# THE LIVING CONSTITUTION

# 2

OUTLINE




The Constitution of the United States is the world's oldest written constitution and one of the shortest. The original, unamended Constitution, which went into effect in 1789, contains just 4,543 words. Yet it established the framers' experiment in free-government-in-the-making that each generation reinterprets and renews. The Constitution remains a document Americans revere. Optimists read it as expressing their hopes; pessimists put faith in its protections against tyranny and other abuses.

Why, after more than 218 years, have we not written another constitution—let alone two, three, or more, like other countries around the world? Part of the answer is the widespread acceptance of the Constitution by optimists and pessimists alike. But also part of the answer is the Constitution's brilliant structure for limited government and the facts that the framers built into the document the capacity for adaptability and flexibility.

As the Constitution won the support of citizens of the early years of the Republic, it took on the aura of **natural law**—law that defines right from wrong, law that is higher than human law. "The [Founding] Fathers grew ever larger in stature as they receded from view; the era in which they lived and fought became a Golden Age; in that age there had been a fresh dawn for the world, and its men were giants against the sky."[1] This early Constitution worship helped bring unity to the diverse new nation. Like the crown in Great Britain, the Constitution became a symbol of national loyalty, evoking both emotional and intellectual support from Americans, regardless of their differences. The framers' work became part of the American creed and culture.[2] It stood for liberty,


We the People

## TIME LINE

### THE LIVING CONSTITUTION

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|---|---|
| **1788** | *Federalist Papers* provide political arguments for ratifying the Constitution |
| **1789** | Judiciary Act establishes the structure of the federal judiciary |
| **1801** | Federalists relinquish control over the federal government |
| **1803** | *Marbury* v. *Madison* asserts the power of judicial review |
| **1835** | Chief Justice John Marshall dies—most influential Supreme Court Justice |
| **1868** | President Johnson impeached but not convicted over reconstruction |
| **1920** | 19th Amendment grants women the right to vote |
| **1972** | Equal Rights Amendment (ERA) proposed |
| **1974** | Nixon becomes first president to resign |
| **1982** | Deadline passes and ERA fails |
| **1998** | President Clinton impeached but not convicted |
| **2000** | Supreme Court ends recount of presidential election. |

equality before the law, limited government—indeed, for just about whatever anyone wanted to read into it.

Even today, Americans generally revere the Constitution, even though many do not know what is in it. A poll by the National Constitution Center found that nine out of ten Americans are proud of the Constitution and feel it is important to them. However, a third think the Constitution establishes English as the country's official language. One in six believes the Constitution establishes America as a Christian nation. Only one out of four could name a single First Amendment right. Although two out of three knew that the Constitution creates three branches of the national government, only one in three could name all three branches.[3]

The Constitution is more than a symbol, however. It is a 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." (See *The Federalist,* No. 51, in the Appendix of this book, or go on the Web to www.law.ou.edu/hist/federalist/.) 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 the rulers. In what ways does the Constitution limit the power of the government? In what ways 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 check power with power.

## CHECKING POWER WITH POWER

It may seem strange to begin by stressing the ways in which the Constitution *limits* governmental power, but keep in mind the dilemma the framers faced. They wanted a stronger and more effective national government than they had under the Articles of Confederation. At the same time, they were keenly aware that the people would not accept too much central control. Efficiency and order were important concerns, but they were not as important as liberty. The framers wanted to ensure domestic tranquillity and prevent future rebellions, but they also wanted to forestall 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 of *federalism* (whose nature and problems we take up in Chapter 3). Even this was not enough. They believed they needed additional means to limit the national government.

The most important way they devised to make public officials observe the constitutional limits on their powers was through *free and fair elections;* voters would be able to throw out of office those who abuse power. Yet the framers were not willing to depend solely on political controls, because they 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."[4]

No less important, the framers feared that a majority might deprive minorities of their rights. "A dependence on the people is, no doubt, the primary control on the government," Madison argued in *The Federalist,* No. 51, "but experience has taught mankind the necessity of auxiliary precautions." What were these "auxiliary precautions" against popular tyranny?

*"And there are three branches of government, so that each branch has the other two to blame everything on."*



**natural law**
God's or nature's law that defines right from wrong and is higher than human law.

**separation of powers**
Constitutional division of powers among the legislative, executive, and judicial branches, with the legislative branch making law, the executive applying and enforcing the law, and the judiciary interpreting the law.

### Separation of Powers

The first step 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."[5] Chief among the "enlightened patrons of liberty" to whose authority Madison was appealing were John Locke and Montesquieu, whose works were well known to most educated Americans.

The intrinsic value of the principle of dispersion of power does not by itself account for its inclusion in our Constitution. Dispersion of power had 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 confirmed the framers' belief in the merits of the separation of powers. Many attributed the evils of state government and the lack of energy in the central government to the fact that there was no strong executive both to check legislative abuses and to give energy and direction to administration.

Still, separating power was not enough. In the framers' view, there was the danger that different officials with different powers might pool their authority and act together. Separation of powers by itself might not prevent governmental branches and officials from responding to the same pressures—from the demand of an overwhelming majority of the voters to suppress an offensive book, for example, or to impose confiscatory taxes on rich people. If separating power was not enough, what else could be done?

## Checks and Balances: Ambition to Counteract Ambition

The framers' answer was a system of **checks and balances**. "The great security against a gradual concentration of the several powers in the same department," wrote Madison in *The Federalist,* No. 51, "consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of 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 laws, but the president can veto them. 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. Moreover, the Senate and the House of Representatives have an absolute veto over each other in the enactment of laws, because both houses must approve bills.

Not only does each branch have some authority over the others, but each is 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. 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. Although in an off-year (nonpresidential) election 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, independent federal courts, which exercise their own powerful checks, were also provided.

## Modifications of Checks and Balances

Distrustful of both the elites and the masses, the framers deliberately built inefficiency into our political system. 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 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."[6] Still,


### THE EXERCISE OF CHECKS AND BALANCES, 1789–2003

*vetoes* The president has vetoed more than 2,500 acts of Congress. Congress has overridden presidential vetoes more than 100 times.

*judicial review* The Supreme Court has ruled some 174 congressional acts or parts thereof unconstitutional. Its 1983 decision striking down legislative vetoes (*INS* v. *Chadha*) affects another 200 provisions.

*impeachment* The House of Representatives has impeached two presidents and 15 federal judges; of these, the Senate has convicted seven judges but neither president.

*confirmation* The Senate has refused to confirm nine cabinet nominations, and many other cabinet and subcabinet appointments were withdrawn because of likely Senate rejection.

For additional resources on the Constitution, go to www.prenhall.com/burns.

**checks and balances** Constitutional grant of powers that enables each of the three branches of government to check some acts of the others and therefore ensure that no branch can dominate.

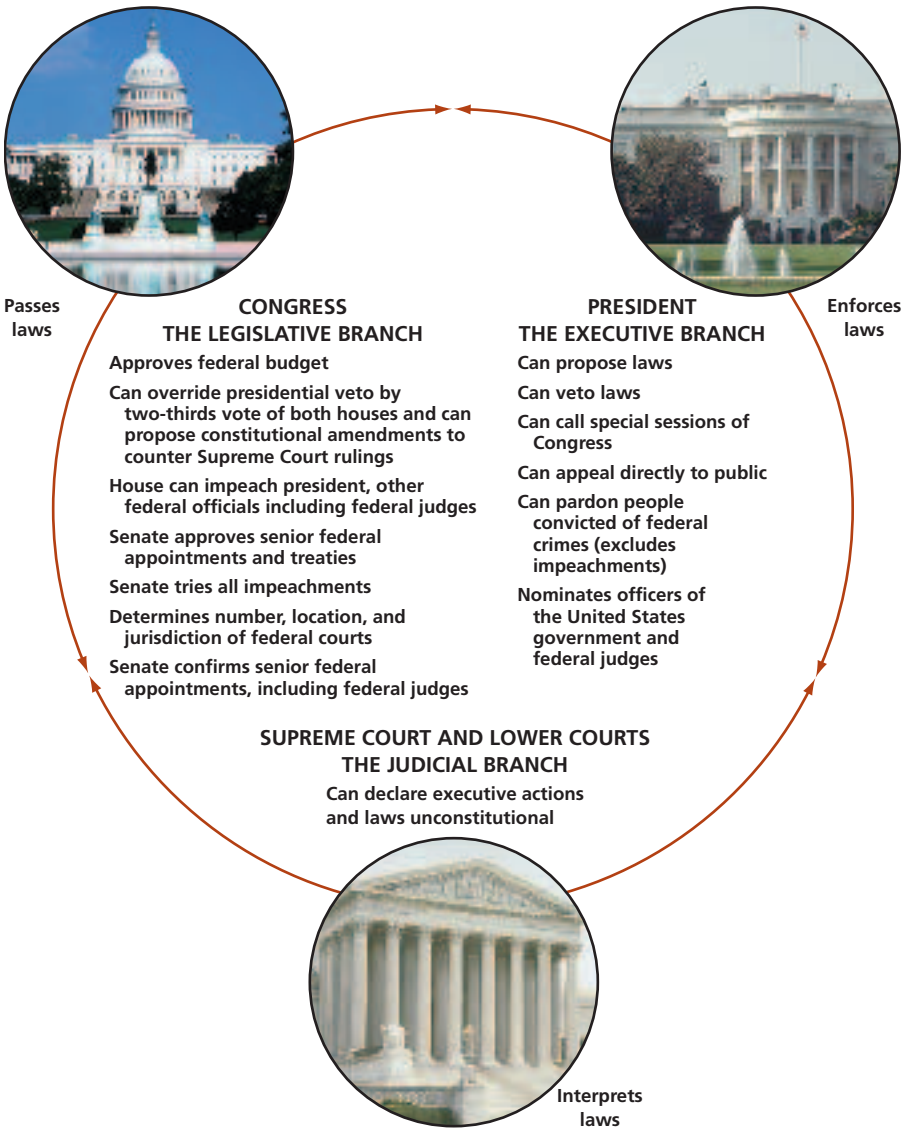



**FIGURE 2–1 The Separation of Powers and Checks and Balances.**

even though the fragmentation of political power written into the Constitution remains, several developments have modified the way the system of checks and balances works.

**THE RISE OF NATIONAL POLITICAL PARTIES** Political parties can serve as unifying factors, at times drawing together the president, senators, representatives, and sometimes even judges behind common programs. When parties do this, they help bridge the separation of powers. Yet parties can be splintered and weakened by having to work through a system of fragmented governmental power, so they never become strong or cohesive. Moreover, when one party controls Congress or one of its chambers and the other controls the White House (**divided government**), as has generally been the case since the end of World War II, the parties may intensify checks and balances rather than moderate them, to the point that action on some important issues may be difficult.[7]

Divided government may lead to so much competition between the legislative and executive branches that we find "each institution protecting and promoting itself through a broad interpretation of its constitutional and political status, even usurping the other's power when the opportunity presents itself."[8] Thus we have had battles over presidential impoundment of funds appropriated by Congress, budget gridlock, and unseemly and angry confirmation hearings for the appointment of justices of the Supreme Court and even lower federal courts and members of the executive branch. Divided

**divided government**
Governance divided between the parties, especially when one holds the presidency and the other controls one or both houses of Congress.

government also makes it difficult for the voters to hold anybody or any party accountable. "Presidents blame Congress . . . while members of Congress attack the president. . . . Citizens genuinely cannot tell who is to blame."[9]

Still, when all the shouting dies down, political scientist David Mayhew concludes, there have been just as many congressional investigations and just as much important legislation passed when one party controls Congress and another controls the presidency as when the same party controls both branches.[10] And Charles Jones, a noted authority on Congress and the presidency, adds that not only is divided government not that important in determining how our government responds to crises, but divided government is precisely what the voters appear to have wanted through much of our history.[11]

**EXPANSION OF THE ELECTORATE AND THE MOVE TOWARD MORE DIRECT DEMOCRACY** The framers wanted the president to be chosen by the electoral college—wise, independent citizens free from popular passions and hero worship—rather than by ordinary citizens. Almost from the beginning, however, that is not the way the electoral college worked.[12] Rather, voters actually do select the president, because presidential electors chosen by the voters are pledged in advance to cast their electoral votes for their party's candidates for president and vice president. Nevertheless, presidential candidates may very occasionally win the national popular vote but lose the vote in the electoral college, as demonstrated in Al Gore's winning the popular vote in the 2000 presidential election but losing the electoral college with 266 votes to George W. Bush's 271.

The kind of people allowed to vote has expanded from white property-owning males to all citizens over 18 years of age. In addition, during the past century, American states have expanded the role of the electorate by adopting **direct primaries**, in which the voters elect party nominees for the House and Senate and even for president; by permitting the voters in about half the states to propose and vote on laws (**initiatives**); and by allowing voters to reconsider actions of the legislature (**referendums**) and even to remove elected state and local officials from office (**recall**). And with the passage of the Seventeenth Amendment, senators are no longer elected by state legislatures but are chosen directly by the people.

**ESTABLISHMENT OF AGENCIES DELIBERATELY DESIGNED TO EXERCISE LEGISLATIVE, EXECUTIVE, AND JUDICIAL FUNCTIONS** When the national government began to regulate the economy, it found that it was impossible to legislate precise and detailed rules on complex matters such as railroad safety, mass communications, the health and safety of working conditions, and environmental protection. Consequently, in assigning these regulatory responsibilities, Congress provides administrative agencies with the power to make and apply rules and to decide disputes. Beginning in 1887, Congress created *independent regulatory commissions* such as the Interstate Commerce Commission (which went out of business in 1995, although many of its functions were transferred to the Surface Transportation Board within the Department of Transportation) and later the Federal Communications Commission. More recently, it has established *independent executive agencies* such as the Environmental Protection Agency.

**direct primary**
Election in which voters choose party nominees.

**initiative**
Procedure whereby a certain number of voters may, by petition, propose a law or constitutional amendment and have it submitted to the voters.

**referendum**
Procedure for submitting to popular vote measures passed by the legislature or proposed amendments to a state constitution.

**recall**
Procedure for submitting to popular vote the removal of officials from office before the end of their term.

**CHANGES IN TECHNOLOGY** The system of checks and balances operates differently today from the way it did in 1789. Back then, there were no televised congressional committee hearings; no electronic communications; no *Larry King Live* talk shows; no *New York Times, Wall Street Journal, USA Today,* CNN, or C-SPAN; no nightly news programs with national audiences; no presidential press conferences; and no live coverage of wars and of Americans fighting in foreign lands. Nuclear bombs, television, computers, cellular telephones, fax machines, the Internet—these and other innovations create conditions today that are very different from those of two centuries ago. We also live in a time of instant communication and polls that tell us what people are thinking about public issues.

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. And these new technologies have also added leverage to

# IN COMPARATIVE PERSPECTIVE

## THE EUROPEAN UNION

The European Union grew out of a succession of alliances formed after World War II to promote economic integration and cooperation. Through a series of treaties, the union has grown to include 25 countries, with the addition of 10 Central and Eastern European countries in 2004. One of the most important institutions created by the union is the European Court of Justice (ECJ). The ECJ has the power to declare national laws invalid when they conflict with treaty obligations and has created a uniform system of law that takes precedence over national laws and constitutions. The member states of the European Union also signed the European Convention on Human Rights, which establishes a long list of civil liberties. They are subject to the jurisdiction of the European Court of Human Rights, which resolves allegations of human rights abuses and has invalidated national laws that contravene provisions of the convention.


**Membership in the European Union.**

For the most part, the issues coming before the ECJ have been economic and commercial in nature, but it has struck down laws based on gender discrimination and advanced the right to equal pay for equal work. Critics of the ECJ complain that it has become too activist and compare it to the U.S. Supreme Court in the early nineteenth century under Chief Justice John Marshall, whose rulings striking down state trade barriers promoted the growth of our unified economy.

Due to the success of economic integration, additional treaties, the introduction of the euro as the common currency, and the enlargement of the EU, a Treaty Establishing a Constitution for Europe was submitted for ratification by all 25 member states in 2004–2005. The Constitution strengthens the powers of the European Parliament, creates a President of the Council of Ministers, and includes a Charter of Fundamental Rights for EU citizens; it also clarifies the competences of other EU supranational institutions and those member states.

For more information on the European Union, go to www.userpage.chemie.fu-berlin.de/adressen/eu.html and www.lib.berkeley.edu/gssi/eugde.html. The ECJ maintains a site at www.europa.eu.int/cj/en containing recent decisions and other information.

organized interests by making it easier to target thousands of letters and calls at members of Congress, to organize the writing of letters to the editor, and to organize and mobilize on the Internet. New technologies have also given greater independence and influence to nongovernmental institutions such as the press. They have made it possible for rich people like Ross Perot and religious leaders like Pat Robertson, who have access to ample financial resources, to bypass political parties and carry their message directly to the electorate.

**THE GROWTH OF PRESIDENTIAL POWER** Today problems elsewhere in the world—Afghanistan, Israel, Pakistan, North Korea, Iraq—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. 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 enhance his status. Headline-generating events give the president a visibility no congressional leader can achieve. The office of the president has on occasion served to modify the system of checks and balances and provide some measure of national unity. Drawing on constitutional, political, and emergency powers, the president is sometimes able to overcome the restraints imposed by the Constitution on the exercise of governmental power—to the applause of some Americans and the alarm of others.

## JUDICIAL REVIEW AND THE "GUARDIANS OF THE CONSTITUTION"

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 of a court to strike down a law or a government regulation that in the opinion of the judges conflicts with the Constitution—until some years after the Constitution was adopted. From the beginning, however, judges were expected to restrain legislative majorities. "The independence of judges," wrote Alexander Hamilton in *The Federalist,* No. 78 (which appears in the Appendix), "may be an essential safeguard against the effects of occasional ill humors in the society."

Judicial review is a major contribution of the United States to the art of government, a contribution that has been adopted at an increasing pace by other nations. In Germany, France, Italy, and Spain, constitutional courts are responsible for reviewing laws referred to them to ensure constitutional compliance, including compliance with the charter of rights that is now part of their constitutions.[13] (See also the box on the growth of judicial power in the European Union.)

### Origins of Judicial Review

The Constitution says nothing about who should have the final word in disputes that might arise over its meaning. Whether the delegates to the Constitutional Convention of 1787 intended to give the courts the power of judicial review is a question long debated. The framers clearly intended that the Supreme Court have the power to declare state legislation unconstitutional, but whether they intended to give it the same power over *congressional* legislation and the president is not clear. Why then didn't the framers specifically provide for judicial review? Probably because they believed the power could be inferred from certain general provisions and the necessity of interpreting and applying a written constitution.

The Federalists—who urged ratification of the Constitution and controlled the national government until 1801—generally supported a strong role for federal courts and 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 the position that state legislatures—and not the Supreme Court—had the ultimate power to interpret the Constitution. These resolutions seemed to

**judicial review**
The power of a court to refuse to enforce a law or a government regulation that in the opinion of the judges conflicts with the U.S. Constitution or, in a state court, the state constitution.

# CHANGING FACE OF AMERICAN POLITICS

## THE CIVIL RIGHTS MOVEMENT AND JUSTICE THURGOOD MARSHALL

In 1909, the National Association for the Advancement of Colored People (NAACP) was founded to protest various forms of racial discrimination—discrimination in the criminal justice system, in voting rights, and in education and employment. In the 1920s and 1930s, one of the NAACP's major initiatives was to lobby Congress to enact a federal law against lynching, as well as to bring lawsuits challenging racial segregation. But, because the NAACP was involved in lobbying it was denied tax-exempt status, and in 1938 under the direction of Thurgood Marshall the NAACP's litigation activities were separated and carried forth with the formation of the NAACP Legal Defense and Education Fund, Inc. (LDF).

*Justice Thurgood Marshall.*

As a leader in the civil rights movement in the 1940s and 1950s, Thurgood Marshall was a crusading lawyer for the NAACP's LDF. He argued before the Supreme Court and won a companion case with the landmark ruling in *Brown* v. *Board of Education of Topeka* (1954), which held that segregated public schools were unconstitutional. President John Kennedy appointed him to the federal appellate bench in 1961. President Lyndon Johnson then persuaded Marshall to become solicitor general of the United States, and he was appointed to the Supreme Court in 1967. As the first African American on the Supreme Court, Justice Marshall served until 1991 and continued to champion the cause of civil rights throughout his career.

At the time of the Bicentennial of the Constitution, he spoke out in dissent and defended his view of our "living Constitution":

> I do not believe that the meaning of the Constitution was forever "fixed" at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today. When contemporary Americans cite "The Constitution," they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago.
>
> For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document's preamble: "We the People." When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America's citizens. "We the People" included, in the words of the framers, "the whole Number of free Persons." On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes—at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years. . . .
>
> And so we must be careful, when focusing on the events which took place in Philadelphia two centuries ago, that we not overlook the momentous events which followed, and thereby lose our proper sense of perspective. . . . If we seek, instead, a sensitive understanding of the Constitution's inherent defects, and its promising evolution through 200 years of history, the celebration of the "Miracle at Philadelphia" will, in my view, be a far more meaningful and humbling experience. We will see that the true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making, and a life embodying much good fortune that was not.*

*Remarks at the annual seminar of the San Francisco Patent and Trademark Law Association, Maui, Hawaii, May 16, 1987. In David M. O'Brien, ed., *Judges on Judging,* 2d ed. (C.Q. Press, 2004).

question whether the Supreme Court even had final authority to review state legislation, something about which there had been little doubt.

When the Jeffersonians defeated the Federalists in the election of 1800, it was still undecided whether the Supreme Court would actually exercise the power of judicial review. Logical reasons to support such a doctrine were at hand, and some precedents could even be cited; nevertheless, judicial review was not an established power. Then in 1803 came *Marbury* v. *Madison,* the most pathbreaking Supreme Court decision of all time.[14]

## *Marbury* Versus *Madison*

The election of 1800 marked the rise to power of the Jeffersonian Republicans. President John Adams and fellow Federalists did not take their defeat easily. Indeed, they were greatly alarmed at what they considered to be the "enthronement of the rabble." Yet there was nothing much they could do about it before leaving office—or was there? The Constitution gives the president, with the consent of the Senate, the power to appoint federal judges to hold office during "good Behaviour"—basically, lifetime tenure, subject to removal only by impeachment. With the judiciary in the hands of Federalists, thought Adams and his associates, they could stave off the worst consequences of Jefferson's victory.

The outgoing Federalist Congress consequently created dozens of new federal judgeships. By March 3, 1801, Adams had appointed and the Senate had confirmed loyal Federalists to all these new positions. Adams signed the commissions and turned them over to John Marshall, his secretary of state, to be sealed and delivered. Marshall had just received his own commission as chief justice of the United States, but he continued to serve as secretary of state until Adams's term as president expired. Working right up until nine o'clock on the evening of March 3, Marshall sealed, but was unable to deliver, all the commissions. The only ones left were for the justices of the peace for the District of Columbia. The newly appointed chief justice left the delivery of these commissions for his successor, 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.[15]

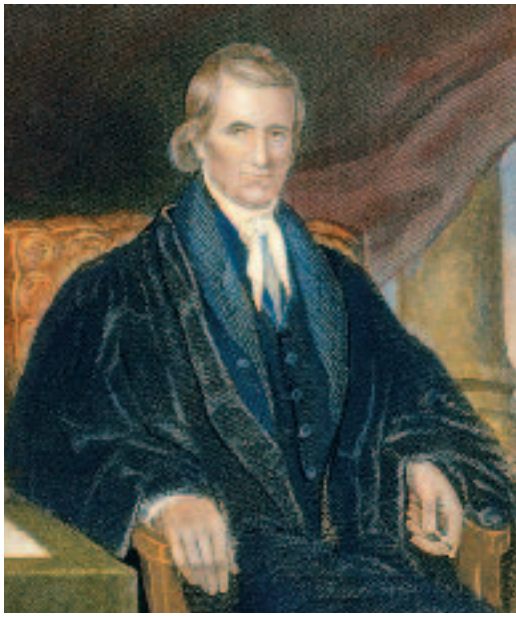
Among the commissions not delivered was one for William Marbury. After waiting in vain, Marbury decided to seek action from the courts. Searching through the statute books, he came across Section 13 of the Judiciary Act of 1789, which authorized the Supreme Court "to issue writs of mandamus." A **writ of mandamus** is a court order directing an official, such as the secretary of state, to perform a duty about which the official has no discretion, such as delivering a commission. So, thought Marbury, why not ask the Supreme Court to issue a writ of mandamus to force James Madison, the new secretary of state, to deliver the commission? Marbury and his companions went directly to the Supreme Court and, citing Section 13, they made the request.

What could Marshall do? 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 so; angry Republicans even threatened impeachment if he did so.

On February 24, 1803, the Supreme Court delivered its opinion. The first part was as expected. Marbury was entitled to his commission, said Marshall, 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.

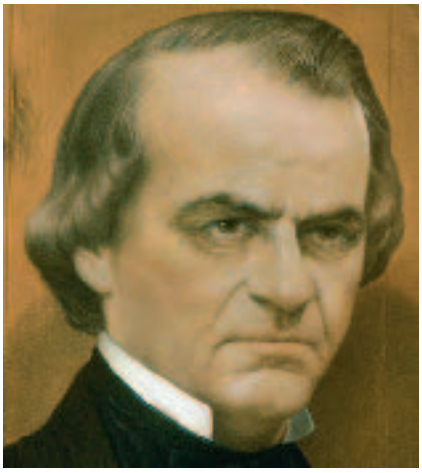
Then came the surprise. Section 13 of the Judiciary Act appears to give the Supreme Court the power to issue a writ of mandamus in cases of original jurisdiction, such as this one in question. But Section 13, said Marshall, is contrary to Article III of the Constitution, which gives the Supreme Court original jurisdiction only when an ambassador or other foreign minister is affected or when a state is a party. Even though this is a case of original jurisdiction, Marbury is neither a state nor a foreign minister. Under the Constitution, wrote Marshall, the Court had no power to issue a writ of mandamus in cases on original jurisdiction.

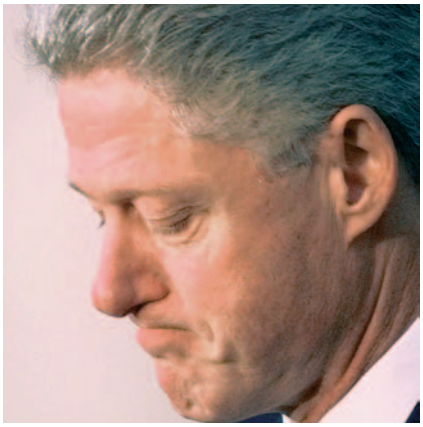
Marshall then posed the question in a more pointed way: Should the Supreme Court enforce an unconstitutional law? Of course not, he concluded. *The Constitution is the supreme and binding law,* and the courts cannot enforce any action of Congress that conflicts with it, even if it expands the power of the Court. Thus by limiting the Court's power to what is granted in the Constitution, Marshall gained the much more important power to declare laws passed by Congress unconstitutional. It was a brilliant move.



*Chief Justice John Marshall (1755–1835), our most influential Supreme Court justice. Appointed in 1801, Marshall served until 1835. Earlier he had been a staunch defender of the U.S. Constitution at the Virginia ratifying convention, a member of Congress, and a secretary of state. He was one of those rare people who served in all three branches of government.*

**writ of mandamus**
Court order directing an official to perform an official duty.





*Two U.S. presidents, Andrew Johnson and Bill Clinton, have been impeached by the U.S. House of Representatives. In both cases the U.S. Senate did not muster a two-thirds majority vote, which would have been needed to convict these two presidents. President Richard Nixon almost surely would also have been impeached by the House of Representatives in 1974 but he resigned and left the presidency, and this decision preempted the House's action.*

**impeachment**
Formal accusation against a public official, the first step in removal from office.

*Marbury* v. *Madison* might have been interpreted by subsequent generations in a very limited way. It could have been interpreted to mean 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 over the decades, building on Marshall's precedent, the Court has taken the commanding position as the authoritative interpreter of the Constitution.

Several important consequences follow from the acceptance of Marshall's argument that judges are the official interpreters of the Constitution. The most important is that people can challenge laws enacted by Congress and approved by the president. 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 that goals unattainable by legislation can be achieved by litigation. Litigation thus supplements, and at times even takes precedence over, legislation as a way to make public policy.[16]

# THE CONSTITUTION AS AN INSTRUMENT OF GOVERNMENT

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 within the framework of a federal system with enough authority to meet the needs of all time. 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 the skeleton of our system. It is filled out in numerous ways that must be considered part of our constitutional system in a larger sense. In fact, it is primarily through changes in the informal, unwritten Constitution that our system is kept up to date. These changes are found in certain basic statutes and historical practices of Congress, presidential practices, and decisions of the Supreme Court.

## The Unwritten Constitution

**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. Examples of congressional elaboration appear in such legislation as the Judiciary Act of 1789, which laid the foundations for our national judicial system; in the laws establishing the organization and functions of all federal executive officials subordinate to the president; and in the rules of procedure, internal organization, and practices of Congress.

A dramatic example of 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 removal from office. Constitutional language defining the grounds for impeachment is sparse. Look at the Constitution (reprinted between this chapter and the next) and note that Article II (the Executive Article) calls for removal of the president, vice president, and all civil officers of the United States on impeachment for, and conviction of, "Treason, Bribery, or other High Crimes and Misdemeanors." It is up to Congress to give meaning to that language.

Article I (the Legislative Article) gives the House of Representatives the sole power to initiate impeachments and the Senate the sole power to try impeachments. In the event the president is tried, the chief justice of the United States presides, as Chief Justice William H. Rehnquist did in the impeachment of President Bill Clinton. Article I also requires conviction on impeachment charges to have the agreement of two-thirds of the senators present. Judgments shall extend no further than removal from office and disqualification from holding any office under the United States, but a person convicted

# IN COMPARATIVE PERSPECTIVE

## THE BRITISH AND AMERICAN SYSTEMS: A STUDY IN CONTRASTS

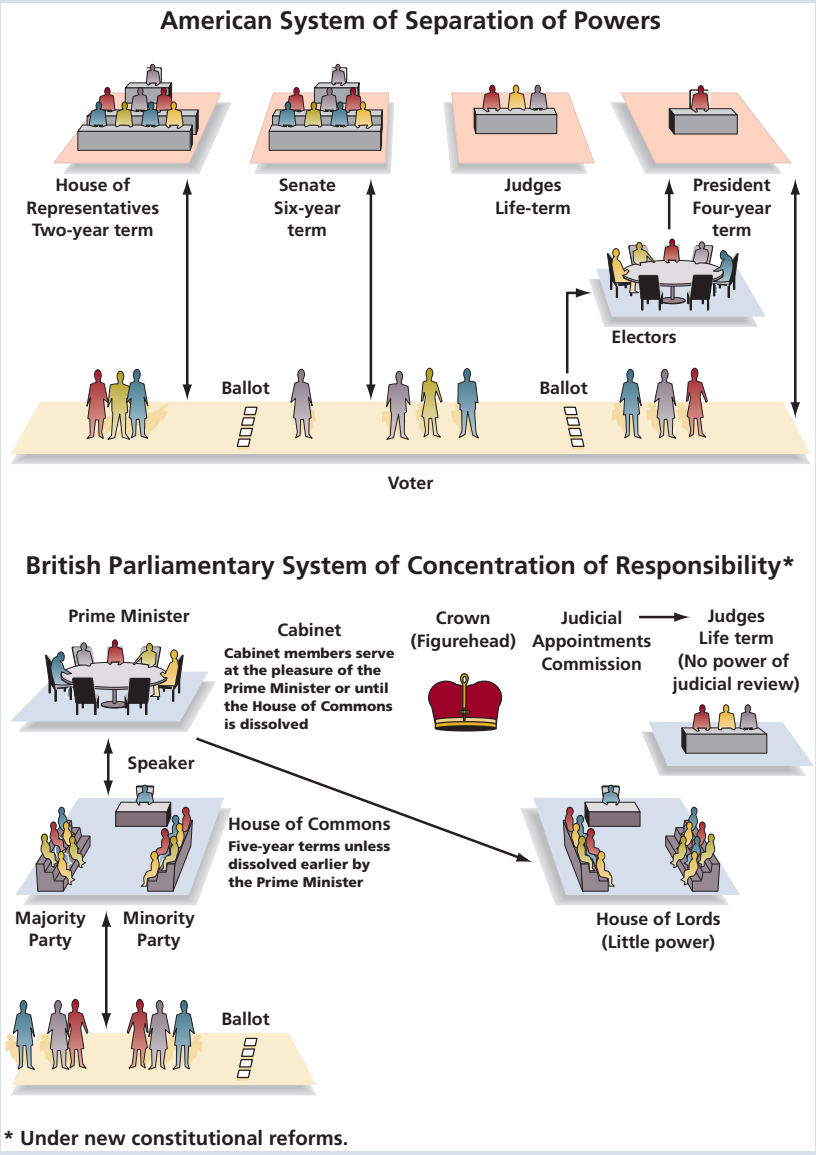
Our political system is based on the Constitution; the United Kingdom of Great Britain and Northern Ireland has no such single document. Yet both systems are "constitutional" in the sense that the rulers are subject to well-defined restraints. Parliament is the guardian of the British constitution. In the United States, it is the courts—ultimately, the Supreme Court—that are the keepers of the constitutional conscience, not Congress or the president. The limitations in our written Constitution and the practices in the unwritten British constitution rest on underlying national values and attitudes toward government.

In the British system, voters elect members of the House of Commons from districts, much as we elect members of our House of Representatives. Like us, the party with the most votes in a district wins the seat, so that even with three or more parties, a plurality of the popular vote usually results in a majority of the parliamentary seats. So long as the parliamentary majority stays together, it can enact into law the ruling party's program.

In British politics, parties are cohesive and disciplined; party members vote together and support their parliamentary leaders. In Britain, the party that wins an election has a very good chance of seeing its policies enacted. By contrast, our system depends on the agreement of many elements of society. The party that wins a presidential or congressional election or even one that controls both these branches may still have a tough time carrying out its campaign promises.

Leaders of the majority party in the House of Commons serve as executive ministers who collectively form the cabinet, with the prime minister at its head. The majority selects the prime minister. If the ruling party loses the support of the majority in the Commons on a major issue, it must resign or call for new elections. The House of Commons, when it chooses to act, has almost complete constitutional power. By tradition, there was no high court with the power to declare acts of Parliament unconstitutional, and the prime minister cannot veto them, although he or she may ask the crown to dissolve Parliament and call new elections.

In recent years, the British system has been substantially modified, however. In 2000, Britain forged sweeping constitutional reforms with the passage of the Human Rights Act, incorporating the European Convention on Human Rights as part of its domestic law and giving citizens their first American-style bill of rights. Besides introducing elements of federalism by devolving power to regional parliaments in Scotland, Wales, and Northern Ireland, the House of Lords was stripped of its hereditary peers (members who served as a result of hereditary titles). The House of Lords now consists only of people appointed by the prime minister for their accomplishments in the arts, business, and public service. The 800-year-old office of the Lord Chancellor, who served as speaker of the House of Lords but also exercised executive and judicial powers in overseeing the administration of the courts, was abolished. A separate supreme court was proposed and the power to appoint justices and judges was to be given to an independent judicial appointments commission. The addition of a bill of rights, the devolution of power, and the judicial reforms creating a separation of powers are the most important changes in the British constitutional system in more than 300 years.




**Comparison of the British and American Systems.**

## YOU DECIDE

### HOW SHOULD THE CONSTITUTION BE INTERPRETED?

Although we have the oldest written constitution in the world, we do not have an agreed-on theory of how it should be interpreted, nor does the document itself say how it should be read. Justices, no less than politicians and citizens, differ over how to interpret it. Some, like Justice Antonin Scalia, contend that judges should adher to the "original intent" of the Constitution, while others, like Justice William J. Brennan Jr., view the Constitution as a "living document" that requires contemporary ratification.

may also be liable to indictment, trial, judgment, and punishment according to the law. Article I also exempts cases of impeachment from the president's pardoning power. Article III (the Judicial Article) exempts cases of impeachment from the jury trial requirement. That is all the relevant constitutional language about impeachment. We must look to history to answer most questions about the proper exercise of these and other powers.[17]

Fortunately, past experience has triggered few acute constitutional disputes about the interpretation of impeachment procedures, so there is little history to go on. The House of Representatives has investigated 67 individuals for possible impeachment and has impeached 15 (two presidents—Andrew Johnson and Bill Clinton—and 13 federal judges). The Senate has held 15 impeachment trials and convicted only seven, all federal judges.

## 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 like the current war against international terrorism. Their presidential practices have established important precedents, building the power and influence of the office.

A major practice involves **executive orders**, which carry the full force of law. They may make major policy changes, such as withholding federal contracts from businesses engaging in racial discrimination, or they may simply be formalities, such as the presidential proclamation of Earth Day.

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 our armed forces into hostilities, and most important, the authority to propose legislation and work actively to secure its passage by Congress.

Foreign and economic crises as well as nuclear age realities 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."[18] The presidency has also become the pivotal office for regulating the economy and promoting the general welfare. Plainly, the president has become a leader in sponsoring legislation as well as the nation's chief executive.

## Custom and Usage

Custom and usage round out our governmental system. The development of structures outside the formal Constitution—such as national political parties and the expansion of suffrage in the states—has democratized our Constitution. Other examples of custom and usage are in televised press conferences and presidential and vice presidential debates. Through such developments, the president has become responsive to the people and has a political base different from that of Congress. Consequently, the constitutional relationship between the branches today is considerably different from that envisioned by the framers.

## Judicial Interpretation

As discussed earlier, judicial interpretation of the Constitution, especially by the Supreme Court, plays an important role in keeping the constitutional system up to date. As social and economic conditions change and new national demands develop, the Supreme Court has changed its interpretation of the Constitution accordingly. Because the Constitution adapts to changing times, it does not require frequent formal amendment. The

**executive order**
Directive issued by a president or governor that has the force of law.

**executive privilege**
The power to keep executive communications confidential, especially if they relate to national security.

**impoundment**
Presidential refusal to allow an agency to spend funds authorized and appropriated by Congress.

advantages of this flexibility may be appreciated by comparing the national Constitution with the rigid and often overly specific state constitutions. Many state constitutions are so detailed that they tie the hands of public officials and must be amended or replaced frequently.

## CHANGING THE LETTER OF THE CONSTITUTION

Many people are disturbed by the idea of a constantly changing system. 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 does 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 over 285 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 tranquillity, and provide for the common defense—the powers of government that were adequate to accomplish these purposes in 1787 are simply insufficient more than 218 years later. Through its remarkable adaptability, our Constitution has survived democratic and industrial revolutions, the turmoil of civil war, the upheavals of major depressions, and the dislocations of world wars.

The framers knew that future experiences would call for changes in the text of the Constitution and that some means for formal amendment was necessary. 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 political 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. Thousands have been introduced since 1789, but few make any headway. Throughout our history, Congress has proposed only 31 amendments, of which 27 have been ratified—including the Twenty-Seventh, which was originally part of the Bill of Rights but took more than 200 years to be ratified (see Figure 2–2).

Recent decades have seen a flurry of congressional attempts at constitutional amendments.[19] Congress has considered more than 11,000 proposals and the states have filed close to 400 petitions for calling a constitutional convention to consider amendments. Why is proposing amendments to the Constitution so popular? In part because interest groups unhappy with Supreme Court decisions seek to overturn them. In part because groups frustrated by their inability to get things done in Congress hope to bypass Congress. And in part because scholars or interest groups (not necessarily mutually exclusive categories) seek to change the procedures and processes of government to make the system more responsive.

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 some difficult questions.[20] First, can

### THINKING IT THROUGH

Justice Scalia, a staunch conservative, contends that departing from the original intent of the Constitution undermines the legitimacy of the Court and leads to judicial legislation. In his view: "A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect 'current values.' Elections take care of that quite well. The purpose of constitutional guarantees—and in particular those constitutional guarantees of individual rights that are at the center of this controversy—is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable." "Originalism," according to Justice Scalia "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."*

By contrast, Justice Brennan, a leading liberal on the Court from 1956 to 1990, emphasized the problems with appealing to original intent: "It is arrogant to pretend that from our vantage [point] we can gauge accurately the intent of the framers on application of principle to specific, contemporary questions. Typically, all that can be gleaned is that the framers themselves did not agree about the application or meaning of particular constitutional provisions and hid their differences in cloaks of generality." Moreover, Justice Brennan maintained that "current justices read the Constitution in the only way that we can: as [contemporary] Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."**

*Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 55 (1989), p. 894.

**William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification," lecture delivered at Georgetown University, October 12, 1985.

FYI

### THE AMENDING POWER AND HOW IT HAS BEEN USED

Leaving aside the first ten amendments (the Bill of Rights), the power of constitutional amendment has served a number of purposes:

**To Add or Subtract National Government Power**

The Eleventh took some jurisdiction away from the national courts.

The Thirteenth abolished slavery and authorized Congress to legislate against it.

The Sixteenth enabled Congress to levy an income tax.

The Eighteenth authorized Congress to prohibit the manufacture, sale, or transportation of liquor.

The Twenty-First repealed the Eighteenth and gave states the authority to regulate liquor sales.

The Twenty-Seventh limited the power of Congress to set members' salaries.

**To Expand the Electorate and Its Power**

The Fifteenth extended suffrage to all male African Americans over the age of 21.

The Seventeenth took the right to elect their United States senators away from state legislatures and gave it to the voters in each state.

The Nineteenth extended suffrage to women over the age of 21.

The Twenty-Third gave voters of the District of Columbia the right to vote for president and vice president.

The Twenty-Fourth outlawed the poll tax, thereby prohibiting states from taxing the right to vote.

The Twenty-Sixth extended suffrage to otherwise qualified persons 18 years of age or older.

**To Reduce the Electorate's Power**

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.

**To Limit State Government Power**

The Thirteenth abolished slavery.

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.

(*cont.*)

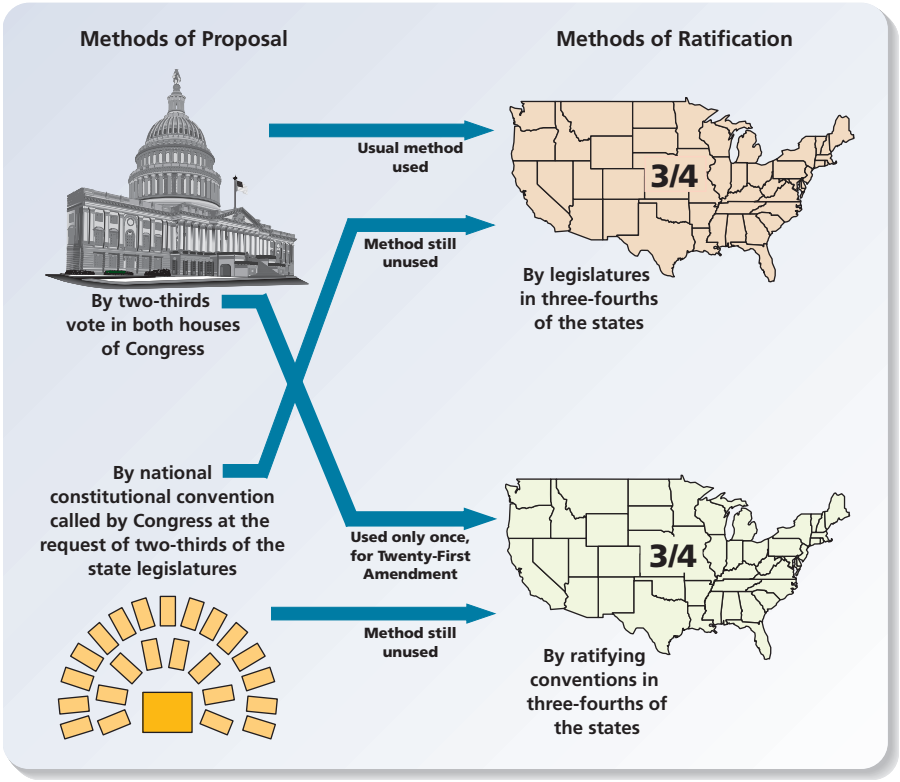



**FIGURE 2–2 Four Methods of Amending the Constitution.**

state legislatures apply for a convention to propose specific amendments on one topic, or must they request a convention with full powers to revise the entire Constitution? How long do state petitions remain alive? How should delegates be chosen? How should such a convention be run? Congress has considered bills to answer some of these questions but has not passed any, in part because most members do not wish to encourage a constitutional convention for fear that once in session it might propose amendments on any and all topics.

Under most proposals, each state would have as many delegates to the convention as it has representatives and senators in Congress. Finally—a crucial point—the 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.[21]

## Ratifying Amendments

After an amendment has been proposed, it must be ratified by the states. Again, two methods are provided by the Constitution: approval by the legislatures in three-fourths of the states or approval by specially called ratifying conventions in three-fourths of the states. Congress determines which method is used. All amendments except one—the Twenty-First (to repeal the Eighteenth, the Prohibition Amendment)—have been submitted 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.[22]

The Supreme Court has said that ratification must take place within a "reasonable time." When Congress proclaims an amendment to be part of the Constitution, it must

decide whether the amendment has been ratified within a reasonable time so that it is "sufficiently contemporaneous to reflect the will of the people."[23] However, Congress approved ratification of the Twenty-Seventh Amendment, which had been before the nation for almost 203 years, so there seems to be no limit on what it considers a "reasonable time." Because of the experience with the Twenty-Seventh Amendment, Congress will probably continue the current practice of stipulating in the text of a proposed amendment that the necessary number of states must ratify it within seven years from the date of submission by Congress. In fact, ratification ordinarily takes place rather quickly (see Figure 2–3).[24]

## Ratification Politics

The failure of the Equal Rights Amendment to be ratified provides a vivid example of the pitfalls of ratification. First introduced in 1923 and frequently thereafter, the Equal Rights Amendment (ERA) did not get much support until the 1960s. An influential book by Betty Friedan, *The Feminine Mystique* (1963), challenged stereotypes about the role of women. The National Organization for Women (NOW), formed in 1966, made passage of the ERA its central mission. By the 1970s, the ERA had overwhelming support in both houses of Congress and in both national party platforms. Every president from Harry Truman to Ronald Reagan, and many of their wives, endorsed the amendment; however, in 1980 the Republican party adopted a neutral stance on the ratification of the amendment. More than 450 organizations with a total membership of more than 50 million were on record in support of the ERA.[25] The ERA provided:

> ***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.
>
> ***Section 2.*** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
>
> ***Section 3.*** This amendment shall take effect two years after the date of ratification.

Soon after passage of the amendment by Congress in 1972 and submission to the states, many legislatures ratified it quickly—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 opposition organized under the leadership of Phyllis Schlafly, a prominent spokesperson for conservative causes, and the ERA became controversial.

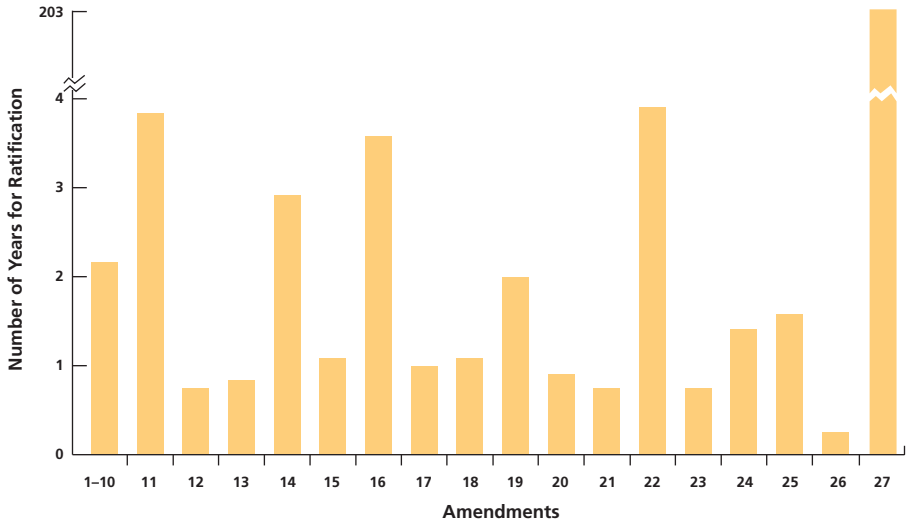



**FIGURE 2–3 The Time for Ratification of the 27 Amendments to the Constitution.**


### THE AMENDING POWER AND HOW IT HAS BEEN USED (*CONT.*)

**To Make Structural Changes in Government**

The Twelfth corrected deficiencies in the operation of the electoral college that were revealed by the development of a two-party national system.

The Twentieth altered the calendar for congressional sessions and shortened the time between the election of presidents and their assumption of office.

The Twenty-Fifth provided procedures for filling vacancies in the vice presidency and for determining whether presidents are unable to perform their duties.

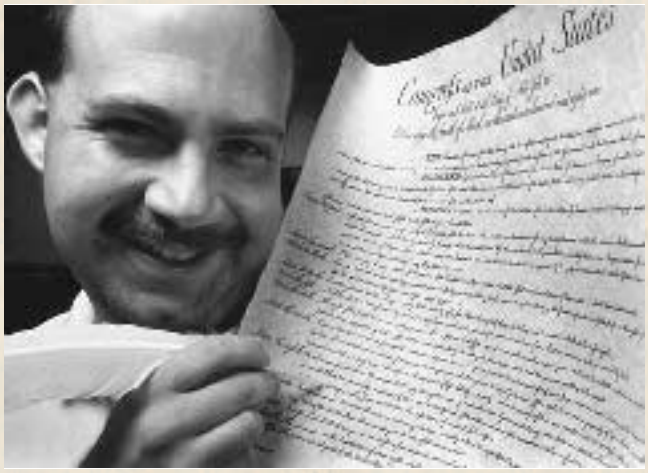
# PEOPLE & POLITICS *Making a Difference*

## GREGORY WATSON

As a student at the University of Texas writing a paper on the Equal Rights Amendment in 1982, Gregory Watson came across an amendment proposed in 1789 as part of the Bill of Rights. It would prohibit a pay raise for members of Congress until the intervention of an election for members of the House. He also found that only six of the original 13 states had ratified it and that during the intervening years only three more states had done so.

Watson decided to start a ratification movement. He got some publicity for his efforts and, with the help of Texas Republican State Representative Don Mielke, persuaded six more state legislatures to ratify this long-forgotten proposed amendment. (By the way, Watson got only a C on his paper, although he is credited with starting a grass-roots movement to persuade 26 state legislatures to ratify the Twenty-Seventh Amendment.)*

After members of Congress tried unsuccessfully in 1989 to avoid public anger by delegating their decision to increase their own salaries to an independent commission, anti-Congress sentiment began to grow, and the ratification movement picked up steam. On May 7, 1992, the Michigan legislature became the thirty-eighth state to ratify the amendment.



The first reaction of some congressional leaders was to question this action because the Supreme Court had made it clear that amendments must be ratified within a "reasonable time." However, when members of Congress realized that the issue could be used against them in the next election, they declared the Twenty-Seventh Amendment to be "valid as part of the Constitution of the United States." The vote was 99 to 0 in the Senate, 414 to 3 in the House.

*Ruth Ann Strickland, "The Twenty-Seventh Amendment and Constitutional Change by Stealth," *PS: Political Science and Politics* (December 1993), p. 720.


*People came from every state in the union to march in support of the passage of the Equal Rights Amendment.*

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."[26] The ERA also became embroiled in the controversy over abortion. Many opponents contended that its ratification would jeopardize the power of states and Congress to regulate abortion and would compel public funding of abortions.[27]

After the ERA became controversial, state legislatures held lengthy hearings, and floor debates became heated. Legislators hid behind parliamentary procedures and avoided making a decision for as long as possible. 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. As the opposition grew more active, proponents redoubled their efforts.

In the autumn of 1978, it appeared that the ERA would fall three short of the necessary number of ratifying states before the expiration of the seven-year limit on March 22, 1979. After an extended debate, and after voting down provisions that would have authorized state legislatures to change their minds and rescind prior ratification, Congress, by a simple majority vote, extended the time limit until June 30, 1982. Nonetheless, by the final deadline, the amendment was still 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. Still, through interpretation, practices, usages, and judicial decisions, the Constitution has proved an enduring and adaptable governing document.


### THIS CONSTITUTION: WHAT IF YOU WERE A FOUNDING FATHER?

You have seen in this chapter that constitutions require trade-offs among competing principles and entail some form of checks and balances. The Make It Real feature for this chapter allows you to see how constitutional principles and changes that you favor would conflict with and require modifications of the Constitution.

Go to Make It Real: "The Constitution: What If You Were a Founding Father?"

## SUMMARY

1. The U.S. Constitution, adopted in 1789, is the world's oldest. It has lasted because it is adaptable and flexible. It both grants and limits governmental power. The Constitution's separation of powers distributes authority among three branches of government: the legislative, executive, and judicial. Checks and balances limit the power of each branch.
2. 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 been able to overcome some restraints imposed by the Constitution.
3. Judicial review is the power of the courts to strike down acts of Congress, the executive branch, and the states as unconstitutional. It is one of the unique features of the U.S. constitutional system. The Supreme Court's power of judicial review was established in the 1803 case of *Marbury* v. *Madison.*
4. 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, custom and usage, and judicial interpretation.
5. Although adaptable, the Constitution itself needs to be altered from time to time, and the framers provided a 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 specially called ratifying conventions in three-fourths of the states.
6. The Constitution has been formally amended 27 times. The usual method has been proposal by a two-thirds vote in both houses of Congress and ratification by the legislatures in three-fourths of the states.

## KEY TERMS

**natural law**
**separation of powers**
**checks and balances**
**divided government**
**direct primary**
**initiative**
**referendum**
**recall**
**judicial review**
**writ of mandamus**
**impeachment**
**executive order**
**executive privilege**
**impoundment**

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## On Reading the Constitution

More than 218 years after its ratification, our Constitution remains the operating charter of our republic. It is neither self-explanatory nor a comprehensive description of our constitutional rules. Still, it remains the starting point. Many Americans who swear by the Constitution have never read it seriously, although copies can be found in most American government and American history textbooks.

Justice Hugo Black, who served on the Supreme Court for 34 years, kept a copy of the Constitution with him at all times. He read it often. Reading the Constitution would be a good way for you to begin (and then reread again to end) your study of the government of the United States. We have therefore included a copy of it at this point in the book. Please read it carefully.

# The Constitution of the United States

## The Preamble

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.

## Article I—The Legislative Article

### Legislative Power

*Section 1* All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

### House of Representatives: Composition; Qualifications; Apportionment; Impeachment Power

*Section 2*

*Clause 1.* The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

*Clause 2.* No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

*Clause 3.* Representatives and direct Taxes[1] shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.[2] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at least one Representative; and until each enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

*Clause 4.* When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

*Clause 5.* The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

### Senate Composition: Qualifications, Impeachment Trials

*Section 3*

*Clause 1.* The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof,[3] for six Years; and each Senator shall have one Vote.

*Clause 2.* Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.[4]

*Clause 3.* No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

*Clause 4.* The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

*Clause 5.* The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

*Clause 6.* The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to law.

### Congressional Elections: Times, Places, Manner

*Section 4* The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

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[1] Modified by the 16th Amendment
[2] Replaced by Section 2, 14th Amendment
[3] Repealed by the 17th Amendment
[4] Modified by the 17th Amendment

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.[5]

### Powers and Duties of the Houses

*Section 5*

*Clause 1.* Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under the Penalties as each House may provide.

*Clause 2.* Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

*Clause 3.* Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

*Clause 4.* Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

### Rights of Members

*Section 6*

*Clause 1.* The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

*Clause 2.* No Senator or Representative, shall, during the time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

### Legislative Powers: Bills and Resolutions

*Section 7*

*Clause 1.* All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

*Clause 2.* Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

*Clause 3.* Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

### Powers of Congress

*Section 8*

*Clause 1.* The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

To borrow Money on the Credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling for the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

*Clause 2.* To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

*Clause 3.* To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

### Powers Denied to Congress

*Section 9*

*Clause 1.* The Migration of Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or Duty may be imposed on such Importation, not exceeding ten dollars for each Person.

*Clause 2.* The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[5]Changed by the 20th Amendment

*Clause 3.* No Bill of Attainder or ex post facto Laws shall be passed.

*Clause 4.* No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.[6]

*Clause 5.* No Tax or Duty shall be laid on Articles exported from any State.

*Clause 6.* No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

*Clause 7.* No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

*Clause 8.* No Title of Nobility shall be granted by the United States; And no Person holding any Office of Profit or Trust under them, shall, without the Consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

### Powers Denied to the States

*Section 10*

*Clause 1.* No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

*Clause 2.* No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

*Clause 3.* No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of Delay.

## Article II—The Executive Article

### Nature and Scope of Presidential Power

*Section 1*

*Clause 1.* The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years and, together with the Vice President, chosen for the same Term, be elected as follows:

*Clause 2.* Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

*Clause 3.* The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Vote, the Senate shall chuse from them by Ballot the Vice President.[7]

*Clause 4.* The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

*Clause 5.* No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

*Clause 6.* In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.[8]

*Clause 7.* The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period of which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

*Clause 8.* Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

### Powers and Duties of the President

*Section 2*

*Clause 1.* The President shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States, he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have the Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

*Clause 2.* He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

*Clause 3.* The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

[6]Modified by the 16th Amendment

[7]Changed by the 12th and 20th Amendments

[8]Modified by the 25th Amendment

*Section 3* He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

*Section 4* The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors.

## Article III—The Judicial Article

### Judicial Power, Courts, Judges

*Section 1* The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

### Jurisdiction

*Section 2* The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State;[9]—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

### Treason

*Section 3* Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Persons shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

## Article IV—Interstate Relations

### Full Faith and Credit Clause

*Section 1* Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

[9]Modified by the 11th Amendment

### Privileges and Immunities; Interstate Extradition

*Section 2*

*Clause 1.* The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

*Clause 2.* A person charged in any State with Treason, Felony or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime.

*Clause 3.* No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[10]

### Admission of States

*Section 3* New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State to be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

### Republican Form of Government

*Section 4* The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

## Article V—The Amending Power

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

## Article VI—The Supremacy Act

*Clause 1.* All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under the Constitution, as under the Confederation.

*Clause 2.* This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Clause 3.* The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall

[10]Repealed by the 13th Amendment

be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## Article VII—Ratification

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In Witness whereof We have hereunto subscribed our Names.

## Amendments

### The Bill of Rights

[The first ten amendments were ratified on December 15, 1791, and form what is known as the "Bill of Rights."]

### Amendment 1—Religion, Speech, Assembly, and Politics

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

### Amendment 2—Militia and the Right to Bear Arms

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

### Amendment 3—Quartering of Soldiers

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in manner to be prescribed by law.

### Amendment 4—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### Amendment 5—Grand Juries, Self-Incrimination, Double Jeopardy, Due Process, and Eminent Domain

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### Amendment 6—Criminal Court Procedures

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

### Amendment 7—Trial by Jury in Common Law Cases

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

### Amendment 8—Bail, Cruel and Unusual Punishment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

### Amendment 9—Rights Retained by the People

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

### Amendment 10—Reserved Powers of the States

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.

### Amendment 11—Suits Against the States

**[Ratified February 7, 1795]**

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

### Amendment 12—Election of the President

**[Ratified June 15, 1804]**

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.[11] The person having the greatest

[11] Changed by the 20th Amendment

number of votes as Vice-President, shall be the Vice-President, if such a number be a majority of the whole numbers of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

### Amendment 13—Prohibition of Slavery

**[Ratified December 6, 1865]**

*Section 1* Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

*Section 2* Congress shall have power to enforce this article by appropriate legislation.

### Amendment 14—Citizenship, Due Process, and Equal Protection of the Laws

**[Ratified July 9, 1868]**

*Section 1* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Section 2* Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one[12] years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

*Section 3* No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

*Section 4* The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

*Section 5* The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[12]Changed by the 26th Amendment

### Amendment 15—The Right to Vote

**[Ratified February 3, 1870]**

*Section 1* The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

*Section 2* The Congress shall have power to enforce this article by appropriate legislation.

### Amendment 16—Income Taxes

**[Ratified February 3, 1913]**

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

### Amendment 17—Direct Election of Senators

**[Ratified April 8, 1913]**

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the Legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

### Amendment 18—Prohibition

**[Ratified January 16, 1919. Repealed December 5, 1933 by Amendment 21]**

*Section 1* After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

*Section 2* The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

*Section 3* This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.[13]

### Amendment 19—For Women's Suffrage

**[Ratified August 18, 1920]**

The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power, by appropriate legislation, to enforce the provision of this article.

[13]Repealed by the 21st Amendment

### Amendment 20—The Lame Duck Amendment

**[Ratified January 23, 1933]**

*Section 1* The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of the Senators and Representatives at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

*Section 2* The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day.

*Section 3* If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

*Section 4* The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have developed upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

*Section 5* Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

*Section 6* This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

### Amendment 21—Repeal of Prohibition

**[Ratified December 5, 1933]**

*Section 1* The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

*Section 2* The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

*Section 3* This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

### Amendment 22—Number of Presidential Terms

**[Ratified February 27, 1951]**

*Section 1* No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the Office of the President more than once. But this Article shall not apply to any person holding the office of President when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

*Section 2* This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several states within seven years from the date of its submission to the States by the Congress.

### Amendment 23—Presidential Electors for the District of Columbia

**[Ratified March 29, 1961]**

*Section 1* The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

*Section 2* The Congress shall have power to enforce this article by appropriate legislation.

### Amendment 24—The Anti-Poll Tax Amendment

**[Ratified January 23, 1964]**

*Section 1* The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

*Section 2* The Congress shall have power to enforce this article by appropriate legislation.

### Amendment 25—Presidential Disability, Vice Presidential Vacancies

**[Ratified February 10, 1967]**

*Section 1* In case of the removal of the President from office or his death or resignation, the Vice President shall become President.

*Section 2* Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take the office upon confirmation by a majority vote of both houses of Congress.

*Section 3* Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

*Section 4* Whenever the Vice President and a majority of either the principal officers of the executive departments, or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his

written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive departments, or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

### Amendment 26—Eighteen-Year-Old Vote

**[Ratified July 1, 1971]**

*Section 1* The right of citizens of the United States, who are eighteen years of age, or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

*Section 2* The Congress shall have power to enforce this article by appropriate legislation.

### Amendment 27—Congressional Salaries

**[Ratified May 7, 1992]**

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall be intervened.