The United States Constitution is the oldest written constitution in the world; it is also one of the shortest. The original Constitution contains only 4,543 words. In comparison, India’s constitution is 117,000 words, and the longest state constitution—that of Alabama—is over 350,000 words. The Framers had long deliberations over the appropriate wording of the document, and in the end, it was not ratified until an initial ten amendments, the Bill of Rights, was added. The Constitution established an enduring system of government that has been altered only seventeen more times in over 225 years. But that stability masks a great deal of debate over its meaning, debate that continues today.

One current debate over the Constitution’s meaning concerns the Second Amendment’s protection of the right to bear arms. What does the Amendment mean? Does each person have such a right? Or, based on the opening clause of the Amendment, does the right extend only to members of state militias? After 70 years of silence on the issue, the U.S. Supreme Court addressed it in June 2008. By a 5-to-4 vote, the Court decided the amendment means that individual citizens, apart from any association with a state militia, have a constitutional right to own a gun (*District of Columbia v. Heller* [2008]). The Court’s interpretation of the Second Amendment invalidated the District of Columbia’s ban on registering (and thus owning) handguns. Two years later, the Court weighed in again on the Second Amendment—this time to determine whether it also prohibits states from restricting handgun ownership. In *McDonald v. Chicago* (2010), the Court ruled that it does. For the first time, the Court found that states are barred from encroaching on citizens’ Second Amendment rights.

Even after the Court’s decisions in these two landmark cases, the debate over the degree to which guns can be restricted continues. One of the more recent questions of state action and litigation is whether handguns can be banned from college campuses. In March 2012, the Colorado Supreme Court struck down the University of Colorado’s ban on concealed weapons on the system’s campuses. In doing so, Colorado joined Oregon and Utah in allowing those with permits to carry concealed weapons anywhere on college campuses. Several other states, including Mississippi and Wisconsin, have passed similar legislation and others are currently considering it. Given outbursts of violence on college campuses, such as the tragedy at Virginia Tech in April 2007 where 33 people were killed, the debate is unlikely to end soon.
Adrienne O’Reilly is the Oklahoma director of Students for Concealed Carry on Campus. O’Reilly and other students in favor of allowing concealed weapons on college campuses wore empty holsters at Oklahoma State University to show support for legislation that would permit it.
The Big Picture  What? The Constitution was created because men cannot be trusted? At least this was James Madison’s rationale. Christine L. Nemacheck describes the factors that led to a Constitution that is designed to impede hasty legislation.

The Basics  Since the Bill of Rights, the Constitution has only been amended 17 times. Learn about the Constitution’s original purpose and what circumstances will be required if ever it should be amended for an 18th time.

In Context  Who were the Framers? What challenges did they face when ratifying the Constitution? By getting inside the Framers’ heads, Costas Panagopoulos explains how we can continue to keep the spirit of the Constitution alive today.

Thinking Like a Political Scientist  Understand how the Constitution affects the behavior of the institutions of government—including the president. Costas Panagopoulos lays out what topics fascinate constitutional scholars the most today and demonstrates why the Constitution encourages the different branches to act strategically.

In the Real World  How well does the system of checks-and-balances really work? Decide whether each branch effectively checks the others—particularly, whether Congress should have the power to oversee the bureaucracy—by examining the failed “Fast and Furious” case and how it was resolved.

So What? According to the Constitution, women have a right to privacy when terminating their pregnancy. Now what? Using abortion as an example, Christine L. Nemacheck illustrates why it is so difficult to implement policies through the various levels and branches of government—and why this may have been the Framers’ intention.
Disagreement over the Second Amendment’s meaning highlights both the genius of and a flaw in the Constitution—its lack of specificity. In composing the Constitution, the Framers were conscious that they were writing a document that needed to withstand the test of time. By not specifying what is meant by the right to “keep and bear arms,” they designed a document that others could apply to changing circumstances. However, this generality also results in continuing debates, which have included the appropriate authority of the governing branches and the extent of national government authority over the states. The power of the courts to determine what exactly the Constitution means has also led to scrutiny of the ways by which it reaches those decisions.

In this chapter, we discuss our constitutionally arranged system of separation of powers and checks and balances, as well as how special-interest groups and political parties try to circumvent these protections. We will see how the judiciary came to be widely accepted as the final interpreter of constitutional meaning and the way both the executive and the legislature have used the Constitution to pursue their own ends. Finally, we examine the difficult process through which citizens can amend the Constitution. As the Framers intended, it is no small feat, and one that is an important factor in the stability of our Constitution.

Views of the Constitution

2.1 Describe the basic structure of the Constitution and its Bill of Rights.

The Constitution's basic structure is straightforward. Article I establishes a bicameral Congress, with a House of Representatives and a Senate, and empowers it to enact legislation, for example, governing foreign and interstate commerce. Article II vests the executive power in the president, and Article III vests the judicial power in the Supreme Court and other federal courts that Congress may establish. Article IV guarantees the privileges and immunities of citizens and specifies the conditions for admitting new states. Article V provides for the methods of amending the Constitution, and Article VI specifies that the Constitution and all laws made under it are the supreme law of the land. Finally, Article VII provides that the Constitution had to be ratified by 9 of the original 13 states to go into effect. In 1791, the first 10 amendments, the Bill of Rights, were added, and another 17 amendments have been added since.

Despite its brevity, the Constitution firmly established the Framers’ experiment in free-government-in-the-making that each generation reinterprets and renews. That is why after more than 225 years we have not had another written Constitution—let alone two, three, or more, like other countries around the world. Part of the reason is the public’s widespread acceptance of the Constitution. But the Constitution has also endured because it is a brilliant structure for limited government and one that the Framers designed to be adaptable and flexible.

As the Constitution won the support of citizens in the early years of the Republic, it took on the aura of natural law—law that defines right from wrong, which is higher than human law. Like the Crown in Great Britain, the Constitution became a symbol of national unity and loyalty, evoking both emotional and intellectual support from Americans, regardless of their differences. The Framers’ work became part of U.S. culture. The Constitution stands for liberty, equality before the law, limited or expanded government—indeed, it stands for just about anything anyone wants to read into it.

Even today, U.S. citizens generally revere the Constitution, although many do not know what is in it. A poll by the National Constitution Center found that nine of ten U.S. adults are proud of the Constitution and feel it is important to them. However, a third mistakenly believe the Constitution establishes English as the country’s official language. One in six believes it establishes the United States as a Christian nation. Only one in four could name a single First Amendment right. Although two in three knew the Constitution created three branches of the national government, only one in three could name all three branches.
Celebrating Constitution Day

On September 17, 1787, the Framers of the United States Constitution met to sign their names to the document. Almost 220 years later, in 2005, Congress declared September 17 to be Constitution Day and mandated that educational institutions commemorate the day. The purpose of the law was to provide instruction to American citizens about their rights and responsibilities under the Constitution.

Across the United States, students from elementary schools through colleges celebrate Constitution Day. In many cases, administrators plan events where a professor or outside guest gives a talk on the importance of our constitutional protections. But, in other cases, college students have celebrated Constitution Day by exercising their constitutional rights. At Jackson Community College in Jackson, Michigan, students organized a Constitution Day voter registration drive and held discussions on a documentary addressing failures of the US educational system.*

At Purdue University, students from a variety of campus organizations teamed up to test their knowledge of the Constitution in a college bowl competition.† Representatives of Purdue’s student government also held sessions to inform students about internship opportunities in their state government.††

At the University of Texas at San Antonio, students from the group Young Americans for Liberty created a 17 foot Constitution that students signed to pledge their support for understanding the document according to the Framers’ original intent. The students also handed out pocket copies of the Constitution and encouraged discussion of its proper interpretation.††

None of these celebrations required more time or effort to organize than most campus activities and they served to inform students about our founding document. What kind of Constitution Day activity can you organize or take part in on your campus?

QUESTIONS
1. Why might Congress have thought it important to establish a “Constitution Day”?
2. What constitutional protections might be especially important for college students?

The Constitution is more than a symbol, however. It is the supreme and binding law that both grants and limits powers. “In framing a government which is to be administered by men over men,” wrote James Madison in The Federalist, No. 51, “the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself.” The Constitution is both a positive instrument of government, which enables the governors to control the governed, and a restraint on government, which enables the ruled to check their government and its leaders.

This chapter examines a number of questions that are still being asked long after the Framers completed their work. How does the Constitution limit the power of the government? How does it create governmental power? How has it managed to serve as a great symbol of national unity and, at the same time, as an adaptable instrument of government? The secret is an ingenious separation of powers and a system of checks and balances that limits power with power.

Checking Power with Power

2.2 Analyze how the Constitution grants, limits, separates, and balances governmental power.

“IIf men were angels,” James Madison argued in The Federalist, No. 51, “no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.” But the Framers knew well that men were not angels, and thus, to create a successful government, they would need to create a government of limited authority. How? Within the government, competing interests would check each other, and externally, the governed would check the government through elections, petitions, protests, and amendments.
Americans today overwhelmingly support the principles of the Constitution, but after the Framers adjourned on September 17, 1787, three years passed before all thirteen states approved the document. The ensuing ratification debate was an inherently political game of multiple moves, in which the Constitution was kept alive by relatively narrow majorities, particularly in two strategically located states.

**Ratification Timeline**

**1787**
- Sep. 17: Constitutional Convention adjourns.
- Sep. 28: Congress sends Constitution to the states.

**1788**
- Mar. 24: Rhode Island rejects in referendum.
- May 23: SC, 149-73
- Jun 21: NH, 57-47
- Jun 25: VA, 89-79
- Jul 26: NY, 30-27
- Apr 28: MD, 63-11
- Apr 1: Congress achieves quorum.
- Apr 30: Washington sworn in as President.

**1789**
- Aug 2: North Carolina adjourns without ratifying.
- Sep 25: Bill of Rights approved, sent to states.
- Nov 21: NC, 194-77

**1790**
- May 29: RI, 34-32

**The United States in 1790**

NEW YORK was an important center of commerce. Located between New England and the mid-Atlantic states, holding the Republic together would have been difficult without New York.

Half of all Americans were southerners, and two-in-five southerners were VIRGINIANS. It was the political and economic center of the South, and the source of the intellectual force behind the Constitution.

* Percent indicate population of state.

**Investigate Further**

**Concept**  Why did it take three years to ratify the Constitution? The first states to ratify the Constitution did so with a strong majority of support for the document. But as those states signed on, opposition in remaining states grew, and the ratification debate intensified.

**Connection**  Which states were most closely divided on ratification? The debate intensified in two strategic states: New York and Virginia. Ratification in those two holdout states was necessary in order to lend legitimacy to the new government.

**Cause**  What were the issues of the debate? Written in support of the new government, The Federalist Papers addressed New Yorkers’ concerns about federal power. For Virginians, the sticking point was a Bill of Rights, which James Madison promised to introduce in the new Congress.
Although our Constitution places limits on the reach of our federal government, citizens in the United States, as elsewhere in the world, show concern over government assuming too much control. According to the Pew Research Center’s Global Attitudes surveys, majorities in most countries surveyed in 2007 agreed that their governments have too much control over their daily lives.* Respondents were asked how much they agreed with the statement, “The (state or national government) controls too much of our daily lives.” Another Pew survey in 2002 asked the same question and allows us to compare the shift in concern between 2002 and 2007.

In the United States, for example, the percentage of respondents indicating that our government had too much control over our daily lives increased from 60 to 65 percent from 2002 to 2007. This trend was even more pronounced in Great Britain, where the percentage of respondents agreeing with that statement increased 10 percentage points from 54 to 64 percent. These changes may not be surprising given the kind of increased security measures governments have instituted since the September 11, 2001, attacks in New York and Washington, D.C.

These concerns are not confined to Western countries involved in the fight against terrorism. We also see an increase in India and Nigeria. In Japan, however, the percentage of survey respondents who are concerned about the government having too much control over their daily lives decreased between 2002 and 2007 (from 42 to 34 percent). Given that our Constitution sets limits on the reach of government, citizens’ perceptions that government has too much control over their daily lives might indicate an inconsistency between the theory and practice of constitutional government.

CRITICAL THINKING QUESTIONS

1. What factors might contribute to respondents’ views that their governments have too much control over their lives?
2. How might a government’s effort to become more open increase its citizens’ views that it is too controlling?
3. In what ways does your federal government have control over your day-to-day life?

The Framers wanted a stronger and more effective national government than they had under the Articles of Confederation. But they were keenly aware that the people would not accept too much central control. Efficiency and order were important, but liberty was more important. The Framers wanted to ensure domestic tranquility and prevent future rebellions; they also wanted to prevent the emergence of a homegrown King George III. Accordingly, they allotted certain powers to the national government and reserved the rest for the states, thus establishing a system whose nature and problems we discuss in the chapter on American Federalism. But even this was not enough. The Framers believed additional restraints were needed to limit the national government.

The most important means they devised to make public officials observe the constitutional limits on their powers was free and fair elections, through which voters could throw out of office anyone who abused power. Yet the Framers did not fully trust the people’s judgment. “Free government is founded on jealousy, and not in confidence,” said Thomas Jefferson. “In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.”

No less important, the Framers feared a majority might deprive minorities of their rights. This risk was certainly real at the time of the framing, as it is today. As District of Columbia v. Heller shows, even if there were sufficient public support for the District’s legislation restricting gun ownership when it was enacted in 1976, the Second Amendment protects citizens’ right to own guns for their own self-protection. “A dependence on the people is, no doubt, the primary control on the government,” Madison contended in The Federalist, No. 51, “but experience has taught mankind the necessity of auxiliary precautions.” What were these “auxiliary precautions” against popular tyranny?

### Separation of Powers

The first step against potential tyranny of the majority was the separation of powers, the distribution of constitutional authority among the three branches of the national government. In The Federalist, No. 47, Madison wrote: “No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that…the accumulation of all powers, legislative, executive, and judiciary, in the same hands…may justly be pronounced the very definition of tyranny.” Chief among the “enlightened patrons of liberty” to whose authority Madison was appealing were the eighteenth-century philosophers John Locke and Montesquieu, whose works most educated citizens knew well.

The intrinsic value of the dispersion of power, however, is not the only reason the Framers included it in the Constitution. It had already been the general practice in the colonies for more than 100 years. Only during the Revolutionary period did some of the states concentrate authority in the hands of the legislature, and that unhappy experience as well as that under the Articles of Confederation confirmed the Framers’ belief in the merits of the separation of powers. Many attributed the evils of state government and lack of energy in the central government to the lack of a strong executive who would check legislative abuses and give energy and direction to administration.

Still, separating power by itself was not enough to protect the people from tyranny. It might not prevent the branches of the government and officials from pooling their authority and acting together, or from responding alike to the same pressures—from the demand of a majority to restrict handgun ownership, for example, or to impose confiscatory taxes on the rich. What else could be done?

### Checks and Balances: Ambition to Counteract Ambition

The Framers’ answer was a system of checks and balances (see Table 2.1). Madison’s idea to avoid concentration of power was to give each branch the constitutional power to check the others. “Ambition must be made to counteract ambition.” Each branch therefore has a role in the actions of the others (see Figure 2.1).
Congress enacts legislation, which the president must sign into law or veto. The Supreme Court can declare laws passed by Congress and signed by the president unconstitutional, but the president appoints the justices and all the other federal judges, with the Senate’s approval. The president administers the laws, but Congress provides the money to run the government. Moreover, the Senate and the House of Representatives have absolute veto power over each other because both houses must approve bills before they can become law.

**TABLE 2.1 THE EXERCISE OF CHECKS AND BALANCES, 1789–2012**

<table>
<thead>
<tr>
<th>チェックリスト</th>
<th>1789–2012の機能とバランスの実行</th>
</tr>
</thead>
<tbody>
<tr>
<td>** Vetoes**</td>
<td>Presidents have vetoed more than 2,500 acts of Congress. Congress has overridden presidential vetoes more than 100 times.</td>
</tr>
<tr>
<td>** Judicial Review**</td>
<td>The Supreme Court has ruled more than 175 congressional acts or parts thereof unconstitutional.</td>
</tr>
<tr>
<td>** Impeachment**</td>
<td>The House of Representatives has impeached two presidents, one senator, one secretary of war, and 16 federal judges; the Senate has convicted seven of the judges but neither president.</td>
</tr>
<tr>
<td>** Confirmation**</td>
<td>The Senate has refused to confirm nine cabinet nominations. Many other cabinet and subcabinet appointments were withdrawn because the Senate seemed likely to reject them.</td>
</tr>
</tbody>
</table>


- Does the relative infrequency of veto overrides surprise you? Why or why not? Are there other checks Congress can use against the president?

**FIGURE 2.1 THE SEPARATION OF POWERS AND CHECKS AND BALANCES**

- Does the fact that the judiciary has the fewest number of checks make it the least powerful?
Not only does each branch have some authority over the others, but each is also politically independent of the others. Voters in each local district choose members of the House; voters in each state choose senators; the president is elected by the voters in all the states, through the Electoral College. With the consent of the Senate, the president appoints federal judges, who remain in office until they retire or are impeached.

The Framers also ensured that a majority of the voters could win control over only part of the government at one time. In an off-year (nonpresidential) election where a new majority might take control of the House of Representatives, the president still has at least two more years, and senators hold office for six years. Finally, there are independent federal courts, which exercise their own powerful checks.

Distrustful of both the elites and the masses, the Framers deliberately built into our political system mechanisms to make changing the system difficult. They designed the decision-making process so that the national government can act decisively only when there is a consensus among most groups and after all sides have had their say. “The doctrine of the separation of powers was adopted by the convention of 1787,” in the words of Justice Louis D. Brandeis, “not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy”—a system in which one person has control over the populace. Still, even though the fragmentation of political power written into the Constitution remains, constitutional silences, or topics the Constitution does not address, and subsequent developments have modified the way the system of checks and balances works.

- **National Political Parties and Interest Groups**

Political parties—the Republican and Democratic parties being the largest—can serve as unifying factors, at times drawing the president, senators, representatives, and sometimes even judges together behind common programs. When parties do this, they help bridge the separation of powers. Yet they can be splintered and weakened by having to work through a system of fragmented governmental power, and by the increasing influence of special-interest groups, so that they never become so strong or cohesive that they threaten liberty.

When one party controls Congress or one of its chambers and the other party controls the White House, partisanship is intensified, and Congress is inclined to more closely monitor the executive branch. Because his party controlled Congress during much of his presidency, President George W. Bush was remarkably free from congressional investigations of his administration. However, when Democrats regained control in both the Senate and the House of Representatives in 2006, they quickly began congressional investigations into the use of intelligence leading up to the war in Iraq and the firing of U.S. Attorneys by the U.S. Justice Department. More conflict is certainly to be expected during divided government, but even when one party controls both branches, the pressures of competing interest groups may make cooperation among legislators difficult.

Because of this competition between the legislative and executive branches, each is prone to encroaching on the power of the other when given the opportunity. Thus we have battles over the budget and angry confirmation hearings for the appointment of Supreme Court justices, lower federal court judges, and members of the executive branch; as a result, some might suspect that less would be accomplished during periods of divided government. The division of powers also makes it difficult for the voters to hold anyone or any party accountable. “Presidents blame Congress…while members of Congress attack the president…. Citizens genuinely cannot tell who is to blame.”

Yet when all the shouting dies down, political scientist David Mayhew concludes, there is just as much important legislation passed when one party controls Congress and another controls the presidency (divided government) as when the same party controls both branches (unified government). New research on the government’s most significant investigations since World War II by our co-author Paul Light is consistent with Mayhew’s conclusion—divided government actually produces more
significant investigations and greater impetus toward improving government performance than does unified government. And Charles Jones, a noted authority on Congress and the presidency, adds that divided government is precisely what the voters appear to have wanted through much of our history. As we discuss in detail in the chapter on Congress, divided government frequently occurs when the president’s party loses congressional seats in the midterm elections.

Expansion of the Electorate and the Move Toward More Direct Democracy

The Electoral College was another provision of the Constitution meant to provide a buffer against the “whims of the masses” (see The Federalist, No. 10). The Framers wanted the Electoral College—wise, independent citizens free of popular passions and hero worship—to choose the president rather than leave the job to ordinary citizens. Almost from the beginning, though, the Electoral College did not work this way. Rather, voters actually do select the president because the presidential electors that the voters choose pledge in advance to cast their electoral votes for their party’s candidates for president and vice president. Nevertheless, presidential candidates may occasionally win the national popular vote but lose the vote in the Electoral College, as happened when Al Gore won the popular vote in the 2000 presidential election but lost the Electoral College with 266 votes to George W. Bush’s 271.

The kind of people allowed to vote has expanded from free, white, property-owning males to include all citizens over the age of 18. In addition, during the past century, U.S. states have expanded the role of the electorate through such means as direct primaries, initiatives, referendums and recalls. And since the ratification of the Seventeenth Amendment in 1913, senators are no longer elected by state legislatures but are chosen directly by the people.

Changes in Technology

Because of new technologies, today’s system of checks and balances operates differently from the way it did in 1789. There were no televised congressional committee hearings in 1789, of course; no electronic communications; no Larry King Live talk shows; no...
New York Times, USA Today, CNN, Fox News, or C-SPAN; no Internet; no nightly news programs with national audiences; no presidential press conferences; no Facebook or Twitter, and no live coverage of wars and of U.S. soldiers fighting in foreign lands. Nuclear bombs, television, computers, cell phones, Smartphones, and iPads—these and other innovations create conditions today that are unimaginably different from those of two centuries ago. We live in a time of instant communication and polls that tell us what people are thinking about public issues almost from one day to the next.

In some ways, these new technologies have added to the powers of presidents by permitting them to appeal directly to millions of people and giving them immediate access to public opinion. In turn, they have enabled interest groups to target thousands of letters, e-mails, and calls at members of Congress; to orchestrate campaigns to write letters to editors; and to organize and mobilize on the Internet. New technologies have also given greater independence and influence to nongovernmental institutions such as special-interest groups and the press. They have made it possible for rich people to bypass political parties and carry their message directly to the electorate, as Meg Whitman, the billionaire former chief of eBay did, spending some $144 million of her own money on her failed 2010 gubernatorial bid in California.19

The Growth of Presidential Power

Today, problems elsewhere in the world—Afghanistan, Israel, Pakistan, Iran, North Korea—often create crises for the United States. The need to deal with perpetual emergencies has concentrated power in the hands of the chief executive and the presidential staff. As a result, the president of the United States has emerged as the most significant player on the world stage, and media coverage of summit conferences with foreign leaders enhances the president’s status. Headline-generating events give the president a visibility no congressional leader can achieve. The office of the president has on occasion modified the system of checks and balances, especially between the executive branch and Congress, and provided a measure of national unity. Drawing on constitutional, political, and emergency powers, the president can sometimes overcome the restraints the Constitution imposes on the exercise of governmental power—to the applause of some and the alarm of others. The Obama administration argued strongly
judicial review
The power of a court to review laws or governmental regulations to determine whether they are consistent with the U.S. Constitution, or in a state court, the state constitution.

Federalists
A group that argued for ratification of the Constitution, including a stronger national government at the expense of states’ power. They controlled the new federal government until Thomas Jefferson’s election in 1800.

for recognizing the authority of the executive, particularly given national security concerns. Obama was following the lead of his predecessors, including President George W. Bush, who asserted that he had authority to use wiretaps to monitor communications of U.S. citizens without court-approved search warrants.20

Judicial Review and the “Guardians of the Constitution”

Explain how the use of judicial review strengthens the courts in a separation of powers system.

The judiciary has become so important in our system of checks and balances that it deserves special attention. Judges did not claim the power of judicial review—the power to review a law or government regulation and strike it down if the judges believe it conflicts with the Constitution—until some years after the Constitution had been adopted. However, many understood that judges would provide an important check on the other branches. Alexander Hamilton, for example, emphasized the importance of judicial independence for protection “against the occasional ill humors in the society.”21

Judicial review is a major contribution of the United States to the art of government, one that many other nations have adopted. In Canada, Germany, France, Italy, and Spain, constitutional courts have the power to review laws referred to them. However, the degree to which the courts utilize this power, and the point in the legislative process at which it occurs, varies across countries.22

Origins of Judicial Review

The Constitution says nothing about who should have the final word in disputes that may arise over its meaning. Today, most scholars agree that the Framers intended the Supreme Court to have the power to declare acts of the legislative and executive branches unconstitutional. But in the years following ratification, the scope of the Court’s power remained uncertain.

The Federalists—who urged ratification of the Constitution and controlled the national government until 1801—generally supported a strong role for federal courts and thus favored judicial review. Their opponents, the Jeffersonian Republicans (called Democrats after 1832), were less enthusiastic. In the Kentucky and Virginia Resolutions of 1798 and 1799, respectively, Jefferson and Madison (who by this time had left the Federalist camp) came close to arguing that state legislatures—and not the Supreme Court—had the ultimate power to interpret the Constitution. These resolutions seemed to question whether the Supreme Court even had final authority to review state legislation, a point about which there had been little doubt.

When the Jeffersonians defeated the Federalists in the election of 1800, the question of whether the Supreme Court would actually exercise the power of judicial review was still undecided. Then in 1803 came Marbury v. Madison, the most path-breaking Supreme Court decision of all time.23

Marbury v. Madison

President John Adams and fellow Federalists did not take their 1800 defeat by Thomas Jefferson easily. Not only did they lose control of the executive office, they also lost both houses of Congress. That left the judiciary as the last remaining Federalist stronghold.

To further shore up the federal judiciary, the outgoing Federalist Congress created dozens of new judgeships. By March 3, 1801, the day before Jefferson was due to become
president, Adams had appointed, and the Senate had confirmed, loyal Federalists to all of these new positions. Although the commissions were signed and sealed, a few, for the newly appointed justices of the peace for the District of Columbia, were not delivered. John Marshall, the outgoing secretary of state and newly confirmed chief justice of the Supreme Court, left the delivery of these commissions for his successor as secretary of state, James Madison.

This “packing” of the judiciary angered Jefferson, now inaugurated as president. When he discovered that some of the commissions were still lying on a table in the Department of State, he instructed a clerk not to deliver them. Jefferson could see no reason why the District needed so many justices of the peace, especially Federalist justices.24

William Marbury never received his commission and decided to seek action from the courts. Section 13 of the Judiciary Act of 1789 authorized the Supreme Court “to issue writs of mandamus,” orders directing an official, such as the secretary of state, to perform a duty, such as delivering a commission. Marbury went directly to the Supreme Court and, citing Section 13, made his request.

Marbury’s request presented Chief Justice John Marshall and the Supreme Court with a difficult dilemma. On the one hand, if the Court issued the writ, Jefferson and Madison would probably ignore it. The Court would be powerless, and its prestige, already low, might suffer a fatal blow. On the other hand, by refusing to issue the writ, the judges would appear to support the Jeffersonian Republicans' claim that the Court had no authority to interfere with the executive. Would Marshall issue the writ? Most people thought he would; angry Republicans even threatened impeachment if he did so.
On February 24, 1803, the Supreme Court delivered what is still considered a brilliantly written and politically savvy decision. First, Marshall, writing for a unanimous Court, took Jefferson and Madison to task. Marbury was entitled to his commission, and Madison should have delivered it to him. Moreover, the proper court could issue a writ of mandamus, even against so high an officer as the secretary of state.

However, Marshall concluded that Section 13 of the Judiciary Act, giving the Supreme Court original jurisdiction to issue writs of mandamus, was in error. It impermissibly expanded the Court’s original jurisdiction, which is detailed in Article III of the Constitution. Marshall concluded that the grant of original jurisdiction in Article III was meant to be limited to those cases explicitly mentioned: when an ambassador, foreign minister, or a state is a party. Because none of these was at issue in Marbury’s request for the writ of mandamus, the Court deemed Section 13 of the Judiciary Act contrary to the Constitution. Given that Article VI provided that the Constitution is the “supreme Law of the Land,” and judges took an oath to uphold the Constitution, any law in conflict with it could not withstand the Court’s review.

Although the Federalists suffered a political loss in not seating all their “midnight judges” on the bench, Marshall and the Court gained a much more important power: to declare laws passed by Congress unconstitutional. Subsequent generations might have interpreted *Marbury v. Madison* in a limited way, such as that the Supreme Court had the right to determine the scope of its own powers under Article III, but Congress and the president had the authority to interpret their powers under Articles I and II. But throughout the decades, building on Marshall’s precedent, the Court has taken the commanding position as the authoritative interpreter of the Constitution.

Once we accept Marshall’s argument that judges are the official interpreters of the Constitution, several important consequences follow. The most important is that people can challenge laws enacted by Congress and approved by the president, as did a variety of states and parties in challenging health care reform. Simply by bringing a lawsuit, those who lack the clout to get a bill through Congress can often secure a judicial hearing. And organized interest groups often find they can achieve goals through litigation that they could not attain through legislation. For example, as discussed at

Following the Supreme Court’s 2008 decision affirming individual citizens’ right to own handguns and thus making it more difficult to restrict gun ownership, Laurence Tansel shopped for his first handgun.
In the beginning of this chapter, gun rights activists were able to achieve success in the courts through cases like *District of Columbia v. Heller* (2008) and *McDonald v. Chicago* (2010) that they were not able to achieve by rolling back restrictions on handguns legislatively. Litigation thus supplements, and at times even takes precedence over, legislation as a way to make public policy.25

**Informal Change: The Unwritten Constitution**

2.4 Assess how the Constitution has evolved through changes in the informal, unwritten Constitution.

As careful as the Constitution’s Framers were to limit the powers they gave the national government, the main reason they assembled in Philadelphia was to create a stronger national government. Having learned that a weak central government was a danger to liberty, they wished to establish a national government with enough authority to meet the country’s needs. They made general grants of power, leaving it to succeeding generations to fill in the details and organize the structure of government in accordance with experience.

Hence our formal, written Constitution is only a skeleton. It is filled out in numerous ways that we must consider part of our constitutional system in a larger sense. In fact, our system is kept up to date primarily through changes in the informal, unwritten Constitution. These changes exist in certain basic statutes and historical practices of Congress, presidential actions, and court decisions.

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**For the People**

The Constitution of the United States is the world’s oldest written constitution. Some 235 other countries have written constitutions; more than 50 new constitutions have been enacted as recently as 2000. Seven countries have no written constitution, including Oman, New Zealand, and the United Kingdom.*

Debate was critical in getting the signers’ agreement to the U.S. Constitution in 1787. Since then, the ambiguity and brevity of many constitutional provisions have spurred a great deal of additional debate, although there has not been a serious effort to alter our basic system of government since the Constitution went into effect in 1789. Indeed, the potential to alter the Constitution through the amendment process has created a remarkable democratic system of government capable of withstanding a civil war, two world wars, and internal and external security threats, all the while providing individual protections for an increasingly diverse population.

Our governing document provides for a unique balance between our national and state governments. This allows us to take advantage of nation-wide policies that provide for equity across the states, while also meeting the specific needs of localities through protections on state power. The Constitution also protects our most closely held liberties, including our right to express our views, to due process of the law, and to worship (or not) as we each see fit.

The Framers of the Constitution provided American citizens with the tools of self-government; indeed for a Government by the People. As Benjamin Franklin is reported to have said to a woman as he was leaving the Constitutional Convention, the Framers gave us “a republic, if [we] can keep it.”†

**QUESTIONS**

1. What features have led to the durability of the United States Constitution?
2. In what situations might it be important to have consistency in law across the United States?

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Congressional Elaboration

Because the Framers gave Congress authority to provide for the structural details of the national government, it is not necessary to amend the Constitution every time a change is needed. Rather, Congress can create legislation to meet the need with what we refer to as congressional elaboration. The Judiciary Act of 1789, for example, laid the foundations for our national judicial system, just as other laws established the organization and functions of all federal executive officials subordinate to the president and enacted the rules of procedure, internal organization, and practices of Congress.

Another example of this congressional elaboration of our constitutional system is the use of the impeachment and removal power. An impeachment is a formal accusation against a public official and the first step in removing him or her from office. Constitutional language defining the grounds for impeachment is sparse. In fact, the last time the House of Representatives formally accused a president of an impeachable offense, President Bill Clinton in 1998, House members had nearly 20 scholars testify before them as to the clause’s meaning, and they still did not find consensus on it. Although the Constitution provides for the basic procedural structure of impeachments, it leaves up to Congress to determine when a president’s actions amount to an impeachable offense.

A more recent example involves the debate over health care reform and whether Congress has the power to mandate that American citizens purchase health insurance. Part of that debate centers on congressional authority under the commerce clause (Article I Section 8). Although the Constitution is clear that Congress has the authority to regulate “commerce… among the several States,” just what “commerce” is, and how far congressional authority to regulate it extends, is something on which many experts disagree. In arguments before the U.S. Supreme Court, the U.S. government contended that Congress has the authority to regulate health insurance, which accounts for 17% of the U.S. economy. Opponents of the reform argued that Congress cannot require American citizens to buy health insurance based only on the fact that they are citizens of the United States. In its decision, the Court ruled that Congress had unconstitutionally exceeded its authority under the commerce clause when it enacted the Patient Protection and Affordable Care Act, but it upheld the Act based on Congress’s taxing authority.

Presidential Practices

Although the formal constitutional powers of the president have not changed, the office is dramatically more important and more central today than it was in 1789. Vigorous presidents—George Washington, Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Theodore Roosevelt, Woodrow Wilson, Franklin Roosevelt, Harry Truman, Lyndon Johnson, Bill Clinton, and George W. Bush—have boldly exercised their political and constitutional powers, especially during times of national crisis such as the war against international terrorism and the 2008 economic crisis. Their presidential practices have established important precedent, building the power and influence of the office.

A major practice is the use of executive orders, which carry the full force of law but do not require congressional approval, though they are subject to legal challenge. Executive orders direct the executive branch to take some action, such as President Franklin Roosevelt’s 1942 order to intern Japanese Americans during World War II or President Truman’s order to integrate the armed forces in 1948. Not all executive orders are as path-breaking as these two examples, but even so they are a tool for the executive. For example, President Obama has issued executive orders to stimulate the U.S. economy, such as an order establishing the SelectUSA Initiative aimed at improving opportunities for investment in the United States. Presidents have long used these orders to achieve goals that may lack congressional support. Other practices include executive privilege, the right to confidentiality of executive communications, especially those that relate to national security; impoundment by a president of funds previously appropriated by Congress; the
power to send armed forces into hostilities; and the authority to propose legislation and work actively to secure its passage by Congress.

Foreign and economic crises as well as nuclear-age realities and the war against international terrorism have expanded the president’s role: "When it comes to action risking nuclear war, technology has modified the Constitution: the President, perforce, becomes the only such man in the system capable of exercising judgment under the extraordinary limits now imposed by secrecy, complexity, and time." The presidency has also become the pivotal office for regulating the economy and promoting the general welfare through an expanded federal bureaucracy. In addition, the president has become a leader in sponsoring legislation as well as the nation’s chief executive.

**You Will Decide**

**Should We Interpret the Constitution According to Original Intent or Today’s Needs?**

Debate about how to interpret the Constitution began almost immediately, and, as we have seen, it continues to this day, with very important practical implications for citizens.

One kind of constitutional interpretation is the **originalist approach**. Originalists believe that the Constitution should be understood according to the Framers’ intent. If the exact wording of the document does not provide a conclusive answer, most originalists consider the context of the times in which it was written and interpret it in light of that history. Especially important are writings or speeches by the Framers themselves or by proponents of subsequent amendments.

A second approach to interpreting the Constitution sees it as a changing and evolving document that provides a basic framework for government but that allows, and even encourages, new generations to interpret ideas such as “equal justice” and “due process” in light of the needs of their time. This **adaptive approach** may mean that subsequent generations will interpret the same document differently from prior generations.

The adaptive approach makes the Supreme Court a more powerful institution in U.S. government. The originalist approach forces people and institutions to adopt amendments if they want constitutional change.

*What do you think? Should we interpret the Constitution according to the Framers’ original intent, or should it be considered in light of the needs of today’s society? What are some of the arguments for or against each approach?*

**Thinking It Through**

Differences between the adaptive and the originalist views do not necessarily align with political labels such as conservative or liberal, although they may in particular cases. For example, Justice Antonin Scalia, who tends to be originalist in his approach, voted in *District of Columbia v. Heller* to strike down the District’s prohibition on registering handguns through a close reading of the original, literal meaning of the Second Amendment. Because the Amendment indicates that “the right of the people to keep and bear Arms, shall not be infringed,” Justice Scalia, writing for the majority of the Court, determined that individual citizens had a constitutionally protected right to own handguns.

Justice Stephen Breyer typically favors a more adaptive approach. In his dissent to the Court’s majority opinion, Justice Breyer argued that the Court must consider the District of Columbia’s restriction on handguns in light of present day conditions, such as the public safety concerns raised by gun violence. Justice Breyer weighed an individual’s right to own a handgun against the District’s responsibility to protect its citizenry, and sided with the District of Columbia.

If the Constitution is indeed open to changing interpretations, are any constitutional principles absolute and not open to new interpretation? This danger in the adaptive approach worries some because the selection of judges is only indirectly democratic; due to lifetime appointments, judges could lose the people’s confidence yet retain their power. There are problems with the originalist approach as well. A global economy, electronic and mass media, and the need to respond immediately to national security threats are only some examples of circumstances the Framers could not consider or address in the Constitution. In other instances, such as with privacy, for example, the original wording of the Constitution implies an interpretation but does not explicitly say it.

**CRITICAL THINKING QUESTIONS**

1. How do you think we should interpret the Constitution? What are the best arguments of both sides of this question?

2. Why does it matter whether we take an originalist or an adaptive approach to interpreting the Constitution?
Judicial Interpretation

In its decision in *Marbury v. Madison* (1803), the Supreme Court established that it was the judiciary’s responsibility to interpret the Constitution. The courts have made far-reaching decisions that have settled, at least for a time, what some of the vague clauses of the document mean. For example, the Supreme Court ruled that segregation by race, even when equal facilities were provided, violated the requirements of the equal protection clause (*Brown v. Board of Education* [1954]), and that Americans have a constitutionally protected right to privacy, even though the word “privacy” appears nowhere in the Constitution (*Griswold v. Connecticut* [1965]). In both of these cases and a myriad of others, the Court’s definition of what the Constitution meant led to changes in our political system without any amendment to the document itself. Although there is relatively little current debate over the judiciary’s authority to interpret the Constitution, there is substantial disagreement over *how* it should be read. (See the *You Will Decide* box, p. 67.)

Changing the Letter of the Constitution

2.5 Describe the processes by which formal changes to the Constitution can be made.

The idea of a constantly changing system disturbs many people. How, they contend, can you have a constitutional government when the Constitution is constantly being twisted by interpretation and changed by informal methods? This view fails to distinguish between two aspects of the Constitution. As an expression of *basic and timeless personal liberties*, the Constitution does not and should not change. For example, a government cannot destroy free speech and still remain a constitutional government. In this sense, the Constitution is unchanging. But when we consider the Constitution as an *instrument of government* and a positive grant of power, we realize that if it did not grow with the nation it serves, it would soon be irrelevant and ignored.

The Framers could never have conceived of the problems facing the government of a large, powerful, and wealthy nation of approximately 300 million people at the beginning of the twenty-first century. Although the general purposes of government remain the same—to establish liberty, promote justice, ensure domestic tranquility, and provide for the common defense—the powers of government that were adequate to accomplish these purposes in 1787 are simply insufficient more than 225 years later. The Framers knew that future experiences would call for changes in the text of the Constitution and that it would need to be formally amended. In Article V, they gave responsibility for amending the Constitution to Congress and to the states. The president has no formal authority over constitutional amendments; presidential veto power does not extend to them, although presidential influence is often crucial in getting amendments proposed and ratified.

Proposing Amendments

The first method for proposing amendments—and the only one used so far—is by a *two-thirds vote of both houses of Congress*. Dozens of resolutions proposing amendments are introduced in every session, but Congress has proposed only 31 amendments, of which 27 have been ratified (see Figure 2.2).

Why is introducing amendments to the Constitution so popular? In part because groups frustrated by their inability to get things done in Congress hope to bypass it. In part because Congress, the president, interest groups, or the public may want to
overturn unpopular Supreme Court decisions. In part because the nation needs to make government more responsive to changing times. Congress, the president, interest groups, and the public were all involved in an effort to overturn the Supreme Court’s decision to strike down a Texas law barring flag burning (Texas v. Johnson [1989]). Though Congress attempted to bypass the decision with the Federal Flag Protection Act of 1989, which prohibited intentionally burning or defiling the flag, the Court struck down that law as well (United States v. Eichman [1990]). In doing so, the Court ruled that the First Amendment protects burning the flag as a form of political speech.

Following its failure to overturn the decision through new laws, Congress has made repeated efforts to send a constitutional amendment banning flag burning to the states. The House of Representatives has voted seven times since the early 1990s on an amendment prohibiting the “physical desecration of the flag of the United States,” but the Senate has been unable to garner the necessary two-thirds vote. It came close to succeeding in June 2006, but the vote fell one short of the number required to send the amendment to the states for ratification. See Table 2.2 on how the amending power has been used.

The second method for proposing amendments—a convention called by Congress at the request of the legislatures in two-thirds of the states—has never been used. Under Article V of the Constitution, Congress could call for such a convention without the concurrence of the president. This method presents difficult questions including whether state legislatures must apply for a convention to propose specific amendments on one topic, or a convention with full powers to revise the entire Constitution. Under most proposals Congress has considered clarifying the process: each state would have as many delegates to the convention as it has representatives and senators in Congress and a constitutional convention would be limited to considering only the subject specified in the state legislative petitions and described in the congressional call for the convention. Scholars are divided, however, on whether Congress has the authority to limit what a constitutional convention might propose and to date, Congress has not passed any legislation on the topic.
TABLE 2.2 THE AMENDING POWER AND HOW IT HAS BEEN USED

<table>
<thead>
<tr>
<th>To Increase or Decrease the Power of the National Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Eleventh took some jurisdiction away from the national courts.</td>
</tr>
<tr>
<td>The Thirteenth abolished slavery and authorized Congress to legislate against it.</td>
</tr>
<tr>
<td>The Sixteenth enabled Congress to levy an income tax.</td>
</tr>
<tr>
<td>The Eighteenth authorized Congress to prohibit the manufacture, sale, or transportation of liquor.</td>
</tr>
<tr>
<td>The Twenty-First repealed the Eighteenth and gave states the authority to regulate liquor sales.</td>
</tr>
<tr>
<td>The Twenty-Seventh limited the power of Congress to set members’ salaries.</td>
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</tbody>
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<table>
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<tr>
<th>To Expand the Electorate and Its Power</th>
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</thead>
<tbody>
<tr>
<td>The Fifteenth extended suffrage to all male African Americans over the age of 21.</td>
</tr>
<tr>
<td>The Seventeenth took the right to elect U.S. senators away from state legislatures and gave it to the voters in each state.</td>
</tr>
<tr>
<td>The Nineteenth extended suffrage to women over the age of 21.</td>
</tr>
<tr>
<td>The Twenty-Third gave voters of the District of Columbia the right to vote for president and vice president.</td>
</tr>
<tr>
<td>The Twenty-Fourth outlawed the poll tax, thereby prohibiting states from taxing the right to vote.</td>
</tr>
<tr>
<td>The Twenty-Sixth extended suffrage to otherwise qualified persons aged 18 or older.</td>
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</tbody>
</table>

<table>
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<tr>
<th>To Reduce the Electorate’s Power</th>
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<tbody>
<tr>
<td>The Twenty-Second took away from the electorate the right to elect a person to the office of president for more than two full terms.</td>
</tr>
</tbody>
</table>

<table>
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<tr>
<th>To Limit State Government Power</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Thirteenth abolished slavery.</td>
</tr>
<tr>
<td>The Fourteenth granted national citizenship and prohibited states from abridging privileges of national citizenship; from denying persons life, liberty, and property without due process; and from denying persons equal protection of the laws. This amendment has come to be interpreted as imposing restraints on state powers in every area of public life.</td>
</tr>
</tbody>
</table>

<table>
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<tr>
<th>To Make Structural Changes in Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Twelfth corrected deficiencies in the operation of the Electoral College that the development of a two-party national system had revealed.</td>
</tr>
<tr>
<td>The Twentieth altered the calendar for congressional sessions and shortened the time between the election of presidents and their assumption of office.</td>
</tr>
<tr>
<td>The Twenty-Fifth provided procedures for filling vacancies in the vice presidency and for determining whether presidents are unable to perform their duties.</td>
</tr>
</tbody>
</table>

Overall, have constitutional amendments resulted in a stronger or weaker federal government than was established in the Constitution?

Ratifying Amendments

After Congress has proposed an amendment, the states must ratify it before it takes effect. Again, the Constitution provides two methods, and Congress may choose: approval by the legislatures in three-fourths of the states or approval by special ratifying conventions in three-fourths of the states. Congress has submitted all amendments except one—the Twenty-First (to repeal the Eighteenth, the Prohibition Amendment)—to the state legislatures for ratification.

Seven state constitutions specify that their state legislatures must ratify a proposed amendment to the U.S. Constitution by majorities of three-fifths or two-thirds of each chamber. Although a state legislature may change its mind and ratify an amendment after it has voted against ratification, the weight of opinion is that once a state has ratified an amendment, it cannot “unratify” it.39

The Supreme Court has said that ratification must take place within a “reasonable time” so that it is “sufficiently contemporaneous to reflect the will of the people.”40 However, when Congress approved ratification of the Twenty-Seventh Amendment, it had been before the nation for nearly 203 years, so there seems to be no limit on what it considers a “reasonable time” (see Figure 2.3). In fact, ratification ordinarily takes place rather quickly—one-third of all amendments were ratified within about one year, and 80 percent were ratified within
about two years. Congress will probably continue to stipulate that ratification must occur within seven years of the date it submits an amendment to the states.

## Ratification Politics

The failure of the Equal Rights Amendment (ERA) to be ratified provides a vivid example of the pitfalls of ratification. First introduced in 1923, the ERA did not get much support until the 1960s. By the 1970s, the ERA had overwhelming support in both houses of Congress and in both national party platforms. Every president from

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**OF the People**

**Diversity in America**

Women in the Workforce Forty Years After Failure to Ratify the ERA

As mentioned in the text, although the Equal Rights Amendment had substantial support, it failed to get the necessary votes to be ratified. Many who were opposed to the amendment suggested that women would be subject to the military draft and that full-time housewives and mothers would be forced to work outside the home.

Even without the Equal Rights Amendment, the role of women in American society has changed greatly since the amendment was first passed by Congress and submitted to the states. In 1973, for example, approximately 76 percent of all men were employed in the civilian labor force compared to only 42 percent of all women. And, unemployment figures for women seeking work during that year was 50 percent higher than for their male counterparts.

In contrast, by 2010 nearly 54 percent of all women were employed in the civilian labor force compared to 64 percent of men. Although unemployment figures for both men and women were higher due to the troubled economic conditions of the day, a smaller percent of women who were actively seeking work were unable to get it (8.6 percent) as compared to men (10.5 percent).*

Even though women are more greatly represented in the workforce today than they were when Congress passed the ERA, one of proponents’ primary goals, removing income equality, has remained elusive. According to the Department of Labor, women on average received lower wages than men. For every dollar the average male worker makes, the average female worker makes only 81 cents, even after controlling for the type of employment. For example, in 2010, the median weekly salary for male financial managers was $1,546 compared to only $1,022 for their female counterparts.**

### QUESTIONS

1. Why might income inequality persist even though men and women serve in more equal numbers today in the workforce?

2. What effect would ratifying the ERA have had on women’s representation in the 1970s workforce?

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Harry Truman to Ronald Reagan, and many of their wives, endorsed the amendment. More than 450 organizations with a total membership of more than 50 million were on record in support of the ERA.\textsuperscript{41} The ERA provided for the following:

\textbf{Section 1.} Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

\textbf{Section 2.} The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

\textbf{Section 3.} This amendment shall take effect two years after the date of ratification.\textsuperscript{42}

Soon after Congress passed the amendment and submitted it to the states in 1972, many legislatures ratified it—sometimes without hearings—and by overwhelming majorities. By the end of that year, 22 states had ratified the amendment, and it appeared that the ERA would soon become part of the Constitution. But because of opposition organized under the leadership of Phyllis Schlafly, a prominent spokesperson for conservative causes, the ERA became controversial.

Opponents argued that "women would not only be subject to the military draft but also assigned to combat duty. Full-time housewives and mothers would be forced to join the labor force. Further, women would no longer enjoy existing advantages under state domestic relations codes and under labor law."\textsuperscript{43} Opposition to ratification arose chiefly in the same cluster of southern states that had opposed ratification of the Nineteenth Amendment, which gave women the right to vote. In the end, despite extensions on the deadline to ratify the ERA, the amendment fell three states short of the 38 needed for ratification.

The Framers intended that amending the Constitution should be difficult, and the ERA ratification battle demonstrates how well they planned. Through interpretation, practices, usages, and judicial decisions, the Constitution has proved a remarkably enduring and adaptable governing document and one that is frequently used as a model for emerging democracies. But it is essential for citizens, individually and together, to keep watch that constitutional provisions are enforced and that change comes when necessary. Not all efforts for constitutional change are successful, but even failed drives for constitutional amendments can achieve a degree of success through the legislative process, influence on the executive, or calls for action by the judiciary.

Although the Equal Rights Amendment failed to be ratified by the 1982 deadline, men and women continue to lobby for equal rights.
views of the constitution

2.1 Describe the basic structure of the Constitution and its Bill of Rights, p. 53.

The U.S. Constitution’s first three articles establish the legislature, the executive, and the judiciary. The Bill of Rights, the first ten amendments to the Constitution, was added in 1791 and provides protections from federal government infringement on individual liberties.

Checking Power with Power

2.2 Analyze how the Constitution grants, limits, separates, and balances governmental power, p. 54.

The U.S. Constitution separates power vested in the legislature, which has the power to create law; the executive, with the power to enforce the law; and the judiciary, which interprets the law. None of the branches depends on the others for its authority, and each branch has the power to limit the others through the system of checks and balances.

Competing interests within this structure check and balance one another. Political parties may sometimes overcome the separation of powers, especially if the same party controls both houses of Congress and the presidency. Typically, this is not the case, however, and a divided government intensifies checks and balances. Presidential power, which has increased over time, has sometimes overcome restraints the Constitution imposes on it.

Judicial Review and the “Guardians of the Constitution”

2.3 Explain how the use of judicial review strengthens the courts in a separation of powers system, p. 62.

Judicial review is the power of the courts to review acts of Congress, the executive branch, and the states and, if necessary, strike them down as unconstitutional. This authority provides the judiciary a powerful check on the other branches of government. In deciding that it lacked the jurisdiction to order a judicial commission be delivered, the Supreme Court, in Marbury v. Madison, established its authority to rule an act of the federal legislature unconstitutional. The Court’s decision was politically savvy and greatly enhanced the role of the judiciary in a separation of powers system.

Informal Change: The Unwritten Constitution

2.4 Assess how the Constitution has evolved through changes in the informal, unwritten Constitution, p. 65.

The Constitution is the framework of our governmental system. The constitutional system has been modified over time, adapting to new conditions through congressional elaboration, presidential practices, and judicial interpretation.

Some jurists believe the Constitution is a static document with a set meaning, and they tend to interpret the Constitution according to a close reading of the text or according to what they think the Framers intended. Others consider the document’s meaning to evolve with time and changing circumstances.

Changing the Letter of the Constitution

2.5 Describe the processes by which formal changes to the Constitution can be made, p. 68.

Although adaptable, the Constitution itself needs to be altered from time to time, and the Framers provided a formal procedure for its amendment. An amendment must be both proposed and ratified: proposed by either a two-thirds vote in each chamber of Congress or by a national convention called by Congress on petition of the legislatures in two-thirds of the states; ratified either by the legislatures in three-fourths of the states or by special ratifying conventions in three-fourths of the states.
MUTLIPLE CHOICE QUESTIONS

2.1 Describe the basic structure of the Constitution and its Bill of Rights.

The Constitution reflects the Framers’ respect for ___ law, which implies a universal sense of right and wrong.

a. natural
b. formal
c. federal
d. corporal
e. civil

2.2 Analyze how the Constitution grants, limits, separates, and balances governmental power.

The Constitutional provision that the Senate must confirm the president’s nominees to the federal courts represents the ___

a. principle of separation of powers.
b. limited authority of the national government.
c. system of checks and balances.
d. system of federalism.
e. principle of judicial review.

2.3 Explain how the use of judicial review strengthens the courts in a separation of powers system.

Which of the following is an example of judicial review?

a. Congressional review of federal court nominees
b. Presidential appointment of federal court judges
c. The federal courts agreeing to review one’s detention
d. The federal courts’ determination that a law is consistent with the Constitution
e. The federal courts agreeing to review a case from lower courts

2.4 Assess how the Constitution has evolved through changes in the informal, unwritten Constitution.

The Supreme Court’s determination that the necessary and proper clause permitted the establishment of a national bank illustrates the concept of

a. congressional elaboration.
b. judicial interpretation.
c. executive privilege.
d. reserve powers.
e. substantive due process.

2.5 Describe the processes by which formal changes to the Constitution can be made.

One of the reasons that the Constitution has never been altered through the convention process includes which of the following?

a. All states are required to agree to the convention
b. Amendment petitions must be agreed to by three-fifths of the states

c. Uncertainty over what could and could not be considered at a convention
d. The president’s willingness to alter the Constitution as necessary
e. Congressional authority to unilaterally amend the Constitution.

ESSAY QUESTION

Madison's understanding of human nature greatly affected his views on government. Explain how the system of separation of powers and checks and balances reflect Madison's views. Has the Constitution been successful in addressing Madison's concerns? Why or why not?

Explore Further

IN THE LIBRARY

Carol Berkin, A Brilliant Solution: Inventing the American Constitution (Harcourt, 2002).

James Macgregor Burns, The Vineyard of Liberty (Knopf, 1982).


**ON THE WEB**

[www.constitutioncenter.org/](http://www.constitutioncenter.org/)
The National Constitution Center’s Web site includes information on the Constitution and its Framers as well as an interactive constitution, online exhibits, and news updates.

[www.memory.loc.gov/ammem/amlaw/lawhome.html](http://www.memory.loc.gov/ammem/amlaw/lawhome.html)
This Library of Congress Web site is devoted to the Continental Congress and the Constitutional Convention. There are links to online documents contained in the Library’s collection.

[www.archives.gov/](http://www.archives.gov/)