

THE
CONSTITUTION

An Introduction

MICHAEL STOKES PAULSEN *and* LUKE PAULSEN

CHAPTER 2

SUPERSTRUCTURE

The Framers' Grand Design

THE FRAMERS OF THE CONSTITUTION created something entirely new: a written constitution for a confederate republic, covering a vast territory and embracing thirteen separate states. It is difficult to overstate how groundbreaking the American concept was. There was literally nothing in the world like what the framers were trying to achieve.

In designing the structure of this new system, the framers of course drew on existing forms and experience. Nearly all the states had adopted new constitutions during the opening months of the American Revolution. Great Britain's government provided another possible model—sometimes to be emulated, sometimes to be rejected. Finally, there was the near-disastrous experience of the Articles of Confederation—in many ways an example of what *not* to do. But there was no perfect precedent for the framers to follow. They became innovators out of necessity, creatively refashioning old ideas to fit new circumstances. The resulting superstructure of the Constitution—the broad framework into which its pieces fit—is the unique product of experience, revolutionary ideology, and unavoidable circumstances—of accident *and* of brilliant design.

The revolutionary generation took certain principles of government so much for granted that there was never really any serious doubt that the Constitution would embody them. There was no doubt, for instance, that the Constitution would be a *written* constitution—an innovation that Americans had already come to regard as one of their greatest contributions to the

science of government. Nor was there any question that the new national government would need to be *republican* in nature—that is, the new government would not be a monarchy (the rule of a king or queen) or an aristocracy (the rule of a small elite). Government, the founding generation insisted, must be representative of the people at large. That was part of what the American Revolution had fought to achieve, and part of its enduring legacy. There would be no turning back. Any *American* government would be, in some form, a representative democracy—in Franklin’s words, “a republic, if you can keep it.”

But other long-held ideas about government did not at first seem to fit America. The principle of *separation of powers*—the division of power among several departments of government, each serving to check or limit the authority of the others—had become well accepted as an indispensable feature of good government. However, the British model of “mixed government” stemmed from older notions that the people should have only a limited role in government—the executive branch (the King) and part of the legislative branch (the House of Lords) embodied other, loftier “estates” of society. How could such features of monarchy and aristocracy be translated to America? *Should* they be?

Finally, it was widely assumed at the time that a representative government—a republic—could only exist in a small country. Perhaps the thirteen states could have truly republican governments, but how could such an arrangement be replicated in a national government spanning over a thousand miles along the eastern coast of North America? The idea was almost unheard of. Certainly there could be no serious prospect of eliminating the states entirely and creating one consolidated government. What, then, would be the relationship of the states to each other, and to the national authority? Which government(s) would be sovereign?

The framers’ answers to these questions—inspired answers, but also to some extent improvised ones—created what James Madison, in *The Federalist* No. 37, called the Constitution’s “superstructure.” In this chapter, we look at four cornerstones of the Constitution’s overall design: first, the fact that it is a *written* constitution; second, its essentially *republican* character; third, the carefully crafted *separation of powers* among the branches of the national government; and fourth, the distinctive feature of *federalism*, dividing power between the national government and the states.

With some of these features, the framers were bold innovators. With others, they adapted traditional arrangements to suit American needs. In still others, the framers had little choice but to play the hand they were dealt and try to convert awkward inconveniences into advantages. The framers' success is a tribute, paradoxically, both to their great creativity and to their practical conservatism. Some things they just couldn't mess with. With others, they had to start pretty much from scratch.

A Written Constitution as “Supreme Law of the Land”

First, and most obviously, the US Constitution is a *written constitution*—a single, specific authoritative document. The Preamble declares that “We the People of the United States” have ordained and established “this Constitution.” The written-ness of the Constitution matters enormously. America's Constitution is a specific written document, not a collection of traditions or practices—as in Great Britain, which is said to have an “unwritten” constitution. In America, there is no “unwritten constitution.” The boundaries of what may be done in the name of the Constitution are marked by the words, phrases, and structure of the document itself.

This point probably strikes most people today as so obvious as barely to require mentioning. But in the eighteenth century this was a dramatic innovation. Before America, a nation's “constitution” referred to its established, traditional pattern of government practice. America gave the word a fresh meaning: the Constitution of the United States is a *written* charter of government, supreme over all other laws, limiting the actions of all government officials and setting forth the rights and liberties of the people. Our entire system of government thus rests on the authority of a written document, not on an unwritten tradition, and certainly not on whatever government officials happen to decide at any given point in time. In America, the fundamental rules of the game are written down, and intended to be binding.

To be sure, the written Constitution has changed over time. There are now twenty-seven amendments, adopted between 1789 and 1992 under a detailed process prescribed by the Constitution itself in Article V (see [Chapter 5](#)). In addition, *interpretations* of the Constitution's words have changed over time—sometimes for the better, sometimes for the worse. Ultimately, however,

the words themselves are what matter. The written-ness of the Constitution is its first and most distinctive characteristic.

From the very start, Americans regarded this innovation as a magnificent improvement over prior regimes of government. The great Chief Justice John Marshall, writing in the famous 1803 Supreme Court decision *Marbury v. Madison* (discussed in [Chapter 6](#)), made this point emphatically. In dramatic, admiring words, he referred to “what we have deemed *the greatest improvement on political institutions—a written constitution*.” In America, Marshall observed, “written constitutions have been viewed with so much reverence” that the idea of permitting departures from the written Constitution was absurd and intolerable. “Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation,” Marshall wrote, speaking for a unanimous Supreme Court. The whole point of a written constitution—the great American advance in political science—was to set forth clearly and absolutely what government could and could not do.

Article VI of the Constitution itself says much the same thing, in bold and clear language: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . *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.” All branches of government are equally bound by the Constitution. No branch of the federal government—not the Congress, not the President, not even the Supreme Court—can legitimately act in ways contrary to the words of the Constitution. Indeed, Article VI requires that *all* government officials—legislative, executive, and judicial, state and federal—“shall be bound by Oath or Affirmation, to support this Constitution.” Thus, the idea of a written constitution is closely tied to the idea of *constitutional* supremacy: In America, no branch of government is supreme. The government as a whole is not supreme. The *Constitution* is supreme. *It is the written Constitution that prevails over every other source of authority in the United States.*

The fact that the Constitution is written, and that this written Constitution is supreme law, affects literally everything else about the Constitution. The powers of government are limited to what the Constitution sets forth in writing. Departures from those limitations are *unconstitutional*. And because the Constitution is supreme law, such actions are unlawful. The rights of the people are written down, and government is bound to honor and enforce

those rights in strict accordance with what was written. Actions of government that infringe those rights are unconstitutional and illegal—again, because the words of the Constitution are supreme.

“Republican” Government

The second cornerstone feature of the US Constitution is that it creates a *republican* form of government—one in which all government power ultimately can be traced, directly or indirectly, to decisions made by the people through their chosen representatives. The Constitution was enacted by “We the People”—the first three words of the document—and the people are its rightful masters. As Abraham Lincoln would memorably summarize it (in the Gettysburg Address in 1863), the founding fathers created a government “of the people, by the people, for the people.”

WRITTEN CONSTITUTIONALISM AND CONSTITUTIONAL INTERPRETATION

The fact that America’s Constitution is a written constitution has important and obvious implications for constitutional interpretation. Yet the enterprise of constitutional interpretation—the question of how the document is to be interpreted and faithfully applied—has remained hotly disputed throughout the nation’s history.

What counts in interpreting the Constitution? Obviously, the meaning of the Constitution’s words and phrases is first and foremost. If the meaning of the Constitution’s words could be ignored entirely, or—what would amount to the same thing—if everyone could assign to those words whatever meaning he or she chose, there would seem to be little point in having a written constitution. It would also make nonsense of the Constitution’s statement in Article VI that “[t]his Constitution shall be the supreme Law of the Land.” The Constitution would not really be “supreme Law” if its words could be ignored or manipulated to suit the whims of whoever is interpreting them.

But the agreed primacy of the text masks a deeper set of questions: Is it the *original* meaning of the Constitution’s language that counts—that is, the meaning that the words and phrases would have had at the time to the people who drafted and adopted them? Or does the meaning of the Constitution’s words *evolve and adapt* with changes in the times? This is an age-old debate, between defenders of “original meaning” and advocates of a “living constitution.” The original-meaning approach treats the Constitution’s meaning as constant unless and until the people adopt a constitutional amendment. This has both the advantages and the disadvantages of permanence and stability. The living-constitution approach is more flexible, but runs the risk of simply allowing shifting popular will or shifty politicians to change the meaning of the fundamental law of the land, by playing games with, or simply out-and-out changing, the meaning of words. (We incline toward the former view: that the meaning of the Constitution is fixed by the original

meaning of its words. The people can change their written Constitution by amendment, but they should not be able to evade or supplant the “supreme Law of the Land” simply by inventing their own meanings for words or altering meanings to suit their purposes.)

Another issue: what is the role of the *intentions, purposes, or expectations* of those who wrote the words? Again, the debate has long raged between those who accord primacy to the text itself—the so-called “objective meaning” the Constitution’s words would have had to readers and writers of the English language at the time they were penned—and those who say that what counts more is the “original intention” lying behind those words. The distinction, put in colloquial terms, is between what the framers of the Constitution actually *said* and what they probably *meant*. The two are, of course, often closely related and frequently reinforce one another. The meaning of a constitutional provision often is best understood by considering the problem its drafters were trying to address, the purpose behind the provision, and the result that its drafters expected it to achieve. But other times “plain meaning” and “original intent” may pull in different directions. For example, as we will see in later chapters, the Fourteenth Amendment was largely intended to forbid *racial* discrimination by government. But its language is broader, saying that states may not deny any “*person*” the “equal protection of the laws.” The literal language thus seems to cover more than just race. (Again, we incline toward emphasizing the objective, original meaning of the Constitution’s words rather than evidence of original intention or expectation, though this question remains a vexed one and often presents difficult conundrums.)

A third aspect of constitutional interpretation concerns the implications that might be thought to flow from the *structure or nature of the document as a whole*, including the relationships created by its provisions and structures, like the separation of powers among the branches of the national government and the nation-state framework of federalism preserved by the Constitution. In a sense, reasoning from constitutional structure is a variation on the theme of emphasis on the written text: it simply considers the text as a whole, and the relationships and implications created by its constituent parts. This method of constitutional interpretation is broadly accepted, but people often disagree over what implications really do flow from the Constitution’s structure and nature.

A fourth issue concerns the role of *precedent* in constitutional interpretation. Put in its starkest form: What if the words of the Constitution say one thing but prior judicial interpretation, or prior executive or congressional practice, has said something else entirely? Or, in a common situation: what if the words of the Constitution are (arguably) vague or ambiguous but for years have been interpreted in a particular way? Does precedent settle the Constitution’s meaning (in either case)? What if later generations of judges and other officials disagree with prior interpretations? The issue is a recurrent and difficult one. On the one hand, Anglo-American law has long recognized the value of precedent in developing the unwritten “common law.” On the other hand, if the matter at hand is interpreting a written constitution, the text probably should have precedence over precedents (so to speak), at least where the text’s meaning is clear. (Once again, that is our leaning; but again, this view remains much debated.)

Finally, there is the question of whether interpretation of the Constitution should be affected by each generation’s view of *justice* and *good policy*: Should the Constitution be interpreted so as to produce what judges (or others) view as just or desirable outcomes from a social policy perspective? Or do such considerations essentially make the Constitution subject to manipulation and arbitrary decision—and turn constitutional law into a political football? Is consideration of policy as likely to produce bad outcomes as good ones? Given that people disagree as to what is good or bad policy, might not such judgments be better left to the democratic political process rather than squeezed into constitutional interpretation?

Again, we incline toward the view that faithful constitutional limitation must take the document on its own terms and not seek to refashion those terms in the service of what are thought desirable policies. The Constitution, by deliberate design, leaves many choices to democratic self-government; that is where such policy decisions should be made. Where the Constitution prescribes a rule, that rule of course prevails over any contrary policy—that is what it means for the Constitution to be (in the words of Article VI) “the supreme Law of the Land.” But by the same token, where the Constitution leaves a matter to “the People,” that is part of our constitutional system as well. Where the document does not prescribe a rule, it is improper to read one’s views of desirable policy into the document in an effort to make it say something it doesn’t say.

That stance, too, remains debatable, as do all of these points about constitutional interpretation. This in part explains the rich diversity of views on specific questions of constitutional law throughout our history—views that, as we will see, have often erupted into vitriolic debates, hotly contested judicial decisions, and even civil war—concerning the powers of government, the rights of individuals and groups, and the structure of the American republic.

James Madison, explaining the nature of the Constitution in *The Federalist* No. 39, addressed the question of whether the form of the proposed government was “strictly republican,” noting that no other type of government would be compatible with “the genius of the people of America; with the fundamental principles of the revolution; or with that honorable determination, which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government.” Madison sought to reassure his readers that the new Constitution was indeed “republican” in its basic design.

“What, then, are the distinctive characters of the republican form?” Madison inquired. “It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it.” There could be no monarchy or aristocracy in American government. “It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people,” Madison continued. All government officers must be either themselves elected, or appointed by persons who are elected.

Madison then went on to show how the Constitution reflects that principle. As we shall see in more detail in the next chapter, Congress is entirely elected—the House of Representatives directly by the people, the Senate originally by the elected legislatures of each state (an arrangement later changed by the Seventeenth Amendment to direct election by the people of each state). The President is elected indirectly, by electors selected in each

state. And Supreme Court justices and other judges are appointed by the President (who is elected), subject to confirmation by the Senate (also elected). The Senate would still possess the advantages of being a select, small, relatively stable body, but it would be a republican institution, not an aristocratic one. (As discussed later in this chapter, the Senate would also be representative of America's *federalism*, with two senators representing each state.) The President would possess the advantages of unity and centralized responsibility in the exercise of the executive power of the nation, but would be an elected representative of the entire people, not a monarch.

In an earlier paper, *The Federalist* No. 10—an essay that has come to be regarded as setting forth a foundational insight of American political science—Madison had addressed the then-conventional wisdom that a republican form of government was only possible when limited to a small territory, where citizens generally knew each other and government was close to the people, both geographically and psychologically. Madison's *The Federalist* No. 10 turned this proposition inside out: a larger republic, especially a federal one, could better control the vices of “faction”—the tendency of special interests to pursue agendas adverse to the interests of the people as a whole—than a smaller one, for two reasons. First, by providing a broader, deeper pool of talented and virtuous persons from which representatives would be chosen, and second, by encompassing a broader and more diffuse group of interests, an extended republic would both tend to yield better representatives and lessen the cohesiveness and power of any particular faction. Thus, a broad union of states with a republican system of government would best preserve liberty and advance the true interests of the people.

The fundamental point is that, in America, *the people rule*. No branch of government is hereditary; all power flows from the people. Indeed, the Constitution has two specific provisions, in Sections 9 and 10 of Article I, forbidding either the national government or any state from granting any “title of nobility”: no dukes, earls, lords, or princes. Moreover, Article IV of the Constitution commits the entire nation to guaranteeing that each state will maintain “a republican form of government”—a government broadly representative of the people.

Two Structural Cornerstones: Separation of Powers and Federalism

The two most important structural features of the Constitution designed at Philadelphia are *separation of powers* and *federalism*. Both ideas have to do with one central theme: *power*. Who exercises governing power and how is it to be divided? How should power be allotted so as to ensure its responsible exercise and—just as importantly—to protect liberty by avoiding too great a concentration of power in any one set of hands? How should powers be arranged so as to provide each branch with “checks and balances” on the powers exercised by the others?

Separation of powers and federalism are both concerned with the division of government power. Separation of powers is about dividing the powers of government among three independent branches: the legislative, executive, and judicial departments. Federalism is about dividing government power between two *levels* of government: the national (“federal”) government and the state governments.

As we have seen, one of the concerns leading to the adoption of the Constitution was the need for a national government of stronger powers, adequate to the needs of a true nation spanning much of the continent. But with power comes danger. The men who framed the Constitution knew this well. They had just fought the American Revolution to free the colonies from what they considered the tyranny of a strong, central government. They did not want to create the same sort of problem for themselves, exchanging one tyranny for another.

The task before them was to create a government strong enough to govern effectively yet designed in such a way that it would not be dangerous to the liberty of the people. The concepts of separation of powers and federalism thus address a central conundrum of the Constitution’s making: How should a national government of adequate powers be arranged to make sure that those powers work well and do not lead to tyranny? The Constitution’s answers built in part on earlier models, but with important changes to address the distinctive situation of America. With respect to federalism especially—the division of power between the national government and the states—the Constitution’s solution was a unique creation.

More than anything else, however, it was the framers’ brilliant act of *combining* the separation of powers with America’s unique federalism that has proven to be distinctive, creating a double barrier against the tyranny that can result when government power is concentrated in one person or a small group. As James Madison explained in *The Federalist* No. 51:

In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. *Hence a double security arises to the rights of the people.* The different governments will controul each other; at the same time that each will be controuled by itself. [emphasis added]

The success of this unique “double-check” arrangement has helped make the US Constitution a model for other democracies over the past two centuries. We will examine each system of checks in turn, beginning with separation of powers and then turning to federalism.

Separation of Powers

The idea of dividing the powers of government among separate branches was not new when the Constitution was written. In fact, it was adopted from the governmental system that Americans had rebelled against: Great Britain was distinguished by the separation of powers, an arrangement that had developed over the course of many years. The English King had once been an absolute monarch with all government power—executive, legislative, and judicial. But a separation of powers slowly emerged over time, with a separate legislative branch, Parliament, eventually claiming many important powers. Parliament itself was divided between a House of Lords, appointed by the King, and a House of Commons, chosen more democratically.

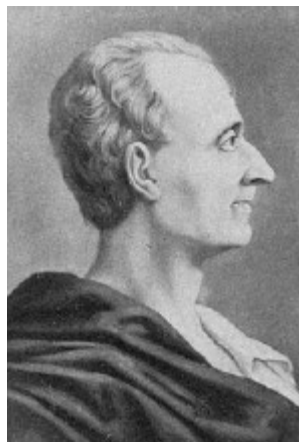
The King gradually yielded his absolute judicial power too. At first, the King appointed judges as his agents, to decide controversies for him and to enforce his commands. The judges were the *King's* men: they carried out the King's laws and answered to the King for their decisions. (The most important court in Great Britain was called “the King's Bench.”) Eventually, the judges began to assert, and maintain, their independence from the King. He could not directly overrule their decisions. Over time, the House of Lords—the branch of Parliament appointed by the King—came to serve the function of a supreme court that could review the decisions of all the King's other courts.

By the time the framers of the Constitution were meeting in Philadelphia, Great Britain already had a system of separation of powers, of a kind. The arrangement was praised by the leading political thinkers of Europe,

including one Frenchman, the Baron de Montesquieu, who had an enormous influence on the founding fathers of the American Constitution.

In Great Britain, however, separation of powers reflected the idea that government should represent different levels of society: the one (the King), the few (the Lords), and the many (the Commons). The British system was thus a mixture of monarchy, aristocracy, and democracy—a “mixed government” of the several estates of society more than the true separation-of-powers scheme idealized by Montesquieu’s political science. How would this translate to the American scene, where *republican* government was a cornerstone principle? At the same time, the framers appreciated the idea that power needed to be divided. They did not want a king, but they also knew they needed a much stronger executive than had existed under the Articles of Confederation, which really did not even have an executive branch but only a committee of the Congress exercising certain executive functions. The framers did not want a “House of Lords”—they wanted no “Lords” or privileged elite at all—but the idea of two separate houses of the legislature, checking each other, retained considerable appeal.

CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU (1689–1755)



The oracle who is always consulted and cited on this subject [separation of powers], is the celebrated Montesquieu.

—JAMES MADISON,
THE FEDERALIST NO. 47

The “celebrated Montesquieu” was a French nobleman and scholar, the eighteenth century’s greatest authority on matters of government, and a vital source for the framers of the Constitution. His definitive work, *L’Esprit des lois* (*The Spirit of Laws*), was a thorough and powerful analysis of laws and systems of government as they related to a nation’s character, or “spirit.” In Montesquieu’s view, different sets of laws were appropriate for different national spirits. Thus, when the framers sought to create a new, even revolutionary government for America’s widespread and diverse population, *The Spirit of Laws* was a natural source.

The Spirit of Laws presented monarchy and republic as the two best forms of government. According to Montesquieu, both worked well because they were “moderate” systems: they distributed power to guard against its abuse. In a republic, citizens could check a runaway government; in a monarchy, the nobility would prevent the king from acting outside his authority. Montesquieu believed that either system could produce good governance—but he took the reasoning of “moderation” one step further: what about a system that combined features of a monarchy and a republic, as the unwritten British constitution did? The division of a government into several departments, some characteristic of a republic and some reflecting monarchy, would produce an extra safeguard against the abuse of power: a system that would act as a check on itself.

Here was the foundation for the Constitution’s separation-of-powers system—but the framers took the idea even further than Montesquieu himself did. In place of Montesquieu’s “ideal” governments—a traditional, centralized monarchy and the small, independent republic—they envisioned a large, united republic whose government borrowed features of a monarchy. The Constitution’s success is a testament to the soundness of their vision—and, by extension, to Montesquieu’s theories of government.

The American solution was to transform the British model of mixed government, which corresponded to a division of different elements of society, into an American model of separating power among various *republican* institutions. Each would perform different functions and check the others. Madison thus borrowed Montesquieu’s well-accepted maxims of political science—which embraced separation of powers—and transposed them into a distinctly American, republican key. Concentration of government power in a single institution was dangerous, Madison wrote in *The Federalist* No. 47, even where that institution was elected and republican: “The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”

Thus, the core idea of separation of powers under the US Constitution is that the power of the national government is divided among three broad departments of government—the legislative, executive, and judicial

departments—each composed of officials directly or indirectly chosen by the people. Each branch derives its power directly from the Constitution and so, implicitly, from “We the People.” In addition, each branch is to a large extent *independent* of the other two—in how its members are selected, in how it is protected from encroachments or domination by the other two branches, and in its assigned tasks. Intriguingly, the Constitution preserves the symmetry and balance of the “one, few, many” idea (in the form of the President, the courts, and Congress), but it makes all three branches answerable, ultimately, to the people.

Accordingly, under the Constitution, the members of each branch are separately elected or appointed. The President has absolutely no role in selecting members of Congress, as the English King did with the House of Lords. Nor can the President dissolve Congress, remove any of its members from office, or call new elections. Congress judges the elections of its own members, which occur on a regular two-year schedule for the House of Representatives and on a rotating six-year schedule for the Senate. Congress also has the sole power to punish or expel its members for misconduct.

By the same token, the legislative branch does not select the executive, as is the case with modern parliamentary systems (where the prime minister is a member of the legislature, chosen by its members). Indeed, to preserve the separation of executive from legislative power, the Constitution specifically prohibits the President, or any executive branch officer, from being a member of the legislative branch. The Constitution also provides for separate election of the President, through a system of special “electors” (today referred to as the “electoral college”) chosen on a state-by-state basis. No member of Congress may be an elector. Further, Congress has no control over a sitting President’s salary and may remove the President only by impeachment and conviction for “high crimes and misdemeanors.” This keeps the President as independent of the Congress as possible.

The American system also refines the selection of the judicial branch: the President nominates Supreme Court justices and other judges, but subject to Senate confirmation before they may take office—an important check. Once appointed, members of the judicial branch serve for life, cannot have their salaries reduced, and (like the President) may only be removed by Congress (not the executive), through the impeachment process. This makes the judicial branch as independent of the Congress and the President as possible.

The structural separation and independence of the branches means that no branch is the boss of any of the others; none can tell the others what they *must* do. Rather, each branch is co-equal (or “co-ordinate”) under the Constitution. As James Madison put it in *The Federalist* No. 49, “The several departments, being perfectly co-ordinate by the terms of their common commission [from the Constitution], neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.”

Each branch possesses its own independent powers, which it may use not only to perform its assigned tasks but also to ward off attacks by the other two—and to defend the Constitution against violations by the other branches. Powers thus also serve as *checks*. But again, these powers are separate only to a certain extent: legislative powers overlap with executive powers, and judicial powers intersect with those of both other branches. As a result, the government often cannot take action unless at least two and sometimes all three independent branches agree—an important way of safeguarding liberty and making sure that the Constitution’s careful allocations of power and written guarantees of individual rights are not reduced to useless pieces of paper.

The fact that the branches are co-equal in the sense of being independent of each other does not mean that the branches all have *equal power*, however. They clearly do not. Congress and the President, the elected branches, necessarily have more governing powers than the judicial branch. As Alexander Hamilton noted in *The Federalist* No. 78, “[T]he judiciary is beyond comparison the weakest of the three departments of power.” Rather, the key to separation of powers is that no one branch has *all* the power, or supreme power over the others; moreover, each branch has important powers that may serve to check the actions of the other branches. This system of separate, independent branches, exercising some separate and some shared powers, and each armed with some power to check and balance the others, is perhaps the most important structural feature of the Constitution.

A few important examples illustrate this point. First, Congress is given *all* the legislative powers of the national government. (We will look at these powers in detail in the next chapter.) The President may not enact laws or make decrees on his own, as the King of England originally could. But the President has a check on Congress: he may veto any bill passed by Congress, unless two-thirds of both the House and the Senate override his veto. The

override provision makes the veto only a limited check on Congress—Congress has a check on the President’s check.

Likewise, the Constitution provides that only Congress can declare war. The President may not legally start a war on his own (as the King of England could). He has only the limited power to defend against attacks initiated by an enemy; otherwise, Congress must declare war. But the President is Commander in Chief of the military, meaning that once Congress has authorized war, the President alone is in charge of conducting the war. He decides the objectives, the tactics, when and how (and even whether) to wage the war, and when to conclude it. But once again, the Congress has a check: it controls all funds, including for the military. If Congress concludes that the President has gone too far in waging war, it may cut off funding for the army. Thus, the war power—another power the framers considered too important and dangerous to vest in a single set of hands—is carefully divided between Congress and the President, and ultimately shared.

Consider also the checking power of the courts—and the checks on the courts’ exercise of that power. The judicial branch is independent in its power to decide “cases” and “controversies” under federal law, including cases involving the Constitution. Neither the President nor Congress can dictate or directly control the courts’ decisions. The independence of the judiciary operates as a formidable check on the actions of the other two branches. But Congress and the President have checks on this check, too. Congress largely controls the courts’ jurisdiction—their authority to hear and decide cases. And if the courts’ decisions conflict with the Constitution itself, Congress and the President possess the power to disregard them (and have done so on certain occasions, as we will see in later chapters). After all, Congress and the President are bound by oath to support and defend the Constitution, and must resist unconstitutional actions by the courts, and by each other, just as the courts are bound to resist violations of the Constitution by Congress and the President.

The courts have power to decide cases—and thus check Congress and the President—but little practical power to enforce their decisions, and none to *command* the other two branches. As Alexander Hamilton wrote in *The Federalist* No. 78, the judicial branch “may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” Indeed, if the courts could command the other two branches, that would violate Madison’s

(and Montesquieu's) rule that the accumulation of all power in one set of hands is "the very definition of tyranny." Traditionally, however, Congress and the President have deferred to the constitutional judgments of the Supreme Court—with only a few notable exceptions—even in cases of extraordinary errors risking great harm to the nation. The courts' very weakness thus has become a source of their strength.

The key to an effective system of separation of powers, Madison wrote in *The Federalist* No. 51, lies in "so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."

[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must . . . be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.

The Constitution's separation of powers was a creative and radical reworking of the British model, specially suited for the new republican government of America. By a careful division of powers among truly independent branches, the framers created something entirely new: a *balanced, republican* form of national government.

Federalism

At the same time that the framers were dividing power "horizontally" among the three branches of the federal government, they were also dividing power "vertically" between the federal government and the state governments. *Federalism* is the name given to this division of power.

The framers' approach here was innovative, even brilliant. Never before had a nation successfully divided power between separate states and a united national government. Such arrangements always seemed to break down: either they collapsed out of weakness into feeble, separate, individual nations squabbling with each other (the direction in which the Articles of Confederation was leaning at the time the Constitution was proposed), or power became concentrated at the center, with a strong national government swallowing up the separate states and posing a danger of tyranny. Most people in the late eighteenth century thought it impossible for a vast nation to

remain truly republican—representative of the people. Only small communities (like the individual states) had ever achieved that. A large nation would tend, they feared, toward centralized dictatorship. (Recall how Madison's *The Federalist* No. 10 turned this argument around, championing the virtues of an extended republic.)

Moreover, as a practical matter, the people would never give up their attachment to their individual states. (Thomas Jefferson, while in Philadelphia writing the Declaration of Independence for the Continental Congress in 1776, wrote of missing “his country”—by which he meant *Virginia*, not America.) There was no way that the framers could have eliminated states and made one consolidated government, even if they had wanted to do so.

Guided in part by James Madison's careful thinking on the issue, the framers decided that the solution was to set forth in the Constitution a detailed, written division of authority between the two levels of government. The national government would get the powers it needed to function as a true government for the *nation*, but it would not be given authority in all areas. The states would be preserved, not merely as administrative districts for the national government but as co-sovereign entities possessing all powers *not* delegated to the national government. Neither the national government nor the state governments would be supreme. Rather, once again, the Constitution would be supreme. Though the laws of the nation would prevail over conflicting laws of the states—Article VI, clause 2, often called the Constitution's “Supremacy Clause,” states this position clearly—the national government would not have all of the powers in the first place. And the states would be there to check the national government if it overstepped its bounds.

The arrangement was not perfect. There would continue to be tensions between the states and the national government over the division of power between them for many years. Some of those tensions between the two levels of government, state and national, remain even today. But to a certain extent this was precisely the plan: that the two levels of government would compete with each other and restrain each other, much as the separation of powers would ensure that the three branches of the federal government would keep each other in check. Federalism thus furnishes the second half of James Madison's “double security” to the liberty of “the People.”

There are three key features to the Constitution's federalism, as crafted by the framers:

First, the federal government is one of limited and specifically “enumerated” powers. The Constitution lists, item by item, the powers of Congress. It describes the powers of the President and the courts with (reasonably) precise language. The federal government is supreme over the states within the sphere of the powers it was given, but the states are supreme within the sphere of powers that were not given to the federal government. Madison had lobbied vigorously at the Constitutional Convention for his favored proposal, that the national government should have a veto over state laws, but the convention rejected this idea. Rather, the convention considered it enough to make clear that the Constitution, federal laws, and national treaties would be the “supreme Law of the Land” and be binding on all the states, as Article VI provides.

Beyond that, the framers’ plan was that the states could have whatever laws they wished for governing their own citizens on local matters, and the federal government could not interfere. (As detailed in [Chapter 5](#), that principle was later confirmed, and reinforced, by the addition of the Tenth Amendment to the Constitution: “The powers not granted to the national government, nor prohibited to the states, are reserved to the states respectively, or to the people.”)

Second, the governments serve as mutual checks on one another. Not only was the national government in some ways designed to represent the states—the Senate, for example, consists of two senators from each state, regardless of population—but the states were to remain a separate base of power, ready to call the national government to account if it exceeded its powers. Likewise, the national government was given the duty to guarantee that state governments neither violate the Constitution nor abandon a republican form of government for their own people. Alexander Hamilton, characteristically, defended this arrangement in terms of a balance of power. As he wrote in *The Federalist* No. 28:

Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress. How wise will it be in them by cherishing the union to preserve to themselves an advantage which can never be too highly prized!

James Madison went even further in *The Federalist* No. 46. Addressing the hypothetical situation of the national government invading the rights of the states, Madison argued that “the State governments with the people on their side would be able to repel the danger” through the power of “citizens with arms in their hands,” recalling the image of the Minutemen who fought the British troops at the outset of the American Revolution. State governments would channel the strength of the people and supply the means and organization to check any encroachments by the national government.

With this system of checks, however, came the danger that states would misuse their constitutional position as counterweights to the national government. As we shall see in [Chapters 6, 7, and 9](#), Hamilton’s and Madison’s arguments for the role of the states in checking national government power came to be used both for good purposes (resisting federal laws that violated the freedom of speech and of the press during the administration of President John Adams) and for bad purposes (secession, civil war, and opposition to equal civil rights).

Third, the Constitution creates “a more perfect Union” of the states. As discussed in the previous chapter, before the Constitution was adopted, the “union” was really more like a treaty among thirteen separate nations—more like a “united nations of America” than the United States of America we know today. The Constitution created a government for “We the People of the United States,” not for “We the States.” By establishing that the Constitution was supreme and binding on *all* the states, and by establishing a stronger national government not dependent on the states for the ability to exercise its powers, the framers’ federalism guarded against the union disintegrating back into separate, independent states.

Union. The idea of a union of the states is crucial to the Constitution. As we shall see in [Chapter 7](#), it became a central constitutional theme during the Presidency of Abraham Lincoln, who fought to preserve, protect, and defend that union from destruction.

A Grand Design

These four cornerstone features of the Constitution—the commitment to *written constitutionalism*; the insistence on *republican* government; the maintenance of *separation of powers* (and resulting checks and balances) among three branches of government; and the distinctive feature of

federalism, dividing power between two levels of governments—provide the framework for everything else in the document.

Moreover, as we have seen, these key ideas intersect at crucial points, reinforcing one another. A written constitution is the people's way of specifying precisely—and writing down permanently—the republican form of government they want. The structure of separate, independent branches, competing with and checking each other, is designed in part to make sure that the powers and rights set forth in a written Constitution would not end up being merely words on paper. Separation of powers, and the “double-check” added by federalism, would preserve in practice the limits established in theory. The republican principle in turn modified the theory of separation of powers, emphasizing mutually checking elected or appointed branches rather than branches that represent different “estates” of society. And federalism helped make republican government work for so large a nation, by limiting the powers of the national government and by providing that the nation as a whole would guarantee the preservation of a republican form of government in every state.

Each of these four cornerstone principles of the Constitution thus supports the others. As we shall see in the next chapter, when it then came to filling in the details of the Constitution—the interior design of each branch, and the form and specific powers granted them—the framers would constantly return to these first principles of the Constitution's structure.