According to Madison, "The most common and durable source of factions has been the various and unequal distribution of property." Madison was concerned not with reducing inequalities of wealth (which he took for granted) but with controlling the seemingly inevitable conflict that stems from them. The Constitution, he argued, was well constructed for this purpose.

Through the mechanism of representation, wrote Madison, the Constitution would prevent a "tyranny of the majority" (mob rule). The people would not control the government directly but indirectly through their elected representatives. And those representatives would have the intelligence and the understanding to serve the larger interests of the nation. Moreover, the federal system would require that majorities form first within each state and then organize for effective action at the national level. This and the vastness of the country would make it unlikely that a majority would form that would "invade the rights of other citizens."

Can you explain why . . .
having many factions reduces the danger of factions?

The purpose of *Federalist* No. 10 was to demonstrate that the proposed government was not likely to be dominated by any faction. Contrary to conventional wisdom, Madison argued, the key to mending the evils of factions is to have a large republic—the larger, the better. The more diverse the society, the less likely it is that an unjust majority can form. Madison certainly had no intention of creating a majoritarian democracy; his view of popular government was much more consistent with the model of pluralist democracy discussed in Chapter 2.

Madison pressed his argument from a different angle in *Federalist* No. 51 (see the appendix). Asserting that "ambition must be made to counteract ambition," he argued that the separation of powers and checks and balances would control efforts at tyranny from any source. If power is distributed equally among the three branches, he argued, each branch will have the capacity to counteract the others. In Madison's words, "usurpations are guarded against by a division of the government into distinct and separate departments." Because legislative power tends to predominate in republican governments, legislative authority is divided between the Senate and the House of Representatives, which have different methods of election and terms of office. Additional protection arises from federalism, which divides power "between

two distinct governments"—national and state—and subdivides "the portion allotted to each . . . among distinct and separate departments." Madison called this arrangement of power, divided as it was across and within levels of government, a "compound republic."

The Antifederalists wanted additional separation of powers and additional checks and balances, which they maintained would eliminate the threat of tyranny entirely. The Federalists believed that such protections would make decisive national action virtually impossible. But to ensure ratification, they agreed to a compromise.

A Concession: The Bill of Rights

Despite the eloquence of the *Federalist* papers, many prominent citizens, including Thomas Jefferson, were unhappy that the Constitution did not list basic civil liberties—the individual freedoms guaranteed to citizens. The omission of a bill of rights was the chief obstacle to the adoption of the Constitution by the states. (Seven of the eleven state constitutions that were written in the first five years of independence included such a list.) The colonists had just rebelled against the British government to preserve their basic freedoms. Why did the proposed Constitution not spell out those freedoms?

Can you explain why . . . some of the nation's founders thought that adding a bill of rights to the Constitution might actually limit individual rights?

The answer was rooted in logic, not politics. Because the national government was limited to those powers that were granted to it and because no power was granted to abridge the people's liberties, a list of guaranteed freedoms was not necessary. In *Federalist* No. 84, Hamilton went even further, arguing that the addition of a bill of rights would be dangerous. To deny the exercise of a nonexistent power might lead to the exercise of a power that is not specifically denied. For example, to declare that the national government shall make no law abridging free speech might suggest that the national government could prohibit activities in unspecified areas (such as divorce), which are the states' domain. Because it is not possible to list all prohibited powers, wrote Hamilton, any attempt to provide a partial list would make the unlisted areas vulnerable to government abuse.

But logic was no match for fear. Many states agreed to ratify the Constitution only after George Washington suggested adding a list of guarantees through the amendment process. Well in excess of one hundred amendments were proposed by the states. These were eventually narrowed to twelve, which were approved by Congress and sent to the states. Ten became part of the Constitution in 1791, after securing the approval of the required three-fourths of the states. Collectively, the ten amendments are known as the **Bill of Rights.** They restrain the national government from tampering with fundamental rights and civil liberties and emphasize the limited character of the national government's power (see Table 3.2).

Ratification

The Constitution officially took effect upon its ratification by the ninth state, New Hampshire, on June 21, 1788. However, the success of the new government was not ensured until July 1788, by which time the Constitution was ratified by the key states of Virginia and New York after lengthy debate.

Bill of Rights The first ten amendments to the Constitution. They prevent the national government from tampering with fundamental rights and civil liberties, and emphasize the limited character of national power.

The reflection and deliberation that attended the creation and ratification of the Constitution signaled to the world that a new government could be

TABLE 3.2 The Bill of Rights

The first ten amendments to the Constitution are known as the Bill of Rights. The following is a list of those amendments, grouped conceptually. For the actual order and wording of the Bill of Rights, see the appendix.

Guarantees	Amendment
Guarantees for Participation in the Political Process	
No government abridgement of speech or press; no government abridgement of peaceable assembly; no government abridgement of petitioning government for redress.	1
Guarantees Respecting Personal Beliefs	
No government establishment of religion; no government prohibition of free religious exercise.	1
Guarantees of Personal Privacy	
Owner's consent necessary to quarter troops in private homes in peacetime; quartering during war must be lawful.	3
Government cannot engage in unreasonable searches and seizures; warrants to search and seize require probable cause.	4
No compulsion to testify against oneself in criminal cases.	5
Guarantees Against Government's Overreaching	
Serious crimes require a grand jury indictment; no repeated prosecution for the same offense; no loss of life, liberty, or property without due process; no taking of property for public use without just compensation.	5
Criminal defendants will have a speedy public trial by impartial local jury; defendants are informed of accusation; defendants may confront witnesses against them; defendants may use judicial process to obtain favorable witnesses; defendants may have legal assistance for their defense.	6
Civil lawsuits can be tried by juries if controversy exceeds $20; in jury trials, fact-finding is a jury function.	7
No excessive bail; no excessive fines; no cruel and unusual punishment.	8
Other Guarantees	
The people have the right to bear arms.	2
No government trespass on unspecified fundamental rights.	9
The states or the people retain all powers not delegated to the national government or denied to the states.	10

launched peacefully. The French observer Alexis de Tocqueville (1805–1859) later wrote:

> That which is new in the history of societies is to see a great people, warned by its lawgivers that the wheels of government are stopping, turn its attention on itself without haste or fear, sound the depth of the ill, and then wait for two years to find the remedy at leisure, and then finally, when the remedy has been indicated, submit to it voluntarily without its costing humanity a single tear or drop of blood.[35]

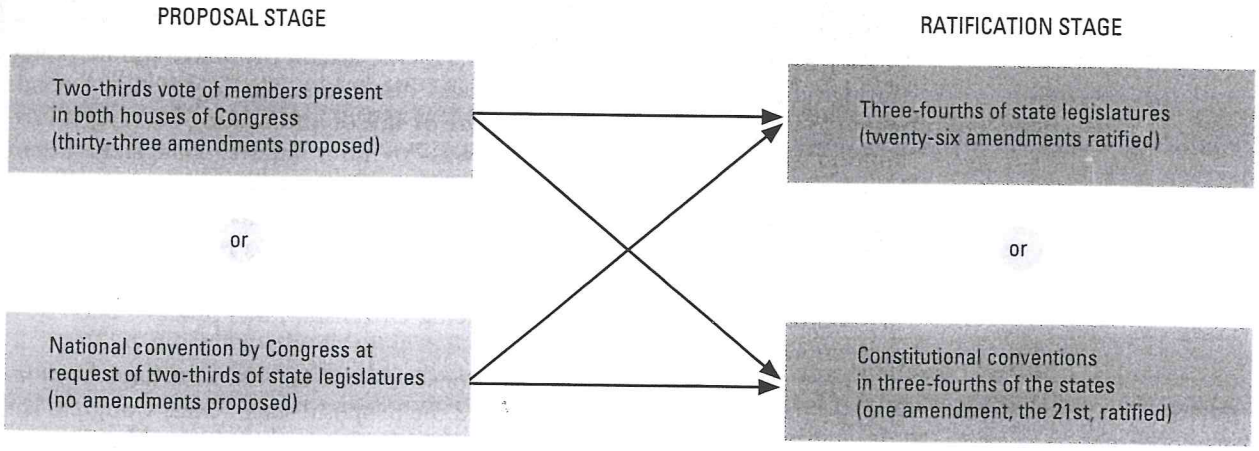
★ Constitutional Change

The founders realized that the Constitution would have to be changed from time to time. To this end, they specified a formal amendment process, and one that was used almost immediately to add the Bill of Rights. With the passage of time, the Constitution has also been altered through judicial interpretation and changes in political practice.

The Formal Amendment Process

The amendment process has two stages, proposal and ratification; both are necessary for an amendment to become part of the Constitution. The Constitution provides two alternatives for completing each stage (see Figure 3.3). Amendments can be proposed by a two-thirds vote in both the House of Representatives and the Senate or by a national convention, summoned by Congress at the request of two-thirds of the state legislatures. All constitutional amendments to date have been proposed by the first method; the second has never been used.

FIGURE 3.3 Amending the Constitution



Amending the Constitution requires two stages: proposal and ratification. Both Congress and the states can play a role in the proposal stage, but ratification is a process that must be fought in the states themselves. Once a state has ratified an amendment, it cannot retract its action. However, a state may reject an amendment and then reconsider its decision.

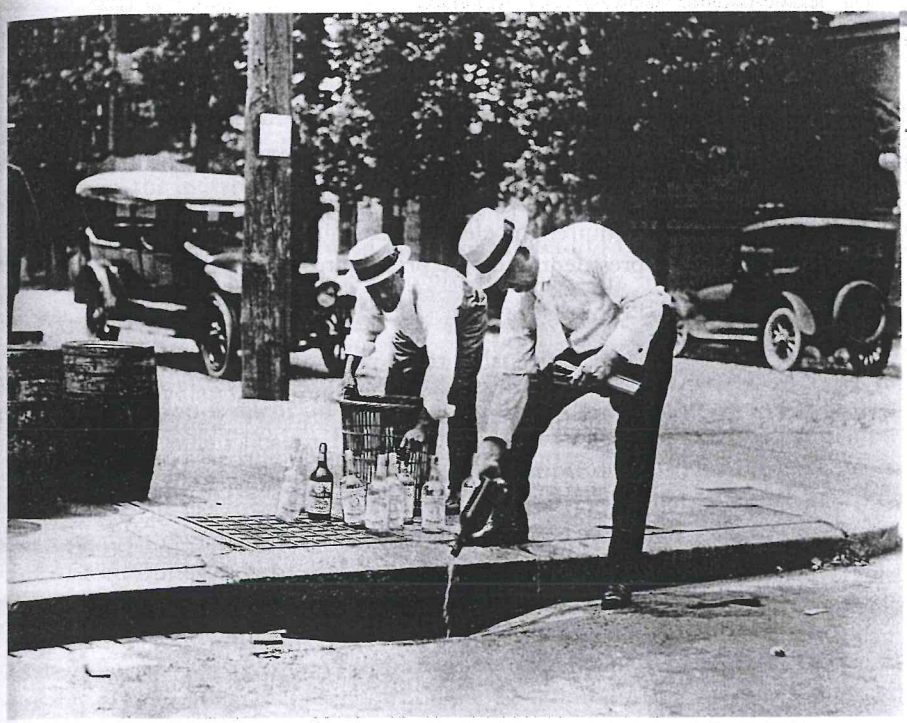
A proposed amendment can be ratified by a vote of the legislatures of three-fourths of the states or by a vote of constitutional conventions held in three-fourths of the states. Congress chooses the method of ratification. It has used the state convention method only once, for the Twenty-first Amendment, which repealed the Eighteenth Amendment (prohibition of intoxicating liquors). Congress may, in proposing an amendment, set a time limit for its ratification. Beginning with the Eighteenth Amendment, but skipping the Nineteenth, Congress has set seven years as the limit for ratification.

Note that the amendment process requires the exercise of extraordinary majorities (two-thirds and three-fourths). The framers purposely made it difficult to propose and ratify amendments (although nowhere near as difficult as under the Articles of Confederation). They wanted only the most significant issues to lead to constitutional change. Note, too, that the president plays no formal role in the process. Presidential approval is not required to amend the Constitution, although the president's political influence affects the success or failure of any amendment effort.

Calling a national convention to propose an amendment has never been tried, and the method raises several thorny questions. For example, the Constitution does not specify the number of delegates who should attend, the method by which they should be chosen, or the rules for debating and voting on a proposed amendment. Confusion surrounding the convention process has precluded its use, leaving the amendment process in congressional hands.[36] The major issue is the limits, if any, on the business of the convention. Remember that the convention in Philadelphia in 1787, charged with revising the Articles of Confederation, drafted an entirely new charter. Would a national convention called to consider a particular amendment be within its bounds to rewrite the Constitution? No one really knows.

Most of the Constitution's twenty-seven amendments were adopted to reflect changes in political thinking. The first ten amendments (the Bill of Rights) were the price of ratification, but they have been fundamental to our system of government. The last seventeen amendments fall into three main categories: they make public policy, they correct deficiencies in the government's structure, or they promote equality (see Table 3.3). One attempt to make public policy through a constitutional amendment was disastrous. The Eighteenth Amendment (1919) prohibited the manufacture or sale of intoxicating beverages. Prohibition lasted fourteen years and was an utter failure. Gangsters began bootlegging liquor, people died from drinking homemade spirits, and millions regularly broke the law by drinking anyway. Congress had to propose another amendment in 1933 to repeal the Eighteenth. The states ratified this amendment, the Twenty-first, in less than ten months, less time than it took to ratify the Fourteenth Amendment, guaranteeing citizenship, due process, and equal protection of the laws.

Since 1787, about ten thousand constitutional amendments have been introduced; only a fraction have survived the proposal stage. Once Congress has approved an amendment, its chances for ratification are high. The Twenty-seventh Amendment, which prevents members of Congress from voting themselves immediate pay increases, was ratified in 1992. It had been submitted to the states in 1789 without a time limit for ratification, but it languished in a political netherworld until 1982, when a University of Texas student, Gregory D. Watson, stumbled upon the proposed amendment while researching a paper. At that time, only eight states had ratified the amendment. Watson took up



Down the Drain
The Eighteenth Amendment, which was ratified by the states in 1919, banned the manufacture, sale, and transportation of alcoholic beverages. Banned beverages were destroyed, as pictured here, by federal agents from the Treasury Department, which enforced prohibition. The amendment was spurred by moral and social reform groups, such as the Woman's Christian Temperance Union, founded by Evanston, Illinois, resident Frances Willard in 1874. The amendment proved to be an utter failure. People continued to drink, but their alcohol came from illegal sources. *(© Bettmann/ Corbis)*

the cause, prompting renewed interest in the idea. In May 1992, ratification by the Michigan legislature provided the decisive vote, 203 years after congressional approval of the proposed amendment.[37] Only six amendments submitted to the states have failed to be ratified.

Interpretation by the Courts

In *Marbury* v. *Madison* (1803), the Supreme Court declared that the courts have the power to nullify government acts that conflict with the Constitution. (We will elaborate on judicial review in Chapter 14.) The exercise of judicial review forces the courts to interpret the Constitution. In a way, this makes a lot of sense. The judiciary is the law-interpreting branch of the government; as the supreme law of the land, the Constitution is fair game for judicial interpretation. Judicial review is the courts' main check on the other branches of government. But in interpreting the Constitution, the courts cannot help but give new meaning to its provisions. This is why judicial interpretation is a principal form of constitutional change.

What guidelines should judges use in interpreting the Constitution? For one thing, they must realize that the usage and meaning of many words have changed during the past two hundred years. Judges must be careful to think about what the words meant at the time the Constitution was written. Some insist that they must also consider the original intent of the framers—not an easy task. Of course, there are records of the Constitutional Convention and of the debates surrounding ratification. But there are also many questions about the completeness and accuracy of those records, even Madison's detailed notes. And at times, the framers were deliberately vague in writing the document. This may reflect lack of agreement on, or universal understanding of, certain