

# Unit 2

## The Constitution: Fixed or Flexible?

### Learning Objectives

After completing this session, you will be able to:

- Describe the contrasting views of the Constitution as timeless and perfect and the belief that it is a living document to be reinterpreted by each generation.
- Describe the procedures for amending the Constitution.
- Explain how the Constitution limits power in our governmental system.
- Describe how the framers resolved the problem of structuring government authority within the national government itself.

### Topic Overview

Unit 2 covers basic questions regarding the role of the Constitution in American society. This session illustrates the conflicting views of the document and raises the fundamental issue of how we should treat it. A key to understanding American society is the contradictory approaches to the Constitution that we hold. Understanding these views creates a greater appreciation for the role of the Constitution in modern life.

The U.S. Constitution was forged in a time of great political turmoil in America. States were quarreling under our nation's first constitution, the **Articles of Confederation**, which went into effect in 1781. The Articles reserved most powers for the states by creating a weak national legislature and not providing for a national executive or court system. States often disregarded laws passed by the legislature, including laws governing taxes and trade between the states, because there was no way to enforce the laws or adjudicate disputes between the states. Shay's Rebellion and other violent mob actions convinced prominent leaders, including Washington, Madison, and Adams, of the need to create a stronger national government with the ability to enforce its decisions over state resistance.

When the delegates met in Philadelphia in 1787 to revise the Articles of Confederation, they soon voted to discard the Articles altogether in favor of a new charter of government. Although there was agreement over the need for a new **constitution**, delegates at the Philadelphia Convention disagreed over the role the new constitution should play in American society. James Madison, for instance, thought that the key to effective government was for the people to develop a strong emotional attachment to its basic law—the Constitution. To that end, he urged the use of patriotic events to build veneration for the document. Thomas Jefferson, in contrast, disdained such “sanctimonious reverence,” favoring instead frequent and radical changes in the constitutional system. Americans have accepted both sides of the Madison-Jefferson debate. While they treat the Constitution as “timeless and perfect,” they have often considered it a living document to be reinterpreted by each generation.

## Topic Overview, cont'd.

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Despite including the phrase “We the People” at the beginning of the Constitution, the framers questioned the ability of the people to rule themselves, and thus rejected direct democracy as a form of government. Instead, they created a republic, where decisions are made and filtered through elected or appointed officials who are ultimately accountable to the people. Madison in particular feared the power of self-serving **factions**, or organized interests (both majority and minority) that put their interests above the interest of the community as a whole. Because the causes of factions are basic to human nature, and thus eliminating them is impossible, government can only control their effects.

In addition to adopting a republic over a direct democracy, the framers sought to curb the self-serving factions by instituting additional safeguards including **separation of powers** and **checks and balances**. The Constitution establishes three branches of government—legislative, executive, and judicial—that exercise separate (but sometimes overlapping) powers. The **legislature**, which is Congress, makes all laws, while the **executive** (the president) must execute the laws. The Supreme Court, and lower **courts** created by Congress, interpret the laws.

The principle of checks and balances gives each branch of government the capability to counterbalance the authority of the other branches. In practice this makes the branches interdependent. For example, while Congress makes the laws, the president must sign or veto those laws. In the case of a veto, Congress can try to override it with a two-thirds vote in both houses. Through its appropriations powers, also known as “power of the purse,” Congress can check the president and the executive branch by refusing to fund presidential programs or initiatives, and by exercising oversight of executive agencies. Supreme Court and lower federal judges can be impeached and removed by Congress, while the president and the Senate are responsible for judicial appointments and confirmation.

Through the Constitution, the framers sought to create a foundation of government that would provide a blueprint for generations to come. But they also realized that the Constitution might need modification from time to time to meet new challenges and changing societal values. The Constitution itself stipulates how the changes can be made. **Amendments** can be proposed by a two-thirds vote of both houses of Congress or by a national convention called by Congress at the request of two-thirds of the states. Once passed, amendments must be ratified by either three-fourths of the state legislatures, or by ratifying conventions in three-fourths of the states.

## Pre-Viewing Activity and Discussion (30 minutes)

Before viewing the video, discuss the following questions:

- Discuss how the Constitution should be read—a document to be read literally and applied without regard to changed circumstances or as a living document subject to reinterpretation as the times demand.
- How does the Constitution guard against the concentration of power?
- Who ordained and established the Constitution?
- Is the original Constitution democratic?

## Watch the Video (30 minutes) and Discuss (30 minutes)

The video includes three segments. If you are watching on videocassette, watch each segment and then pause to discuss it, using the questions below. If you are watching a real-time broadcast on the Annenberg/CPB Channel, watch the complete video and then discuss.

### 1. The Death Penalty: Is It Constitutional?

Throughout U.S. history, judges have had to interpret constitutional principles in the light of unique cases and social contexts. A basic question facing judges is how much weight should they assign to changing societal norms and public opinion in their decisions. Should the Constitution be interpreted as a fixed set of principles that endure even though society changes, or should it be reinterpreted and reapplied as society changes? This is not a new question. In fact, the Constitution's framers themselves disagreed over the answer. The death penalty and the vague language of the Eighth Amendment offer excellent examples of the difficulties in applying the Constitution to specific societal problems.

#### Discussion Questions

- How should judges interpret vaguely worded phrases in the Constitution?
- Should public opinion dictate how the Constitution is interpreted?
- Should public opinion be ignored?
- If public opinion is relevant to the interpretation of the Constitution, how are we to know what the public wants?

### 2. When Congress Says Yes, and the President Says No ... And Congress Says Yes

Following years of wartime freezes on workers' wages and labor strikes, organized labor began a series of labor strikes in 1946. At their height, the strikes placed over 2 million workers on the picket lines. Although he was a Democrat and generally supported organized labor, President Harry S. Truman tried to stop the steel strikes first by negotiating with union heads and then by placing the coal mines under government control. Republicans had recently gained a majority in both houses of Congress, and they were determined to act through legislation. They passed the Taft-Hartley Act of 1947, which permitted states to legislate right-to-work laws that prohibited "closed shop" contracts that excluded non-union workers from unionized plants. It also authorized federal injunctions against strikes that "jeopardized the public health or safety." Truman's veto of the Taft-Hartley act set up a clash between Congress and the President and illustrated the Constitution's principles of separation of powers and checks and balances.

#### Discussion Questions

- Why does the president have the veto power?
- Since Truman favored some portions of the Taft-Hartley Act, would the nation have been better served if he had possessed a line-item veto?
- How does the battle over the Taft-Hartley Act demonstrate the Constitution's version of checks and balances?

### 3. Seventy-Two Years to Success: Women Gain the Right To Vote

The story of the struggle over women's suffrage illustrates the difficulties involved in passing a constitutional amendment. At the end of the Civil War, Congress passed the Fifteenth Amendment to the U.S. Constitution that granted the right to vote to former male slaves. Many abolitionists, including Susan B. Anthony and Elizabeth Cady Stanton, argued unsuccessfully that the amendment should also grant women the right to vote. Supporters of women's suffrage continued to press the issue by introducing a constitutional amendment into every Congress after that. By the early 1890s, the profound changes in women's lives fueled the suffrage movement; but as the movement grew stronger, so did the opposition. In the final analysis, the suffragettes won, but the battle was long and hard, demonstrating that amending the Constitution is seldom easy.

## Watch the Video and Discuss, cont'd.

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### Discussion Questions

- Why were women originally excluded from voting?
- Why was it so difficult to secure the right to vote for women?
- Has it always been this difficult to amend the Constitution?
- The Nineteenth Amendment is one of only 27 amendments. Have any of the others changed the principles under which our constitutional system operates?

## Post-Viewing Activity and Discussion (30 minutes)

### 1. Ongoing Disputes Over the Meaning and Application of Constitutional Principles (20 minutes)

The Constitution of the United States establishes a set of fundamental principles and procedures that govern our laws and public policy. Our country's founders purposely created a document that is written in general and often sparse language. As a consequence, the document must regularly be reinterpreted in relation to real problems and disputes over specific exercises of government power. The following provisions from the body of the Constitution represent a few of the many conflicts over constitutional interpretation and application that have occurred over our nation's history, and continue to this day. Can you think of other conflicts over the body of the Constitution? How should they be resolved? Discuss.

**Article I, Section 8, Clause 3: How Far-Reaching Are Congress's Powers To Regulate Under the Commerce Clause?** Congress is granted the power to "regulate commerce" with foreign nations, among the several states, and with the Indian tribes. While no one questions that this power exists, courts have struggled to define its reach. To what extent does the national government's power to regulate commerce limit or prohibit state laws that affect commerce? The struggle over this question intensified after the Civil War with the vast changes in the country, including industrialization and the creation of a national system of railroads. Through actions like the creation of the Interstate Commerce Commission in 1887, which was the first federal regulatory agency created by Congress, the national government has clearly expanded its reach over the workplace including specifying rules for workplace safety and setting uniform workweek standards. Building on the Civil Rights Act of 1964, Congress also barred racial discrimination in private businesses (e.g., restaurants and motels) serving interstate travelers. In recent years, some federal judges have suggested that, under the right circumstances, Congress's exercise of its commerce powers could be reversed in favor of state powers to maintain their own rules.

**Article I, Section 8, Clause 11: Congress Is the War-Making Branch?** The Constitution grants Congress the power to declare war, which it has officially done five times in our nation's history. The War Powers Resolution, which passed over President Nixon's veto in 1973, was supposed to ensure that both Congress and the President play a role in determining when and where U.S. forces are sent to hostile areas. It requires the president to obtain congressional approval after introducing troops into hostile areas after 60 days. Presidential compliance with the act has been inconsistent and in some cases nonexistent. The courts have generally stayed out of the dispute, believing that the issue of war-making powers in the national government is a "political question" that is best settled by Congress and the president.

## Post-Viewing Activity and Discussion, cont'd.

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**Article I, Section 8, Clause 18: How Elastic Is the Elastic Clause?** The “necessary and proper clause,” also known as the “elastic clause,” is an important source of Congress’s implied powers, or powers that are assumed to exist based on the enumerated powers outlined in the Constitution. But how far-reaching are Congress’s implied powers? The answer to this question was provided by Chief Justice Marshall in the 1819 case, *McCulloch v. Maryland*. This case involved the Second Bank of the United States, which Congress created using its implied powers. However, nowhere does the Constitution grant Congress the specific power to create a national bank, as critics of the bank pointed out. In his opinion, Marshall outlined the legitimate use of implied powers by Congress: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.” Since then, courts have affirmed Congress’s implied powers, although some judges have ruled that the Constitution’s Tenth Amendment reserves certain powers for the states that cannot be overturned by an expansive reading of the elastic clause.

**Article II, Section 1, Clause 3: Should the Electoral College Be Abolished in Favor of Presidential Elections Determined by Direct Popular Vote?** The framers of the Constitution rejected the idea of direct popular vote to elect the president and vice president, and instead devised an indirect method of election using a group of “electors” who would choose the president and vice president. The states chose their own electors, whose number equals a state’s total number of senators and representatives. In the nineteenth century, electors were supposed to remain loyal to their candidate, but they also could change their minds. Electors today are chosen by popular vote in each state, with 48 states using the “winner-take-all” system that allots all the state’s electors to the candidate who gets the most votes. Only Maine and Nebraska apportion their electors based on the strength of each candidate’s voting support. Most electors today are subject to state laws that require that they vote for their candidate if he or she wins that state. Many people still support the Electoral College because it reflects the relative size of each state in determining the next president. However, many others are disturbed by the fact that a candidate who gets the most votes nationwide may still fail to get the required 270 electoral votes to be elected president, which happened several times in U.S. history. This problem surfaced most recently in 2000 when Al Gore lost the election to George W. Bush even though Gore received approximately 500,000 more votes nationwide than Bush. While there have been numerous attempts to abolish the Electoral College through constitutional amendment, none have gained the necessary two-thirds vote in both houses to initiate state action toward ratification.

**Article II, Section 2, Clause 2: What Does Senate ‘Advice and Consent’ Mean?** The president has the power to make treaties and nominate individuals to various executive and judicial positions in the national government. Such nominations are subject to the “advice and consent” of the Senate. However, there is not an agreed-upon understanding of exactly what the Senate’s role is. In recent years this problem has reemerged around the attempts by some senators to delay or block confirmation of the president’s judicial appointments. For example, Republican senators delayed and ultimately blocked several of President Clinton’s nominees for federal judgeships, and Democratic senators have followed suit by delaying or rejecting several of President Bush’s judicial nominees. Moreover, some senators believe they can compel detailed answers from appointees during confirmation hearings, even after the nominees protest that answering the questions might prejudice their future judicial decisions. So far the courts have refrained from trying to settle these disputes, and are not likely to jump into the fray. The political battle over the proper use of the Senate’s advice and consent authority rages on.

**Article II, Section 4: What Are Impeachable Offenses?** This section specifies that all civil officers of the federal government, including the president, vice president, and federal judges, can be impeached and convicted for offenses including treason, bribes, or other “high crimes and misdemeanors.” Removal from office requires a majority vote for impeachment in the House of Representatives and a two-thirds vote for conviction in the Senate. Since 1797, 16 federal officials have been impeached by the House of Representatives, including two presidents, a cabinet member, a senator, a Supreme Court justice, and 11 federal judges. Of those 16, the Senate convicted only seven, all federal judges. But the question remains: what constitutes high crimes and misdemeanors? This issue recently arose in the impeachment and Senate trial of President William Jefferson Clinton. Supporters of conviction argued that Clinton lied before a grand jury while under oath, which they felt constituted high crimes and misdemeanors. Supporters of Clinton, however, argued that presidential “indiscretions” while in office and evasive answers before a grand jury do not. Since the House of Representatives has almost unlimited power to initiate impeachment proceedings against any federal civil official, it remains up to that legislative body, and the Senate, which can vote to convict or acquit, to determine what constitutes high crimes and misdemeanors.

## Post-Viewing Activity and Discussion, cont'd.

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**Article III, Section 2, Clause 1: What Is the Proper Scope of Judicial Review?** Article III creates a Supreme Court and instructs Congress to add lower federal courts as needed. But Article III doesn't explicitly grant the Supreme Court the power of judicial review, which is the ability to strike down acts of the other branches of the national and state governments as unconstitutional. Instead, the Supreme Court took the power of judicial review for itself in the 1802 case, *Marbury v. Madison*. Since then federal courts, and ultimately the Supreme Court, have exercised the power to say what the Constitution means in specific cases. While few people today question the Court's power to determine what the Constitution means, great disagreement remains over how frequently the power should be used, and how far-reaching the Court's constitutional rulings should be. Advocates of judicial "restraint" argue that because judges are not elected they should generally let the decisions and actions of elected officials stand, or when they have to act they should narrow their ruling as much as possible. Judicial "activists," in contrast, believe that judges are an essential bulwark against the excesses of popular majorities and misguided governmental officials, and therefore should use their powers of judicial review broadly to correct injustices stemming from unconstitutional acts.

**Article VI, Clause 2: How Far Does the Supremacy Clause Grant Federal Over State Powers?** The supremacy clause establishes that when federal laws conflict with state laws, federal law prevails. This process is called preemption, as in the national government "preempting" state law. Since the 1940s, the courts have generally favored national government expansion into policy areas traditionally under the states' control, including local environmental and business regulations. However, critics of this expanded role for the national government argue that the Tenth Amendment protects state powers in areas where they are not prohibited to use those powers, and where no "explicit" grant of national power exists in the Constitution.

### 2. Are Additional Constitutional Amendments Needed? (10 minutes)

After researching the current amendments, develop and present a proposal for a new amendment. Possible changes might include new rights (e.g., a right to education or health care), altered governmental powers (e.g., presidential declaration of war), or changes in procedures (e.g., term limits for Congress or the Supreme Court, direct popular election for presidents). Discuss why the amendment is needed and strategies for gaining ratification.

## Homework

Read the following Readings from Unit 3 to prepare for next week's session.

- Introduction—Federalism: U.S. v. the States
- Tocqueville, *Democracy in America*: "In What Respects the Federal Constitution Is Superior to That of the States"
- *Federalist Papers*: "Federalist No. 46"
- *McCulloch v. Maryland*
- *Dred Scott v. Sandford*

Read next week's Topic Overview.

**Critical Thinking Activity:** Go to the course Web site and try the Critical Thinking Activity for Unit 2. This is a good activity to use with your students, too.

[www.learner.org/channel/courses/democracy](http://www.learner.org/channel/courses/democracy)

## Classroom Applications

You may want to have your students do the post-viewing activities: Ongoing Disputes Over the Meaning and Application of Constitutional Principles and Are Additional Constitutional Amendments Needed? They are provided for you as blackline masters in the Appendix.

## Web-Based Resources

[www.constitutioncenter.org](http://www.constitutioncenter.org)—**The National Constitution Center's** Web site was established by Congress to help raise understanding of the U.S. Constitution. The site includes resources for classroom instruction and activities and a Kids' Corner.

[www.house.gov/Amendnotrat.html](http://www.house.gov/Amendnotrat.html)—**The U.S. House of Representatives** hosts the official government Web site on the Constitution. Teachers and students can utilize several useful research tools, including the text of the six amendments to the Constitution that passed both houses of Congress but failed to gain the necessary three-fourths of the states for ratification.

[www.usconstitution.net](http://www.usconstitution.net)—**USConstitution.net** provides search engines and useful links to all aspects of the U.S. Constitution and other milestones of American history. The site includes constitutions of other nations, such as China.