Chapter 2. The Constitution
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TEXT

I. The Paradoxical American Constitution

No political document in the U.S. is more respected or more misunderstood than the Constitution. It is to politics what the Bible is to Christianity, what the Torah is to Judaism, or the Koran to Islam. Like these religious texts, the Constitution is subject to great battles over interpretation. And these battles are not just intellectual battles. Like religious wars, we have fought and killed each other over what the Constitution means. Conflicts over interpretation will continue as long as we exist as a nation.

The character of our Constitution makes it particularly subject to interpretive disagreement. It is filled with paradox. It attempted to create a powerful yet limited government. It rested on popular support, yet greatly restricted the influence of average people on government policy and on selecting government officials. It gave overlapping powers to the central government and to the state governments. It created a government that revered human rights, yet allowed for enslavement of some human beings and second class citizenship for
all female human beings. It was based on idealistic political philosophy and on hard practical politics. It allowed for change, yet made change difficult. And the list goes on. Many of the paradoxes we shall see in later chapters rest upon paradoxes in the Constitution.

Why is the Constitution so paradoxical in character? Those who wrote the Constitution, whom we call the "Founding Fathers," or just the "Founders" for short, had to bring together many opposing points of view and interests to build enough support among groups and important people to get the document accepted by the states. The formal term for acceptance is ratification. That same term still applies to getting proposed amendments accepted. The Founders compromised when they could. They ducked and avoided when they could not compromise. They employed vague general language so that people with opposing points of view could think they were getting what they wanted.

Creating a document this way inevitably leads to conflict, because at some point after the constitution goes into effect, you have to decide what that vague general language actually means. In addition, as human beings, we have preferences. These preferences often serve our self-interests. We tend to see what we want to see in the Constitution to justify our self-interested preferences. Clashing interpretations that justify clashing self-interests create conflict.

For example, self-interests and interpretations clashed in the 2011 Supreme Court case over the constitutionality of the Affordable Care Act (or “Obamacare”). Those who wanted government to help more people with health care interpreted the Constitution one way, and those opposed interpreted it in a very different way. Supporters won in a narrow 5 to 4 decision in which most of the law was upheld as constitutional under the power of Congress to tax.

But at the same time, this Constitution that divides us also unifies us as a nation. It is a kind of sacred symbol that we all respect and rally around. Both sides in political fights often accuse each other of violating the Constitution—at least their interpretation of the Constitution! Unifying and dividing is another paradox!

II. The Nature of Constitutions

Let us begin by considering what constitutions do in general before we get to the U.S. Constitution in particular. Nearly all groups and organizations, as well as nations, have constitutions. In groups, like a student club or a faculty senate or assembly, the constitution is usually called "by-laws." Both by-laws and constitutions serve the same purposes. To put it another way, a constitution is to a nation-state what a set of by-laws is to a club.
A set of by-laws or a constitution usually starts out by stating the purposes of the organization or government that is to be created. Then it moves to membership in the group (or citizenship in a nation-state), structure of the governing entity, offices and titles, selection of leaders, terms of office, responsibilities, powers and limits on power, relationships among offices, and procedures for decision making and for changing the by-laws or constitution—the amendment process. All by-laws or constitutions have most of these characteristics. The U.S. Constitution is no different.

Constitutions have a fairly long history in the western world, dating back to the time of the Greeks when many of their city-states had written constitutions. Then for a long period of time in the Middle Ages, people saw written constitutions as violating rule by God through divinely chosen leaders—the idea of Divine Right. Of course those kings used a lot of physical might to claim their Divine Right!

The Enlightenment challenged Divine Right. You may have studied the Enlightenment in a world history or western civilization course. It was an intellectual, political, and scientific movement that began in the 1600s till about 1800. It moved western governments back toward the idea of serving the purposes of PEOPLE rather than the purposes of God. Those purposes were usually laid out in a written agreement or contract—a constitution.

The Enlightenment thinker who believed that toleration was essential for society (public domain)

If you study British history, you will learn about a series of actions over hundreds of years, starting with the Magna Carta in 1215, well before the Enlightenment. The Magna Carta created the first limits on the power of the monarch to act without legal procedures and gave citizens certain limited rights. These actions include passage of the English Bill of Rights in 1689, which required that the monarch not act without consent of Parliament and which laid the framework for many of the rights the Founders put into our own Bill of Rights. The net result for the British monarchy was a huge loss in power. The monarchy went from near absolute power to do anything it wanted to a being a symbolic head of state with little real political power.
We can see the spirit of the Enlightenment in both the Declaration of Independence and the Constitution. While the Declaration sees God as giving man “inalienable rights,” the Declaration gives man the responsibility of creating government to protect those rights. And the Declaration gives man the role of dissolving government when it fails to protect those rights. The Constitution also includes many general and specific rights. Its purpose, as seen in the Preamble, is not to serve some religious goal, but rather to “promote the general welfare” of people in the nation.

The first permanent English settlers who came to America brought with them an already rich tradition of writing constitutions. The Mayflower Compact of 1620 was a written agreement that created a government based on majority rule that all settlers who came to Plymouth in the Massachusetts Colony were obligated to follow. Later, colonial governments wrote their own constitutions. During the revolution, people in the colonies wrote state constitutions to replace colonial governments with state governments. So a long and rich tradition of constitution writing existed in America by the time some of the Founders began to write a constitution for the nation as a whole.

III. The Articles of Confederation

Many students erroneously think that our current Constitution came right at the start of the Revolutionary War in 1776, confusing it with the date of the Declaration of Independence. In fact, it was our second national constitution, and it set up our third national government. The first national government was the very shaky government under the Continental Congress, which spent most of its time running from the British army and attempting to support the rebellion. The
Continental Congress drafted the Articles of Confederation during the war in 1777. But the Articles Constitution was not ratified and fully put into place until 1781, two years before the end of the war.

Weaknesses in the Articles Government were obvious even before the war ended. The central government could not compel states to give money or troops to support George Washington’s revolutionary army. It did not even create a central government that could obligate all states to abide by the treaty that ended hostilities in 1783. These weaknesses led to the famous Philadelphia Constitutional Convention in the summer of 1787. But before we get to that, we should briefly describe the Articles and the government it created, which was our only central government from 1781 until the new government took office in 1789.

The **Articles of Confederation** created a very weak central government. It had a one house legislature and no independent executive or court system. Each state had one vote in the legislature. Passing any legislation required nine votes. Getting nine of thirteen votes meant that any five states could stop anything from passing. As a result, the government could not pass any controversial legislation. The delegation that each state sent to the Articles Congress to cast its single vote had its salary set and paid by each state, not by the Articles Government. Delegates might not get paid if their state legislature did not like what they did! Getting states to abide by national laws was difficult because the central government had no real enforcement power. Most critically, states were not required to collect taxes for the national government. All the Articles Congress could do was request money from the state governments. To amend the Articles required that all states had to agree, so even one state could prevent any amendment!
The presiding officer of the Articles Congress was called the “president,” but the powers of the president were not much beyond presiding over the Articles Congress. The first president was Samuel Huntington, a delegate from Connecticut who served as president when the Articles were finally formally ratified and put into effect in March of 1781. But he only served until July of that same year. Because of ill health he resigned and went home.

The Articles Government had the power to create a national army and coin money and lay out standard weights and measures. However, that did not prevent states from doing similar things. States had their own militias, and several had their own navy as well. States printed their own money and did not necessarily recognize weights and measures from other states. Nor did states always enforce contracts from other states, leading to great difficulty in economic transactions across state lines. States engaged in trade wars with their neighbors, placing taxes, or tariffs, on goods coming in that would compete with goods created in that state. Economic chaos ensued across the nation.

Perhaps the key thing to remember about the Articles of Confederation is that it was a confederation. That is, power was centered in the regional governments, the states, and not in the central government. This political fact had grave implications for the government.

Defending a nation from attack is perhaps the most important function of any government. The new nation was under attack from both inside by Native Americans (who, with a great deal of justification, regarded colonists as invaders who were taking their land) and by European colonial powers at the borders. The central government was not strong enough to defend itself. In short, the Articles of Confederation was doomed. Because of its inherent weakness, it could not perform the most basic requirement for any government.

You might ask why the states formed such a weak central government. The first reason has to do with the allegiances that existed at the time. People thought of themselves as citizens of states and had little loyalty to any national entity. Of course, the experience of the war created some sense of national identity and loyalty. However, many of the armies and leaders under whom the revolutionaries fought were state armies and state leaders. The notable exception was George Washington and his small national army. Washington played a critical role in bringing about change. His charismatic character would be central to creating a sufficiently strong sense of national identity to allow for a stronger central government.

A second explanation lay in the political ambitions of state leaders. States were still competing with each other in extending their western borders. These territorial conflicts among states slowed them down in ratifying even the weak Articles Constitution. A strong central government might slow or prohibit state
expansion, and ambitious state leaders wanted to expand their own states to the west.

The third reason for creating such a weak central government was the colonists' negative experience with the strong central government of Britain. Most Americans did not want to create another strong central government that had enough power to become tyrannical. This distrust of strong governments and political power became a central part of the American political culture. That distrust of power and government continues even today.

IV. The Constitutional Convention

A. Preliminary Events

The next part of the story is how we overcame the obstacles to create a stronger central government than existed under the Articles of Confederation. Perhaps the lesson in this story is that things have to get really bad before enough support exists for a big change, a lesson that still applies today.
In the summer of 1786, a rebellion among farmers in western Massachusetts frightened wealthy people across the nation. **Shay’s Rebellion** was named after its leader Daniel Shays. The failure of the government to give promised back-pay owed to military veterans of the Revolutionary War was the root cause of the rebellion. Because they could not farm while fighting, these farmer/soldier patriots had accumulated bills for unpaid taxes on their land. They were outraged that losing their farms was the reward for fighting without pay to free the country. You can imagine how angry they were. So they created an army of about two thousand men. They used armed force to prevent the courts from confiscating their land.

The Articles Congress had no army to put down this rebellion. Finally the governor of Massachusetts found money to hire a state army to stop the rebellion. But the damage had been done to the credibility of the national government. It could not keep promises and could not even enforce the law or put down rebellion. Wealthy people who loaned money became fearful that government was incapable of enforcing contracts that assured repayment of debts. They felt that something had to be done.

Shortly after the rebellion began, five states sent delegates to Annapolis, Maryland to a convention for the purpose of discussing defects in the Articles of Confederation that were a barrier to trade and commerce. The ongoing rebellion in Massachusetts only increased interest in reform. Four other state governments had appointed representatives to attend the **Annapolis Convention**. But the delegates from these states did not get there in time. Because not enough states were represented and because those who were there concluded that more fundamental changes were necessary, they agreed to go home and take the next step. They would ask their state governments and the Articles Congress to call for a convention to examine the Articles Constitution the following summer in Philadelphia.
The Articles Congress, at the request of most of the states, called for a convention to begin in May of 1787 for the “sole and express purpose of revising the Articles of Confederation.” As we shall see, those who met in the Philadelphia state house in the summer of 1787 went far beyond mere “revising.” They threw out the entire Articles Constitution! They replaced it with the Constitution we have today.

B. The Founders—Who They Were and Their Motivations

With the exception of Rhode Island, which strongly opposed changing the Articles of Confederation and which later refused to ratify the Constitution until threatened with invasion, all states sent delegates. Fifty-five men came to the convention, and thirty-nine stayed to sign the final document. Thirteen of the original delegates left the convention for a variety of reasons and did not sign the document, and three refused to sign because of their opposition.

As a body they represented a good cross-section of the political leadership from the American Revolution. Among the most prominent were Alexander Hamilton, who had been one of the delegates to the Annapolis
Convention and an outspoken advocate of a strong central government, as well as an officer in the Continental Army. Ben Franklin was the oldest delegate. Franklin and seven others at the convention had signed the Declaration of Independence. James Madison, who came prepared with ideas, kept a diary of the events of the convention. Because of his ideas and the records he kept, Madison is known as the “father” of the Constitution. George Washington already had legendary status as leader of the Continental Army. His presence and role as presiding officer were critical to any chance that the nation would accept a new constitution. Many of the delegates had served in the military during the revolution, most as officers. Many had served in the Articles Congress or Continental Congress. Others had been governors.

Among the most prominent people not there were Thomas Jefferson and John Adams, both of whom were in Europe as diplomats for the Articles Government. Jefferson participated indirectly by sharing ideas with and sending books to his close friend and Virginia neighbor, James Madison.

Some historians have argued that the delegates were economically motivated and wrote the document to protect their own economic interests and the interests of the wealthy. Looking at their backgrounds only gives partial supporting evidence that they represented the wealthy. While they were certainly not poor, they were not the wealthiest men in the nation. More than half were lawyers, though that was a part-time profession for most. A few were land speculators, some were merchants, and a few were in finance. About a dozen had owned large plantations or farms with slaves. As a whole, they were middle to upper class.

What they wrote into the Constitution tells us far more about their motivations than anything in their backgrounds. The conclusion of most historians, and my own conclusion, is two-fold and more balanced. On the one hand, they were highly practical people who did protect property through the rule of law. But at the same time, they created a document that allowed for change and did not create any permanent aristocracy. Article I, Section 9 specifically prohibits the government from granting to anyone a “Title of Nobility.” The Founders allowed for the possibility of upward economic and social mobility. In fact, several of the delegates, including most notably Ben Franklin, were self-made men who rose from very modest families.

In light of many modern claims about the religious foundations of the Constitution, the religious backgrounds and beliefs of the delegates are important. They came from a variety of religions, though some had no formal religious ties. Most were from what we would consider “high” churches, those with very formal religious ceremonies. Just a little over half were Episcopalian, a few were Catholic, and several were Presbyterian. Only two were Methodists and none claimed a Baptist affiliation. Some were Deists. Both Washington and Franklin had a great deal of disdain for all formal religious organizations, though
both saw religion as playing an important role in encouraging people to behave responsibly. Nearly all insisted in a sharp separation between government and religion and felt that religious belief should not be required for public office. We shall have more to say about this later.

V. The Ratification Battle—Our Unconstitutional Constitution?

The delegates labored through the summer of 1787 and agreed upon fundamental principles in late July. Then a committee of five, called the Committee of Style and Arrangement, crafted the final wording. That committee included Madison and Hamilton, but credit for most of the wording goes to Gouverneur Morris, who was widely respected for his literary skills. Thirty-nine of the delegates signed the completed constitution on September 17, 1787. Today September 17 is known as “Constitution Day.”

If you remember, the Articles Congress called the convention to “revise” the existing Articles of Confederation. The Articles Constitution had clear rules for amendment. All thirteen states had to approve any change before that change could go into effect. This rule created a problem for the delegates. Rhode Island was not even represented and was opposed to any change, so gaining approval from all thirteen was impossible. Moreover, the Founders knew that getting approval from the other twelve was far from certain.

So what did the delegates do? They ignored the existing rule for amendment, pretended that they were starting from scratch, and wrote their own rule for adoption at the end of the Constitution. The last article stated that the new constitution would go into effect when nine states ratified it. Not thirteen!

Clearly this rule violated the existing constitution of the time. And this rule should not have gone into effect until after the new constitution was adopted. But the delegates got away with it. Several who were also members of the Articles Congress persuaded the Articles Congress to submit the proposed new constitution to the states. The Articles Congress did this with some reluctance, but members knew how unpopular the Articles Government was. At the same time, trying to walk a fine line between support and opposition, the Articles Congress made no recommendation for or against ratification.

The political battle over ratification was not easy. Proponents, who were called Federalists because they supported the federal form of union proposed in the new constitution, used a wide range of tactics to win support. These included philosophical argument, but also political flattery, promises, and crude hard-ball campaign tactics in getting elections called for delegates and in electing delegates to the special ratifying conventions to be held in the states. The opposing side was known as Anti-federalists.
A quick note here. You should not confuse the names of these two sides with the emergence of political parties a few years later. Many students confuse the Federalists and Anti-Federalists and the battle over ratification with our first two political parties. Though the first political party also had the name Federalist and was composed of many of those supporting the new constitution, the other party did not have the name “Anti-federalist.” The second party started with the name “Jeffersonians” because it was centered around the views of Thomas Jefferson. Jefferson was in fact a supporter of the Constitution, even though he was not present at the convention. However, the general question separating these new parties was similar to the major question in ratifying the constitution: how powerful should the central government be and what could it do. If you think about it, the power of the central government is still a question separating political parties today. Now let’s get back to the story of ratification.

Some contemporary scholars feel that most average citizens probably opposed ratification, but their opposition was overcome by the intensity of relatively wealthier commercial and landed interests who felt a new arrangement was critical for business success. The other critical element was the presence of George Washington as presiding officer. The understanding that he would be president of the new government calmed the fears of many people.

In June of 1788, the ninth state, New Hampshire, ratified the Constitution. Technically speaking, that was enough to put it into effect. But in this case, nine was not really enough because it was not the right nine. Not all the states were really equal, even though each had one vote in ratification. For practical political reasons, the new government could not work without ALL the large and important states ratifying.

Two large and important states, Virginia and New York, had not yet ratified. Virginia ratified it four days after New Hampshire by a margin of only ten votes at its ratifying convention. A month later New York’s convention ratified it by a narrow margin of 30 to 27 votes. Having these two large and important states ratify, the other states then proceeded with elections and seating a new government.

At this point the Articles Congress accepted the new government and voted to disband itself, ignoring their own rule that required unanimity to change the Articles Constitution. North Carolina held out for more than another year, only approving it in November of 1789 after a Bill of Rights had been proposed. As we noted earlier, Rhode Island, which had refused to even create a ratifying convention, finally took the leap to ratify in the spring of 1790 after threats from the new national government.

What does all this prove? I would argue that it proves that in politics you can get away with almost anything if you can get enough of the right people to go along with you. The Founders got enough and got away with it.
Other than the Constitution itself, perhaps the most important legacy of this almost forgotten political battle are the set of arguments written in favor of ratification. Alexander Hamilton, John Jay, and James Madison wrote these 85 essays under the name “Publius” and published them in a series in New York City newspapers. Collectively known as the Federalist Papers, each essay is addressed to “the People of the State New York.” Because these three men played central roles at the convention, these papers give a great deal of insight into what the Founders were thinking when they wrote the Constitution. When trying to interpret our rather short and vague Constitution today, the courts still use the papers to help determine the intent of the Founders at the convention. So the papers are of legal as well as historical importance.

You can easily find the full text of these papers online. A quick look at the descriptive titles reveals the range of arguments and concerns that existed. Of course, the authors argued that the new proposed constitution would help resolve each concern. The papers began with several essays on the dangers of foreign forces and influence on our fragile nation. If you remember, the nation was not doing a very good job in maintaining an army and defending itself.

The next set of concerns were disputes and conflicts among the states. Again, remember that states were having trade wars with each other. The next two papers, Number 9 and the most famous, Number 10, discuss the problem of “factions,” which today can be interpreted as political parties and interest groups, and how the constitution would help control their dangerous influence. Ask nearly anyone today about their feelings on political parties or interest groups and you will quickly learn that the same concerns still exist.
Following these were a long series of essays on how the new constitution would improve the economy and on the many defects of the Articles Government. Then the essays moved back to questions of military defense. The next group focused on taxation, addressing fears that the new government would greatly increase taxes. A great fear of increased taxes remains today and is central to many modern political campaigns.

Then the essays moved to relations between the national government and the state governments, another question that is still with us today, and then to power relationships among the branches of government. The second most famous essay, Number 51, summarized all of this in discussing the advantages of separation of powers and checks and balances: “usurpations are guarded against by a division of the government into distinct and separate departments...(and then) different governments will control each other.”

The last major group of essays focused on the internal workings of each branch and selection of public officials (numbers 52-83). The final two essays answered miscellaneous objections and provided a concluding summary.

The Anti-federalists wrote their own essays, which were much less well organized. They were also bound together to compete with the Federalist Papers. Authors, including Richard Henry Lee and New York Governor George Clinton, used a variety of pseudonyms, such as the “Federal Farmer,” “Brutus,” and “Cato.” They warned of a too strong national government and of the danger to individual liberties. After the Federalists promised to pass a series of amendments to protect individual rights (what became known as the Bill of Rights), the latter objection lost much of its appeal. In the end the Anti-federalists lost, so their arguments have much less importance today than those of the winners. Yet their fears of a too powerful central government endangering our liberties still echo in modern political debates.
VI. The Structure of the Constitution

A. Preamble, Articles, Sections, and Amendments

Not counting amendments, the Constitution has less than 5,000 words. It is extremely short by historical standards. One source says that the average state constitution is about ten times larger. Depending on font size, the original text and amendments cover about twelve pages. One draft of the constitution for the European Union ran about 300 pages. To repeat this most important point, the U.S. Constitution is short. As a result, a lot of detail gets left out and must somehow be filled in. Short generalities rather than detailed specification means that we spend a lot of time arguing about what these generalities mean when we attempt to apply them to specific modern situations. This observation is a key to understanding many modern political conflicts.

The document begins with a preamble, which many school children have to memorize. It identifies the creators of this new government and lays out the general purposes for the Constitution.

We the People of the United States, in Order 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 to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Perhaps the most important three words are the first three, “We the people.” The Founders might well have said “we the states,” because state delegations were at the convention, and state ratifying conventions were asked to approve it. States were given special status in the workings of government and had both special powers and general reserved powers. Yet the Constitution says it was created by “the people.” Why?

The first reason is practical politics. The Founders knew that they needed popular support to get the document ratified. Appealing to “the people” is a tried and tested political tactic. Listen to almost any political candidate today. Do candidates say they run for their own personal good? No, they say they run and fight for “the people.”

The second reason is more philosophical. It flows from the far more radical philosophical foundation of the 1776 Declaration of Independence. The “Blessings of Liberty” in the Preamble tie directly into the “unalienable rights” of people in the Declaration and the right of people to “dissolve” a government that does not respect those rights. The Founders, at least those who wrote the Constitution, believed that this constitution was the next logical step for people to
take. To use the words in the Declaration, “it is the right of the people...to institute a new government.” And so the idea of the people and rights and liberties of the people tie these two important documents together. However, as we shall see, the Founders would use the Constitution to greatly restrict what powers people to actually rule.

B. Overview of Articles

After the Preamble come seven major parts, called “articles.” The first three deal with the three separate branches of government, the legislative branch, the executive, and the judicial branch. If you take the time to look at a copy of the Constitution, you will quickly see that these three articles differ greatly in length.

The first article is the longest and most detailed, running about three pages in ten sections. Why first and longest? The Founders thought that the legislative branch would be the first among three equal branches.

Article II runs about one page and has four sections with more detail on how the president would be chosen than on anything else. Since then, the workings of the Electoral College have been changed by amendment, so a lot of Article II is no longer relevant.

The three sections of Article III give only a bare outline of the judicial branch. It created only a Supreme Court and left the rest of the structure up to Congress to create.

Article IV and its four sections focus on states, dealing with matters such as relations among states, how states treat citizens of other states, the creation of new states and territories, and mandating that each state maintain a “Republican Form of Government.” It gave the national government the responsibility to enforce that guarantee. We will look at the particulars of Article IV in later chapters on federalism and civil rights and liberties.

Articles V, VI, and VII have no subsections and together cover only about half a page. Article V covers the amendment process. Article VI obligates the new government to honor all debts incurred by previous governments. Those who feel that the document was an economic conspiracy by the wealthy often cite this article as proof. Previous governments owed money to many of the Founders. Certainly they were not fools! They wanted debts to them to be repaid.

Two other important things are in Article VI. The first is the “supremacy clause,” which in practice means that when the national government takes legal actions, states must abide by those actions. Of course this does not answer the question of exactly what the national government can legally do. What the
national government can do under powers and limits imposed by the Constitution turns out to be a most difficult question. We have never completely answered that question.

The other important thing in Article VI regards religious freedom. It states that “no religious test shall ever be required as a qualification to any Office or public Trust under the United States.” While that remains the law, many candidates running for office cite their religious affiliations and beliefs as better qualifying them, and many voters look for religious ties in making their voting choices. Candidates who invite voters to consider their religious ties might be seen as violating the spirit of this clause in Article VI.

Article VII, the final article, gave the controversial rule for ratification of the proposed constitution. It specifically required ratifying conventions in each state. And as you remember, it required approval by nine states to put the new constitution into effect, not all the states as was required in the amendment process of the Articles Constitution.

C. Process for Amendment

The amendment process as laid out in Article V merits additional comment. The process is complex and difficult to complete. The Founders wanted it that way because they felt that any change in the fundamental structure should have great and widespread support and thorough consideration before taking place. In fact, difficulty of change is a major theme in nearly all parts of the Constitution. The Founders created a government that was biased in favor of the status quo because they did not trust slim and often temporary popular majorities to make policy or change fundamental rules or structures.

The amendment process has two basic steps, proposal and ratification. Each of these two steps can take place in two ways. Proposal can come from a two-thirds vote in the House and Senate. It can also come from a constitutional convention called by the legislatures of two-thirds of the states. We have never had an amendment proposed by convention, perhaps because of fear that another convention would propose radical changes, just like the 1787 convention did. Whenever the number of states calling for a convention has come close to the two-thirds requirement, Congress has stepped in and proposed the amendment.

Ratification can take place using a three-fourths rule by either the state legislatures or by ratifying conventions in the states. Even though the Constitution itself was ratified by state conventions, only once in history have we ratified an amendment using ratifying conventions. That was the 21st Amendment in 1933, which overturned the 18th Amendment of 1919, which had put in place prohibition of alcohol. State legislators did not want to vote for alcohol, so they asked Congress to specify ratification by conventions with delegates who would
not have to stand for reelection like legislators would. Congress complied and
gave state legislators the political cover they wanted.

This difficult process has resulted in the passage of only 27 amendments
over more than 200 years. Even in cases where substantial national popular
majorities favored an amendment, such as the Equal Rights Amendment (the
ERA), which would have made women equal under the law to men, amendments
failed to pass enough states.

One problem amendments face is that states make up their own
ratification requirements. Like so many other things, the Constitution does not
say exactly what constitutes ratification in a state legislature. Most states only
require a majority voting in favor in both houses of the state legislature. But some
require a two-thirds vote. Both North Carolina and Illinois require a two-thirds
vote in both houses of their respective legislatures. The ERA received majorities
in both houses in each of those states, but fell short of two-thirds. Rules are
important!

Rules for ratification are silent on other matters as well. For example, how
long do states have to call for a convention? We do not know. How long do they
have to ratify? Again we do not know, though most proposed amendments have
specified a deadline for ratification. What we do know is that if no deadline is
specified in the proposed amendment, ratification can take a long time—a very
long time!

The 27th amendment was originally part of the list of proposed
amendments in the Bill of Rights, but failed to get the required number of states
to ratify it. No deadline was in the proposal. A graduate student discovered this
and managed to stimulate interest around the nation. The amendment says that
Congress cannot raise its pay by passing a law that gives them the raise
immediately. Rather, they must wait until after an election takes place for the raise to go into effect. Because of the unpopularity of Congress, this proposal was quite popular, and state legislators were inclined to pass something that was popular and cost them nothing. A movement spread around the states, and in 1992 enough states ratified it so that it became part of the Constitution. Incidentally, Congress has found ways to evade the intent of the amendment by writing laws that make pay raises automatic!

VII. Compromises and Conflicts in the Constitution—a Document with Many Paradoxes

You should remember that the Founders had several conflicting concerns when they met in the late spring of 1787. First, they wanted to craft a document creating a government that was stronger than the Articles, yet not too strong so as to become tyrannical. They faced a kind of “Goldilocks” choice—not too weak and not too strong, but just right. This would require some delicate balancing.

But equally important, they had to create a document that the states would accept. Even if they created a perfect national government, their efforts would be wasted if the proposed constitution was rejected. The basic reality was that having a stronger central government would inevitably weaken state governments. So they could expect significant opposition from the states. They had to find ways to give enough power to the states to blunt that opposition.

A related set of problems concerned accounting for the differing and conflicting interests of the states. States often had a narrow set of interests, like a slave-based agricultural economy in southern states or trade and commerce in New York. These interests would feel endangered if the state governments that protected them were weakened.

Another dilemma facing the Founders was whether states were equal or not equal. Under the Articles of Confederation, each state was treated as equal, having one vote in the single house Articles Congress. But in fact, all states were not equal. Some were large and wealthy (for example New York, Virginia, and Pennsylvania) and some small and not so wealthy (for example, New Jersey, New Hampshire and Delaware). A successful new constitution would have to treat states both ways, as equal and not equal. Not an easy task!

The list could go on, but let me burden you with just one more. On the one hand the Founders needed popular support to get a new constitution approved. On the other hand they did not want to allow too much popular rule because they did not trust average people to make sound political decisions. Again, they needed to try to some of both.
As you can see, they faced difficult if not seemingly impossible dilemmas. In order to pull it all off, they would have to do a lot of balancing and resolving, dodging and ducking, and perhaps even fooling people into thinking they were getting something that they were not really getting. And after all this was over, they had a time problem. Whatever they created to meet the immediate needs of their own time would then have to endure the test of time. No small order!

While some historical accounts treat the Founders as great political philosophers, I would argue that they were great practical politicians who did what was necessary to craft an acceptable document. That the Constitution has lasted is certainly to their credit, but perhaps even more to the credit of later generations who also did what was necessary to help it survive.

We now turn to how the Founders resolved these dilemmas and paradoxes.

A. Representation—The Great or Connecticut Compromise

The question of representation, or to use a political science term, apportionment, was the first great obstacle. Unless this was resolved, nothing else could be addressed. How would states be represented in the new central government?

States with large populations, which also tended to be wealthier states, wanted their size to determine how many votes they had in the legislative branch. They came with a plan, called the Virginia Plan. It created a two house legislature in which representation in both houses was to be based on population.

Small states advocated what was called the New Jersey Plan. It proposed the same arrangement that existed under the Articles of Confederation, a one house legislature with each state having a single vote.

The delegates spent weeks in furious argument over these two plans. Finally delegates from Connecticut came up with a compromise that had it both ways. Large states would have the advantage in a lower house, called the House of Representatives, which based apportionment on population. All states would be equal in having two votes in an upper house, called the Senate. This created what we call a "bicameral" or two house legislature. This historical compromise goes by two different names. The name Connecticut Compromise gives credit to the state from which it came. It is also called the Great Compromise because of its great importance in allowing the convention to move on to other matters.

Having two houses with different systems of representation has had profound implications in the operation of the national government. This arrangement makes action on anything more difficult. Suppose a strong majority
of the population represented by a majority of their representatives in the House of Representatives passes a bill. However, if enough small states are opposed, they can block passage in the Senate with the two votes each state has regardless of size. To put it another way, Wyoming with its population of a little over half a million has just as much power in the Senate as California with its population that is about 75 times larger!

B. Slicing and Dicing Power—Separation of Powers and Checks and Balances

How do you create a more powerful central government but at the same time keep it from becoming too powerful? The Founders accomplished these seemingly contradictory goals by combining two ideas.

First, they used an idea laid out a few decades earlier by French political philosopher Baron de Montesquieu, the idea of separation of powers. This idea was already well accepted in America and followed in many state constitutions. Basically, each of the three major functions of government, legislating policy, executing policy, and settling disputes, was given to separate people in separate branches. Thus, no one who works in one branch of government can also have an office in another branch. The only exception to this is the Vice President, who is in the executive branch but also presides over the Senate and can cast a tie-breaking vote. So when a senator becomes president or a cabinet official, the senator must resign from the U.S. Senate.

This arrangement stands in stark contrast to parliamentary systems. In a parliamentary system, the party with a majority of seats chooses the executive, or prime minister, along with her or his cabinet. If no party has a majority, a coalition of parties form a majority to choose the executive leaders from their members. Unlike our presidential system, in a parliamentary system the prime minister and members of the cabinet are also legislators at the same time.

The second idea to help restrain the power of the central government is called checks and balances. What this means is that even though functions are in separate branches, no branch can act completely alone without some cooperation from one or both of the other branches. Moreover, each branch has powers to intervene with the operations of the other branches. Thus, checks and balances really means that powers are not completely separate—powers are more shared than separate.

We can look at each branch and see some examples of what it can do to the other branches. The executive, or president, can veto acts of Congress, call special sessions, has some discretionary powers in deciding how to carry out laws Congress passes, can nominate members of the Supreme Court, can pardon those convicted of crimes by the courts, and also has some discretionary
powers in deciding how vigorously to carry out court decisions that require executive action.

The Congress, which includes both the House of Representatives and the Senate, has internal checks, because both chambers are required to approve any law (with the exception of treaty ratification, which belongs solely to the Senate). Congress can override presidential vetoes by a two-thirds vote in both houses (of total membership, not just of those present and voting). Congress can cut off money for projects or even wars that the president wishes to pursue (power of the purse). It can also investigate executive actions (called the watchdog function). Though the president is commander-in-chief and can give the military orders, the Founders tried to limit that power by reserving for Congress the sole power to declare war. The Founders greatly feared that presidential war-making could lead to a tyrannical chief executive. Congress can impeach, or bring charges against a sitting president or federal judges, including Supreme Court Justices, and then try them and remove them from office. In 1998, for example, the House brought charges of impeachment against President Clinton, but the Senate failed to convict him on any of those charges. The Senate also must approve or confirm all judicial nominations by the president, as well as confirm members of the president’s cabinet and a range of other executive offices. In addition, Congress sets the size and appellate jurisdiction of the Supreme Court and can redraft legislation that the Court has ruled unconstitutional.

The Supreme Court can rule that acts passed by Congress and signed into law by the president are unconstitutional. This is called the power of judicial review. It is not directly written into the Constitution. The Court claimed this power in a famous 1803 case, Marbury v. Madison, by ruling part of a law unconstitutional. We will discuss that case later in the chapter on the Supreme Court. This gives the Court checks over both of the other branches. In addition, the Court can rule presidential claims of power or other executive actions to be unconstitutional. For example, the Supreme Court has placed limits on claims of executive privilege. Executive privilege generally refers to presidential claims to keep secret the discussions and information that take place in the executive branch. Executive privilege is based on the idea that the president cannot get good advice if every discussion might be made public. The Supreme Court has generally recognized this right, but has said that it does not apply to illegal actions that can be legitimately investigated by Congress or the courts.
You may note in looking at these lists of checking powers that Congress seems to have the biggest share of them and most are aimed at the executive. This is no accident. The Founders worried more about an overly powerful and tyrannical executive than about either of the other two branches. Thus the greatest number of checks was placed on executive power.

As we shall see, despite these checks, the executive has grown in power more than either of the other two branches. Presidents are always coming up with new ways to expand their powers. For example, President George W. Bush issued more than a thousand of what are called “signing statements” when he signed bills into law. They gave his interpretations of the law or claimed that parts of laws did not apply to executive actions. Of course, the Supreme Court could rule signing statements to be unconstitutional or place limits on them. But that has not happened—yet! So we do not know exactly how far presidents can go in signing statements. President Obama used his discretionary powers in enforcing laws to protect young children of undocumented immigrants and their families from deportation after Congress refused to pass the Dream Act.

C. Enslavement—a Conflict Postponed
Even today some people in such groups as the League of the South insist that the Civil War, or to use their preferred term, the War Between the States, was about economic differences and not slavery. However, because the economy of the South was based on the labor of enslaved people, one cannot really separate economics from enslavement. According to U.S. Census figures, in 1790 all southern states had at least 21% of their populations comprised of African Americans, almost all of them enslaved. Georgia, Virginia, and South Carolina had 36%, 41%, and 44% of their populations composed of African Americans respectively. Every Northern state had less than 8% African American, with most in the 1-2% range. Southern representatives to the 1787 convention proclaimed that they would not join any union that would end enslavement because of their economic dependence on slave labor.

This was the political reality the Founders faced. So even though many of the Founders strongly felt that enslavement was inconsistent with the principles of the nation they wished to form, they had to find a way to accommodate enslavement. Failing to do so would mean no union. So they cut deals and postponed conflicts over this issue.

Southern delegates wanted no ban on enslavement. They wanted to count the enslaved as population for purposes of representation, but not as population for taxation. They also feared that the North, with greater population, might use their numbers in Congress to pass legislation that taxed Southern exports of raw materials and place tariffs on imports of cheaper European manufactured goods. The joint effect would be to reduce the ability of the South to export cotton and other raw materials to Europe in exchange for manufactured goods, few of which the South produced for itself. The North wanted the ability to place tariffs on manufactured goods. Tariffs would protect their growing but still less efficient manufacturing interests. Northern delegates also did not feel the South should have it both ways, counting those enslaved for representation but not for taxation.

A series of compromises gave each side enough of what they wanted to stay in the proposed union. First, the Constitution did not allow Congress to ban the importation of new slaves until after 1808 and limited the tax on imported slaves to no more than ten dollars a person (Article I, Section 9). Congress could not tax exports, thereby protecting the ability of the South to export its raw materials (Article I, Section 9). But Congress could place tariffs on imports (Article I, Section 8), which satisfied Northern states. The most infamous compromise was the “three-fifths” compromise, in which enslaved persons would be counted as three-fifths of a free person for both the purposes of direct taxes and representation (Article I, Section 2). In addition, the Constitution guaranteed that states were bound to return people fleeing enslavement in another state (Article IV, Section 2). Presumably, this meant that enslaved people could not find freedom in fleeing from Southern states to Northern states.
The six southern states fared pretty well in this compromise. While they did not get a majority of the seats in the House of Representatives as they would have with their own preferences, they did end up with about 45% of the representatives in the House along with their 12 Senate seats, compared to the 14 that the seven Northern states would have. Given the difficulty of passing laws, this would be sufficient to block most measures that might endanger the slave based Southern economy.

If you know your American history, you know that the South became less and less able to protect enslavement. The balance in Congress changed as new “free” states came into the nation. And more and more people outside the South turned against slavery—led by the Abolitionists. Despite what the Constitution said, as Abolitionists became a powerful political force in the North, northern states began to refuse to return enslaved people fleeing to non-slave states.

The Founders had only put off an inevitable conflict with their compromises on human freedom. As Lincoln said decades later, we could not maintain a nation that was half slave and half free. The Constitution could not resolve this contradiction. It could only delay the battle over what kind of nation we would be. Ironically, the delay may have been necessary to have a national government sufficiently strong to finally force Southern states to end enslavement. Nevertheless, the price for the new constitution was decades of human misery and ultimately a horribly bloody war.

D. Electing the President—the Electoral College

In deciding how to elect the president, the Founders faced another set of dilemmas. They knew that popular support was necessary for the Constitution to be accepted. But they also did not trust people to make sound judgments. Twice they rejected motions that would allow direct popular election of the president. They also considered allowing Congress to elect the president. They rejected this idea because it would bind the executive too closely to the legislature and undermine the office as a separate branch of government. That would have undercut the principle of separation of powers.

Ultimately the Founders devised a complex hybrid plan that gave roles to nearly everyone in choosing the president and vice president, the **Electoral College**. The Constitution never uses this term, but does use the term “Electors” in Article II, Section 1. The **electors** are the people selected by states who actually cast votes to choose the president and vice president. Few Americans understand how this institution works. You might ask a few of your friends or relatives to explain it. Their attempted answers might be very entertaining!

Here is how the Electoral College was designed and how it has evolved. The president and vice president were and still are chosen by “electors.” The electors are chosen by the states. Each state has as many electors as they have
members in Congress (the number in the House plus two for the Senate). The states can choose the electors any way they want. This allowed states to let average citizens vote for electors, as all do today. But originally, almost all states had their respective legislatures directly choose the electors. Gradually states allowed popular vote for electors. By 1828 a majority of electors were chosen by popular vote.

Originally each elector had two votes. The winner had to win an absolute majority, that is, 50% of the electoral votes plus one. The person with the second most electoral votes became vice president. In case no one had a majority, the House of Representatives would choose the president, with each state having a single vote. Each state’s vote was determined by the members of the House from that state. If a tie existed for second place, then the Senate would choose the vice president with each Senator having a vote.

This arrangement created problems as political parties arose and began running people for president and vice president as a team. In the election of 1796, after Washington declined to run for a third term, John Adams won the required majority. He was leader of the Federalist Party. The person with the second most was Thomas Jefferson, the leader of the emerging opposing party, which had several names and eventually evolved into the Democrats. So we had a president of one party and a vice president of another party. The problem was that electors cast two votes and no distinction was made between votes for president and votes for vice president. The Founders, who hoped to avoid parties, did not anticipate that parties would emerge and run different candidates for president and vice president as a team.

Things became worse in the election of 1800 when Jefferson and his running mate, Aaron Burr, received the same number of electoral votes—a tie. Even though Burr was supposed to be Jefferson’s vice president, the election went to the House. The Federalists in the House, who had supported fellow Federalist John Adams, tried to cut a deal with Burr, who was a very ambitious man. They nearly pulled it off, but Jefferson eventually mustered enough votes and won the office. As you might guess, this episode poisoned the relationship between Jefferson and Burr.

Jefferson and his supporters vowed to fix the Constitution so that this could not happen again. So the Constitution was amended in 1804 (Amendment XII) to account for the fact that parties were running slates of candidates. Interestingly, the change does not mention parties, which are not mentioned anywhere in the Constitution. The change was simple. Electors still cast two votes. But now they were distinct votes, one designated for president and one for vice president. The rest stayed roughly the same, except for some details about what happens if no one got a majority. In that case the choice of the president goes to the House where again each state got one vote, and a majority is required to choose the president from the top three electoral vote winners. The
choice of the vice president goes to the Senate, where each senator has a single vote, and a majority is required to choose the vice president from the top two vice presidential electoral vote winners.

E. Federalism—Postponing More Conflicts

The Founders had another “Goldilocks problem” in giving power to the states. They needed to give states enough power so they would approve the proposed constitution. But they needed to limit state power to prevent the problems created by the Articles Constitution. A unitary system with power centralized in the national government would never be approved by the states. That would bring back unpleasant memories of the British system. A confederal system was what they had under the Articles of Confederation with the power centered in the states. That was unacceptable as well. So the Founders created something new in between a unitary and confederal arrangement. They created a system that had some powers in the central government, some in the states, and some given to both at the same time—what they called a federal system or federalism.

The Constitution gave states a variety of powers. Here are a few examples of the special status and powers of states. As we discussed in the last section, states chose presidential electors. So states really controlled who the president and vice president would be. Earlier we noted that states played two roles in the amendment process. They could call for a constitutional convention (two-thirds of the states), and they had the power to ratify any proposed amendments (three-fourths of them). States had special and equal representation in the U.S. Senate, each having two votes. In Article IV, Section 3, states are guaranteed territorial integrity, meaning that Congress cannot subdivide states or combine states without their consent.

In addition, Amendment X in the Bill of Rights, sometimes called the “states’ rights amendment,” gave the states “reserved powers.”

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

Exactly what powers are reserved to the states? This has been a major matter of contention down through the years. The Supreme Court has heard many cases in which states tried to use the Tenth Amendment to keep the national government from doing things states thought were reserved for them. With only a few exceptions, the states lost these cases. State leaders got less protection against an expanding national government than they thought they were getting. General vague wording allowed them to imagine what they wanted.
The national government was given a wide range of powers. Today political scientists divide these powers into two separate kinds. Article I, Section 8, lists specific powers that Congress has, such as the power to borrow money and regulate commerce among the states (interstate commerce). These are called “enumerated powers.” The list is long. You should take a look at it.

In the last paragraph of Section 8 is another kind of power that has greatly broadened the powers of the national government, what political scientists call “implied powers.” This refers to powers that are suggested rather than specifically mentioned. The key words are in what is called the “necessary and proper” clause, or the “elastic clause,” because of how it stretches the powers of Congress.

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers....

What this clause means comes from one of the most important Supreme Court cases in American political history, the case of McCulloch v. Maryland (1819). We will discuss this case later in the chapter on federalism because it laid the legal foundation for changing the balance of power between the states and the national government.

The Constitution also prohibits states from doing things like making treaties with other nations, coining money, nullifying terms of legal contracts among people, taxing goods that come in or out of states, or making compacts with other states without the consent of Congress (Article I, Section 10). We should point out that states have found ways around some of the prohibitions. Today states make trade agreements with other nations, but they are careful not to call them treaties. States also add excise taxes to raw materials leaving their borders, like oil and gas. They also place excise taxes on goods coming into states, like alcohol and tobacco products. They just cannot call them “imposts” or “duties,” which the Constitution specifically prohibits. You see how important words are and how words are interpreted. If you see this, then you have a great insight about the nature of our Constitution and its political history!

F. Elections—Ducking a Conflict and Deferring to the States

The Declaration of Independence declared that “governments are instituted among men, deriving their just powers from the consent of the governed.” Several of those at the 1787 constitutional convention had also signed the Declaration back in 1776. Did consent include the right to vote for leaders? Who would be allowed to vote in this proposed representative democracy or republic?

Maximizing popular participation in elections was simply too difficult for men who had little faith in the ability of average people to make good choices. So
they did the same thing as they had done in many other areas. They ducked the issue. They let the states decide. The Constitution states that representatives will be chosen by “the People of the several states,” but then adds that those qualified to vote will be the same people who “have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature” (Article I, Section 2). In other words, if you could vote for the members of the lower house of your state legislature, you could also vote for members of the U.S. House of Representatives.

In Section 4 of Article I, states are allowed to prescribe the “Time, Place, and Manner of holding elections for Senators and Representatives.” But then the Constitution states that Congress may “alter such Regulations.” Down through history Congress has placed a great number of alterations on elections, but that is a story for a later chapter. The important point here is that though the Constitution ducked the question of who could vote, it also allowed for change.

G. Popular Rule—the Need for Popular Support for a System that Limited Popular Rule

So the Founders deferred to states on who could vote. But if you could vote, for which offices would you be allowed to vote? This was another question that raised the dilemma between consent of the governed and the Founders’ lack of faith in those who were to be governed.

Remember the Founders’ conflicting concerns of the need for popular support and distrust of the people. That helps us understand the election rules as set out in the Constitution on which offices citizens were guaranteed a vote. The Constitution guaranteed a direct popular vote only for members in the U.S. House of Representatives every two years. That is one half of one of three branches of government.

State legislatures would choose the Senate in any manner they wished. Direct popular election of Senators came gradually. The Seventeenth Amendment finally guaranteed popular election in 1913. Another limit on popular rule was in the terms of office and schedule of elections. Senators served for six year terms, with a third of them being elected every two years. Not electing everyone at once is called “staggered elections.” So even if a popular majority of citizens wished to elect a majority of members to accomplish some policy goal, they would need two sets of elections, or four years, to get that majority in the Senate. The Founders did not want some temporary majority to be able to capture control of government.

The Supreme Court and other federal judges were to be nominated by the president and confirmed by the Senate, not the popularly elected House. So the courts were far removed from public opinion. We have already discussed the Electoral College and how that was insulated from public opinion.
The bottom line on popular rule through elections was that the Constitution greatly limited the ability of popular majorities to have an impact. The people could not elect very much of the national government right after the Constitution was written. Even today with states allowing voters to select members of the Electoral College and with popular election of the Senate, at least two elections would have to take place before the people could capture control of two branches of government. The courts would still be mostly immune to the will of the people. The guarantee of lifetime appointments of judges means that only as judges retire or die could they be replaced by judges who reflect the views of the popularly elected branches.

The Founders’ design continues to work. We should not be surprised that the national government has trouble in quickly responding to crises in ways that follow majority public opinion.

VIII. The Enduring Problem of Interpretation in a Clearly Unclear Constitution

A. Differing philosophies on interpretation: Living Constitution, Original Intent, Strict or Narrow Construction and Loose Construction, Judicial Activism and Restraint

Nearly every politician has some view on how the Constitution should be interpreted. And they are usually very quick to tell the courts how they feel it should be interpreted. You will hear many labels for these varying opinions on the proper interpretation of the Constitution. My purpose here is to familiarize you with the most commonly used names for these different schools of thought and to discuss a few of the issues involved.

Just as different Christian religious denominations have grown around different interpretations of the Bible, different schools of thought read the Constitution in different ways. However, in the case of the Constitution, the groups are not as cohesive as religious groups. They are often ideological groups that have a range of policy preferences. As is sometimes the case in religion, the preferred interpretations are often closely related to the self-interests and positions of the group.

The idea of the “Living Constitution” is that the Constitution was written in a different time and that each generation should reinterpret the words for their own time. The idea of a "loose construction" of the Constitution is similar to this. That is, the words in the document are general in nature and therefore invite changing meanings as the times change. Thus the Constitution changes meaning through interpretation as well as through the more difficult amendment process.
Here are some examples. Under the ideas of the Living Constitution and loose construction, the famous phrase “cruel and unusual punishment” (the Eighth Amendment) has a very different meaning today than when floggings and hangings were common practice. Under this same idea, new privacy rights could be added by interpretation as we moved into a computer age where every movement can be tracked through credit card purchases and computer chips in cars or in cell phones. As people became more interdependent on each other (as opposed to living on isolated farms where they were mostly self-sufficient), government could become more active in consumer, worker, and environmental protection by broadly interpreting the powers given to Congress.

As you might be guessing, most liberals prefer the ideas of loose construction and the “Living Constitution.” This philosophy allows the Constitution to be reinterpreted to better protect individual privacy and also allow government action aimed at protecting and helping people in the economic area of life. Populists, who want more government action in both areas of life, also would prefer this view of the Constitution.

Conservatives, who you may remember want less government action in economic affairs and more in regulation of personal morality, usually criticize loose construction of the Constitution as rendering it meaningless and violating the original intent of the Founders. Libertarians make the same argument. But they say that the Founders wanted minimal government in ALL areas of life, not just the economic area. So these conservative and libertarian groups use labels like “strict” or “narrow construction,” signifying a belief that the words should be interpreted strictly or narrowly, not allowing new interpretations or meanings over time. They talk about “original intent,” or “originalism,” signifying that the meanings should be no more or no less than what the Founders intended. They go on to say that if a new meaning is needed, then that meaning should come through amendment, not interpretation.

We need to add two other terms that frequently arise in discussions of how the courts should act, “judicial activism” and “judicial restraint.” Judicial activism refers to judges being active in making new policy and getting involved in political matters that the other branches normally handle.

Conservatives and libertarians generally associate judicial activism with the liberal and populist ideologies. Conservatives and libertarians loudly criticize activist judges. In their view these judges are making new laws rather than applying laws properly made by the other two branches. Conservatives and libertarians say they prefer judges who do not substitute their own ideas on what is right for the actions of the executive and Congress, judges who follow a philosophy of judicial restraint.

Conservatives and libertarians are factually wrong in viewing judicial activism as necessarily being liberal. Judicial activism is no more necessarily
liberal or populist than restraint is necessarily conservative or libertarian. When Congress passes a law that conservatives or libertarians don’t like, they find little wrong with an activist court that substitutes its own judgment in striking down the law. One need look no further than the many campaign finance laws that would have limited the influence of money on campaigns. Few conservatives complained about activist courts substituting their judgment for the other two branches when these laws were struck down or limited in application. Conservatives wanted the Supreme Court to substitute its own judgment in 2011 and overturn the Affordable Health Care Act (Obamacare) that had been passed by the other two branches. That would certainly have been judicial activism, not restraint. The bottom line is that activism or restraint can work in either direction. It depends on the nature of existing law and whether that law is something that one side or the other wants overturned or left alone.

What philosophy the courts follow can make a real difference in our lives. Under “original intent” and “strict construction” and “judicial restraint,” Supreme Court decisions like Brown v Board of Education (1954) would never have happened. This is because a narrow interpretation of the Fourteenth Amendment’s “equal protection” clause and the original intent of those who wrote it would not have included desegregation of public schools. Ending segregation in schools would have had to wait for Congress to act. It might even have had to wait for each state legislature to act on its own, because state governments were traditionally responsible for schools. The Founders probably did not intend for the national government to have any responsibility over public schools.

B. Inevitability of Interpretation

Who is right and who is wrong? How should the Constitution be interpreted? Both sides can muster some strong arguments. Times do change and the amendment process is difficult. Less than thirty amendments over more than 200 years are not that many. Some much younger state constitutions have been amended hundreds of times. In a system that is purposely designed to minimize policy changes, perhaps the only way to make necessary changes is to reinterpret the Constitution. If the other branches of government fail to do what is right and what is needed, then an activist court can set things straight.

On the other hand, this argument rests on highly subjective ideas about what is right and what is really necessary. If a change is really necessary, then the Congress and the states can amend the Constitution. If insufficient support exists for amendment, then perhaps the change is not really necessary. Moreover, easily changing the Constitution by interpretation can be for ill as well as good. Loose construction begins to make words mean almost anything, perhaps to the point of meaning nothing. Finally, when courts are activist in making new policy, they run the danger of undermining their effectiveness. The courts depend on the other political branches and public opinion to carry out their decisions. The courts have no police or army or administrators to run prisons or
schools or government agencies. Judicial restraint is wise if the courts want to retain popular respect.

I have no definitive answer for you on which side has the best arguments. All sides have been guilty of hypocrisy. Both often support interpretations that seem to do little more than justify their own policy preferences. On the other hand, no doubt some advocates are sincere and are willing to accept outcomes that are consistent with their philosophy of interpretation even if they might dislike that outcome.

A constant and fixed meaning makes life more predictable—we all need some predictability. The courts' self-restraint to maintain a reputation of objectivity makes practical political sense. But new situations arise all the time that the Founders never could have considered or even imagined. Just because the Founders did not talk about cell phones or computer and satellite tracking, should the courts wait for an amendment to apply limits on unreasonable search to these new situations? Does interstate commerce apply to internet commerce in which only electronic signals cross state lines?

Here is my final point. The words of the Constitution are so general and vague and new situations so numerous that some interpretation is absolutely inevitable. Failing to engage in any interpretation would result in the Constitution having little to say about the modern world.

C. Who Should Do the Interpreting?

The Constitution did not clearly assign the responsibility for interpreting its meaning to the judicial branch. For several decades the president claimed that power. The president used the veto to prevent laws he deemed unconstitutional. The Supreme Court claimed that power in a remarkable case, *Marbury v Madison* (1803). We will discuss the details of this most important case in the chapter on the judicial branch. As political history has evolved, the courts and ultimately the Supreme Court seem to have the final say, though many political battles continue in hopes of a new court that will find differently.

But that is not the end of the debate. In fact, interpreting the Constitution is an ongoing competitive exercise we all engage in almost every day. Those running for office talk about the proper and true meaning of the Constitution. When we go hunting or buy a weapon, many of us talk about rights we think we have under the second amendment. When we get angry at the government gathering information about us, we complain about unreasonable search or the right to privacy. When we debate about what a newspaper prints or what is in the news on tv or the internet, we are debating the first amendment. Over decades and over elections and over billions of printed and transmitted words and new court nominations, courts sometimes change a ruling and the Constitution means something new. What I am saying is that we are all part of a long, slow, and
highly political process. That is the way it has been. That is almost certainly the way it will be as long as this republic exists.

VIII. The Future of the Constitution

When the delegates met at the 1787 convention in Philadelphia at the Pennsylvania State House, George Washington sat in a chair that had a half sun with emanating rays of light built into the design at the top of its back. You can still see that chair today if you visit what is now called Independence Hall and take the National Park Service tour. Ben Franklin wondered to his colleagues if the sun on the chair was setting or rising. He saw that as the central question about their joint enterprise. Were they overseeing the rise or the collapse of a nation?

A rising or setting sun on the back of Washington's chair.

(Picture courtesy The Independence Hall Association at http://www.ushistory.org)

Of course Ben Franklin could not know. The answer depended on the quality of the document they created and on future generations who would apply that document to the world in which they would live. His observation still holds true for us today. Is the sun still rising for us? That is up those of us living today.

KEY TERMS OR IDEAS

Founding Fathers or Founders
ratification
by-laws
Divine Right
Enlightenment
Magna Charta
English Bill of Rights
Mayflower Compact
Continental Congress
Articles of Confederation
Shay’s Rebellion
Annapolis Convention
Alexander Hamilton
Ben Franklin
James Madison
George Washington
Gouverneur Morris
Federalists
Anti-Federalists
Federalist Papers
Preamble to the Constitution
Supremacy Clause
Amendment process, proposal and ratification
Equal Rights Amendment
apportionment
Virginia Plan and New Jersey Plan
bi-cameral
Connecticut or Great Compromise
Baron de Montesquieu and separation of powers
parliamentary system
checks and balances
separation of powers
power of the purse
watchdog function
impeach
judicial review
executive privilege
signing statements
Three-fifths compromise
Electoral College
electors
absolute majority
election of 1800
unitary system
confederal system
federal system
reserved powers
enumerated powers
implied powers
necessary and proper clause or elastic clause
staggered elections
Living Constitution
loose construction
strict or narrow construction
original intent or originalism
judicial activism and judicial restraint

**Possible Web Exercises**

1. Locate your own state’s constitution online. Compare and contrast it with the United States Constitution in terms of how it is organized, the topics it covers and its length.

2. Find who signed the U.S. Constitution from your own state (if your state was one of the states represented, of course!)

3. Who were the presidential Electors from your home state in the past presidential election—note how many your state had. Remember that the number can change after each census!