The Heritage Foundation

# THE ESSENTIAL Constitution

THE ESSENTIAL

# Constitution

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*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.*

# Introduction

The opening words of the preamble to the Constitution, "We the people," majestically echo the message of the Declaration of Independence. The preamble is a statement of the hopes of the American revolutionaries as well as their obligations. The Constitution was meant to make possible a political society rooted in the rights and freedoms proclaimed in the Declaration. In other words, the Constitution marked not the end of the American Revolution, but rather its fulfillment.

The Framers were determined to lay the foundation of the United States on certain principles and to organize its power in a particular way—so that both freedom and order could be preserved.

Understanding the Constitution therefore requires examining each of these principles, and it is essential that we do so because, as President James Madison stated in his 1810 State of the Union message to Congress, "a well-informed people alone can be permanently a free people."[1] President Andrew Jackson made the same point in his 1837 farewell address: "But you must remember, my fellow-citizens, that eternal vigilance by the people is the price of liberty, and you must pay the price if you wish to secure the blessing."[2]

This booklet is designed to help all Americans appreciate and defend the meaning and purpose of the Constitution so that they may preserve freedom for themselves and for succeeding generations.

# The Origins of the U.S. Constitution

No other group of assembled political leaders in history was as attentive to the lessons of the past as were the men who framed our Constitution. In designing a charter for the form of government they had in mind, the Framers looked to both classical and Biblical sources, as well as to English common law and the European Enlightenment.

The Framers knew a lot about the ancient Greeks, who were the first to devise a political system in which the people (the demos) held power (kratos); they called it demokratia, or democracy. The Greek experiment in democracy, however, served mostly as a tragedy to be avoided, not as a model to be imitated. Athens, for example, was the most brilliant and democratic of the Greek city-states but led ancient Greece into its cultural and political decline, dissolving into tribalism and civil war. The Framers therefore rejected the idea of direct, Athenian-style democracy. "Had every Athenian citizen been a Socrates," James Madison wrote in The Federalist Papers, "every Athenian assembly would still have been a mob."[3]

The Framers also had a deep knowledge of the history of the Roman Republic and the writings of Cicero, its great defender. The Roman Republic, which lasted an astonishing 500 years, had a "mixed constitution" in which the chief magistrates shared power with the senate and legislative assemblies. Eventually, however, the rule of law gave way to the will of the emperor, and the republic collapsed into tyranny. As Cicero famously complained: "Our generation, however, after inheriting our political organization like a magnificent picture now fading with age, not only neglected to restore its original colors but did not even bother to ensure that it retained its basic form..."[4]

With such lessons in mind, the Framers were determined to fashion a Constitution that could

## Father of the Constitution

James Madison is generally regarded as the Father of the United States Constitution. No other delegate was better prepared for the Federal Convention of 1787, and no one contributed more than Madison did to shaping the ideas and contours of the document or to explaining its meaning. His contributions included drafting the Bill of Rights.

weather the storms of faction, jealousy, and the lust for power that had ruined previous attempts at good government. In 1787, the year the Constitution was drafted, John Adams published the first of three volumes defending the state constitutions that already existed.[5] He also examined the constitutions of republics such as Venice, where, he wrote, "[g]reat care is taken... to balance one court against another and render their powers mutual checks to each other." That system broke down when the nobility seized and consolidated power.

As Englishmen, the American colonists already enjoyed a constitutional government that made them the freest people in the world. The concept of a balanced constitution was something that distinguished Great Britain from the rest of Europe, and colonial constitutions bore its imprint. It was the British government's attempt to subvert these models of self-government that stirred revolutionary passions.

In seeking "a republican remedy for the diseases most incident to republican government,"[6] the Framers turned to thinkers such as the French philosopher Montesquieu (1689–1755), author of The Spirit of Laws, one of the great works in the history of political theory. Montesquieu developed a robust theory of the separation of powers: to preserve individual freedom, the political authority must be strictly divided into three separate but equal branches with legislative, executive, and judicial powers. "When the legislative and executive powers are united in the same person, or in the same body of magistrates," he wrote, "there can be no liberty." And as Madison summarized in The Federalist Papers, "Ambition must be made to counteract ambition."[7] The Framers elevated the concept of the separation of powers into "a first principle of free government."[8] They intended the separation of powers to function as the conceptual core of a Constitution that would preserve both order and freedom.

Despite their differences, the architects of the Constitution embraced a common intellectual tradition: wisdom from the classical world of the Greeks and Romans; from the Jewish and Christian traditions; from the early European Enlightenment; and from more than a century of English political debates about natural rights, political absolutism, republicanism, and religious freedom. Out of this shared tradition, they produced a Constitution that has made possible the greatest advances in human liberty and equality in history. As Madison summarized their achievement: "The happy Union of these States is a wonder; their [Constitution] a miracle; their example the hope of Liberty throughout the world."[9]

## Sage of the Constitutional Convention

At 81 years old and in declining health, Benjamin Franklin was the oldest delegate at the Constitutional Convention of 1787. He became known as the "Sage of the Constitutional Convention," often acting as a mediator and reminding his fellow delegates that, "we are here to consult, not to contend." After the final meeting of the Convention on September 17, 1787, Franklin was approached by the wife of the Philadelphia mayor who asked what the new government would be. His reply: **"A republic, if you can keep it."**

# The Genius of the Constitution: The Founders' Design

The Constitution's genius begins with recognizing both the virtues and limitations of human nature. It establishes a system of government that channels human nature toward the good of all.

The first plan the Framers tried after declaring independence was called the Articles of Confederation. The government that the Articles created failed because it was too weak to coordinate national policy among states with different priorities. Before the government could do almost anything, the Articles required a unanimous vote by all of the states, which often put the states in the position of voting against their own individual interests. The Framers saw that it was not realistic to expect the states to do that. George Washington wrote, "We have probably had too good an opinion of human nature in forming our confederation."[10] So the Framers tried again, creating a system of government that did not deny the pursuit of self-interest, but instead helped to direct it toward compromise and consensus.

The Framers knew that human nature made this a difficult task. James Madison, for example, wrote that "[i]f men were angels, no government would be necessary" and that "[i]f angels were to govern men, neither external nor internal controls on government would be necessary."[11] The challenge they faced was that "[y]ou must first enable the government to control the governed; and in the next place, oblige it to control itself."[12]

The Constitution accomplishes this by preventing too much power from ending up in too few hands. The Constitution divides and disperses government power, making it difficult for any person or group to obtain power without first seeking to compromise and reach consensus with others. The Constitution divides power to create "checks and balances"[13] among the three branches of the federal government and between the states and the federal government while also recognizing the priority of certain individual rights and requiring widespread agreement to change the "supreme law of the land."

## FEDERALISM

The Constitution divides government power in different ways. Federalism divides it vertically between the state and federal governments. State government is closer to the people and therefore should be principally responsible for looking after the people's "domestic and personal interests."[14] Especially as the country and its population spread, the federal government would be increasingly unable to address these ongoing needs.

On the other hand, giving states too much power would hamper efforts to address the country's collective interests. For example, if Maine were invaded, Florida might consider that the cost of helping with resources and lives outweighed the benefits of preserving the Union. Or if each state had its own currency, trade and commerce would be almost impossible. The question was how to strike the right balance between the individual interests of the states and the collective interests of the nation as a whole.

Always mindful of the need to set limits, the Framers designed the Constitution so that the states would give specific powers to the federal government, not vice versa. The Tenth Amendment therefore says that any powers not directly given to the federal government "are reserved to the States respectively, or to the people." In other words, the states are assumed to have powers that are not given away, and the federal government has only the powers it receives and that are enumerated, or listed, in the Constitution.

## SEPARATION OF POWERS

In addition to limiting the powers given to the federal government, the Framers also divided those federal powers into three branches. The legislative branch (which itself is divided into the House of Representatives and the Senate) makes laws, the executive branch enforces them, and the judicial branch interprets them when settling legal disputes.

# An Enduring Constitution

The U.S. Constitution has endured for more than two centuries. It is not only the world's oldest national constitution still in use, but also the shortest at only 4,543 words. Rather than concoct a detailed recipe covering every possible eventuality, the Framers' brilliant design provides a structure and articulates a set of stable principles that provide a timeless guide for good governance that is enduring and worth preserving.

How does this compare to other national constitutions?

**Average Life Span: 17 Years**[15]

**America's Constitution: Over 230 Years**

# Separation of Powers: Three Branches of Government

## JUDICIAL BRANCH

**Responsibilities:** Interprets the law. Resolves legal disputes between private parties, between private parties and the government, and between different branches of government.

**Checks the Legislature:** Strikes down laws that are unconstitutional.

**Checks the Executive:** Chief Justice presides over Senate impeachment trial of the President. Strikes down unconstitutional executive orders or unconstitutional enforcement actions.

## LEGISLATIVE BRANCH

**Responsibilities:** Creates federal laws, appropriates money, approves treaties, and declares war.

**Checks the Judiciary:** Impeaches and removes judges. Adds/removes courts or changes their jurisdiction. Passes legislation that overrides court decisions that do not involve constitutional issues. Proposes amendments to the Constitution.

**Checks the Executive:** House impeaches the President; Senate decides whether to remove the President from office. Senate can reject executive and judicial nominees made by the President or treaties proposed by the President. Congress can refuse to appropriate funds for presidential priorities. House and Senate can override presidential veto of legislation by a two-thirds vote.

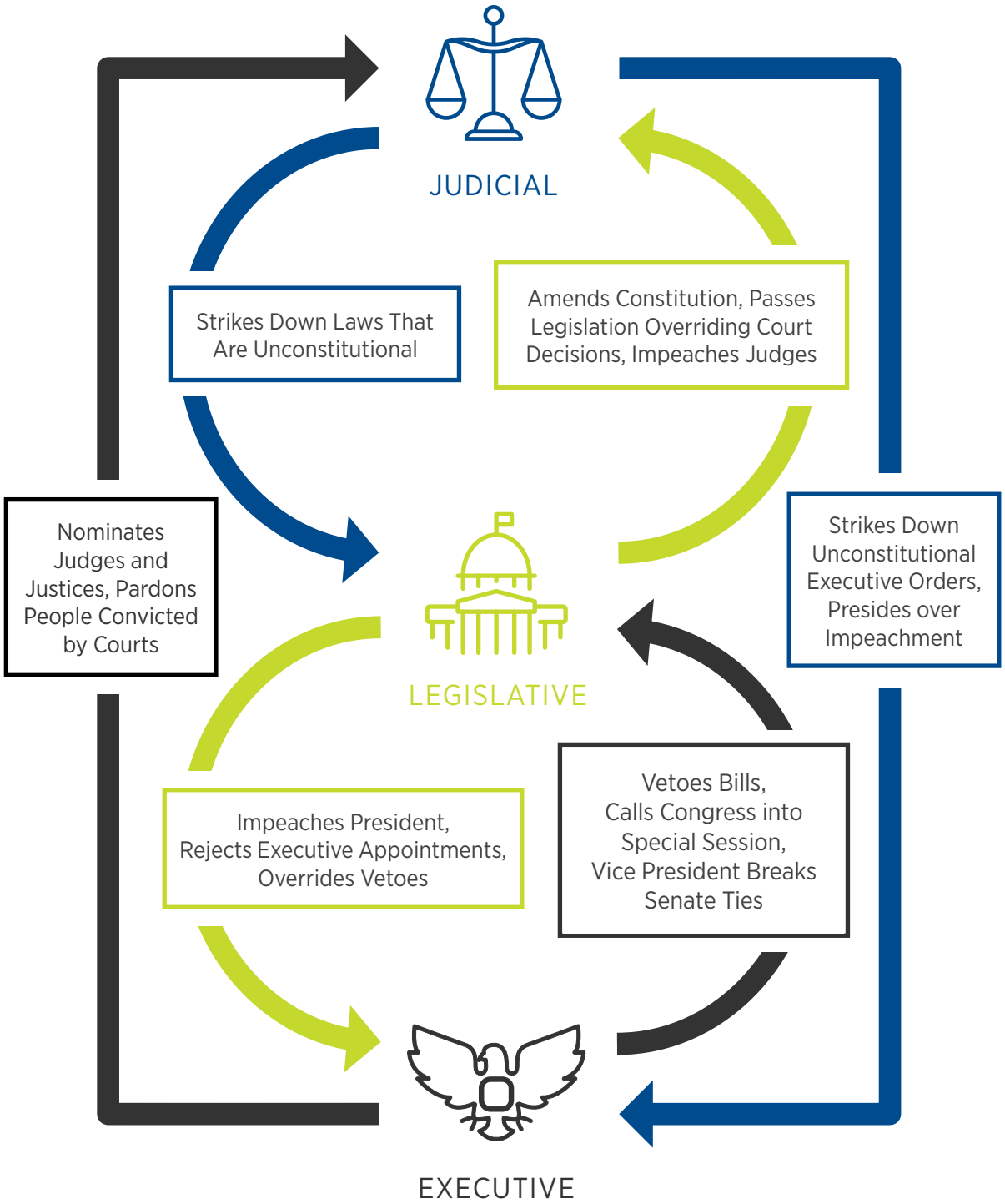
## EXECUTIVE BRANCH

**Responsibility:** Executes the law.

**Checks the Legislature:** Vetoes bills. Calls Congress into special session. Vice President breaks ties in the Senate.

**Checks the Judiciary:** Nominates federal court judges and Supreme Court Justices. Pardons or grants clemency to people convicted of federal crimes.

# Checks and Balances



# The Great Compromise

One of the most contentious issues at the Constitutional Convention was the representation in Congress that each state would have. Delegates from larger and more populous states wanted more influence in the Congress. Delegates from smaller states wanted equal representation. What to do? Connecticut delegate Roger Sherman came up with a brilliant solution: a bicameral legislature—two chambers—composed of a House of Representatives and a Senate. In the Senate, each state would get equal representation (two Senators per state); in the House, states would be given proportional representation, based on population. It is quite possible that without this agreement, the Convention would have been derailed without producing a Constitution that could be ratified.

Once again, the Framers wanted to prevent too much power from ending up in too few hands because that would endanger the freedoms that government exists to secure. Madison, for example, wrote that putting legislative, executive, and judicial powers "in the same hands, whether of one, a few, or many...may justly be pronounced the very definition of tyranny."[16] Quoting Montesquieu, he continued that "there can be no liberty...if the power of judging be not separated from the legislative and executive powers." After all, if one body possessed the power to make and enforce laws, nothing would stop it from enacting unjust laws. Likewise, if the same body exercised both the power to write laws and the power to decide legal disputes, nothing would stop it from arbitrarily changing the law to suit the government's needs. Critically, the government could change the law without considering the will of the people.

Separating the powers of government to protect against tyranny makes sense, but why does the Constitution separate them as it does? It all comes down to timing. A large body of people like Congress acts slowly and deliberately. When it comes to passing laws that will govern all the people of the country, deliberation and debate help to promote compromise and consensus. But speed is necessary if the nation is attacked and a defense must be mounted. In that case, one President can act much faster than an assembly can. Likewise, when the nation needs to speak to foreign countries, one person can present a unified message that Congress cannot.

The Constitution gives to the judicial branch the power to interpret and apply the Constitution or statutes to decide individual legal disputes. Alexander Hamilton explained that this requires the "judgment" of a court rather than the "will" of the legislative branch or the "force" of the executive branch.[17] Unlike legislators or the President, federal judges do not have specific terms, so they are free to render judgment impartially and without fear of political retaliation.

## THE BILL OF RIGHTS

Dividing government power vertically through federalism and horizontally through the separation of powers is an example of the necessary "internal" control of government that Madison described. The Bill of Rights, which recognizes certain fundamental individual rights, is an example of an "external" control.

Each of us has certain fundamental rights that no government may ever take away. The Declaration of Independence refers to these as "unalienable" rights. These include the freedom to practice any religion you choose, to speak your mind, to petition the government to change the law, to be free from unreasonable searches and seizures, to bear arms, to have a fair trial, and to be free from cruel and unusual punishments. The Bill of Rights guarantees those rights for each and every individual, even if the government or a majority of the people might wish to deny those rights to someone.

Justice Antonin Scalia once observed that "[e]very banana republic in the world has a bill of rights." Most are just "words on paper" because those countries' constitutions do not "prevent the centralization of power in one person or in one party."[18] It is the structure of government established by our Constitution that makes our system distinctive. Federalism and the separation of powers, a bicameral legislature, and a judiciary that is independent of the two political branches combine to form a design for government that makes the Bill of Rights real and meaningful.

## AMENDING THE CONSTITUTION

The U.S. Constitution is the oldest written charter in continuous use anywhere in the world. In the famous case of Marbury v. Madison, the Supreme Court in 1803 explained that the Framers wrote the Constitution down for a very practical reason: so that its rules for government "may not be mistaken, or forgotten."[19] When he left office, President George Washington said that because the Constitution expresses the people's will, it is "sacredly obligatory upon all" until it is changed by "an explicit and authentic act of the whole People."[20] That act is the process for amending the Constitution.

By permitting amendments, the Constitution allows the people of today both to continue operating with the rules that have been established and to change those rules if they see fit to do so. By design, amending our "great charter of liberty" is difficult and requires extensive deliberation to ensure that amendments reflect the settled opinion and will of the people. As James Madison explained in The Federalist, the amendment procedure allows subsequent generations to correct errors and make whatever "useful alterations will be suggested by experience."[21] At the same time, the difficulty of the amendment process prevents the Constitution from being weakened or deprived "of that veneration, which time bestows on everything, and without which the wisest and freest governments would not possess the requisite stability."[22]

Amendments have been suggested thousands of times since the Constitution was ratified in 1789, but the states have approved only 27 of the 33 amendments Congress has actually proposed. These included adding the Bill of Rights, changing the way the President and Vice President are elected, abolishing slavery, preventing state governments from discriminating against any person, guaranteeing the right to vote to all citizens regardless of race or sex, giving the federal government the power to collect an income tax, providing for the direct election of Senators, and both outlawing (in 1919) and then legalizing (in 1933) the production and distribution of alcohol.

The great genius of the Constitution is this: it permits the people to govern themselves by putting the power of government in their hands, by protecting them from those who would take power or liberty from them, and by giving each successive generation the ability to improve upon the government bequeathed to them by those who came before.

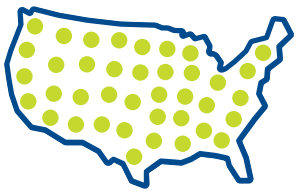
# How Does the Constitutional Amendment Process Work?

## STEP 1 : AMENDMENT IS PROPOSED

This can happen one of two ways.

### OPTION 1

Proposed by Congress with a two-thirds majority vote in both the House of Representatives and the Senate.



### OPTION 2

Proposed by "a convention for proposing amendments" (commonly referred to as a "Convention of States"), which is called by Congress on the application of two-thirds of the state legislatures (at least 34 states).

## STEP 2 : RATIFICATION

There are two ways that an amendment can be ratified.

### OPTION 1

Legislatures in three-fourths of the states (at least 38 states) approve the amendment.

### OPTION 2

Ratifying conventions in three-fourths of the states (at least 38 states) approve the amendment.

# Did You Know?

1. None of the 27 amendments to the Constitution have been proposed by a Convention of States.

2. Congress controls the mode of ratification for each proposed amendment.

3. Twenty-six amendments were ratified by three-fourths of state legislatures. One amendment—the 21st Amendment, which repealed Prohibition—was approved by three-fourths of state conventions in 1933.

4. Amendments to the Constitution can be repealed by adding another amendment.

# What Is a State Ratifying Convention?

The Framers inserted a method of ratification into the Constitution that would allow the amendment process to bypass state legislatures. A ratifying convention is an entirely separate body from the state legislature, made up of delegates. This would presumably include average citizens, who are less likely to bow to political pressure. The guidelines and laws for conducting these ratifying conventions vary from state to state.

# Interpreting the Constitution

The Constitution is the American people's rulebook for government and therefore must be actively applied and defended to ensure that government does not get out of control. Many people probably think that only lawyers can understand the Constitution, but that's not true. The Framers wanted people to read and understand the Constitution. The text of the Constitution was widely read and vigorously debated by just about everybody in this country at the time it was proposed and sent to the states for ratification. Reading and understanding the Constitution is just as important today as it was then.

Three guidelines show the proper method for interpreting the Constitution. The first guideline is that the Constitution is a written document. In that sense, it is like a note to a friend, a contract to buy a car, a college exam, or a grocery list. Every time we handle something written by someone else, we first read the words and then try to figure out what the author meant by what the author wrote. This basic method applies when courts interpret laws enacted by Congress or state legislatures. Statutory construction is "the process of determining what a particular law means so that a court may apply it accurately."[23]

The second guideline is more specific. Back in 1795, the Supreme Court said that the Constitution "can be revoked or altered only by the authority that made it."[24] What is that authority? The Constitution's first three words provide the answer: "We the people," it says, "do ordain and establish this Constitution."

They did this in two stages. The first occurred between May 25 and September 17, 1787, when states sent delegates to Philadelphia to write it. Second, each state held a convention to decide whether to ratify, or approve, the draft Constitution. Those ratifying states were the authority that made the Constitution the "supreme law of the land." Amendments that become part of the Constitution go through the same two stages: proposal and ratification.

The third guideline concerns how to know what "we the people" meant by the words of the Constitution. The most important thing is to keep the goal of interpretation always in mind: determining what the author meant by what the author wrote. Interpreting the Constitution therefore requires figuring out what the people who established or amended it meant by the words they put in it.

This interpretive approach is sometimes called originalism because it focuses on the Constitution's original meaning as determined by "the authority that made it." This job can be challenging for several reasons. The main body of the Constitution and most of its amendments, for example, were ratified a long time ago. Constitutional language can sometimes be unfamiliar or awkward to the modern reader. The Constitution's provisions have come to us not from a single person, but from groups such as the Framers or, in the case of the amendments, Congress. It may be difficult to settle on what the people understood or intended the Constitution to mean at the time

> "Any defensible theory of constitutional interpretation must demonstrate that **it has the capacity to control judges.**"
> —ROBERT BORK

each provision was ratified, but theirs is the only meaning that counts.

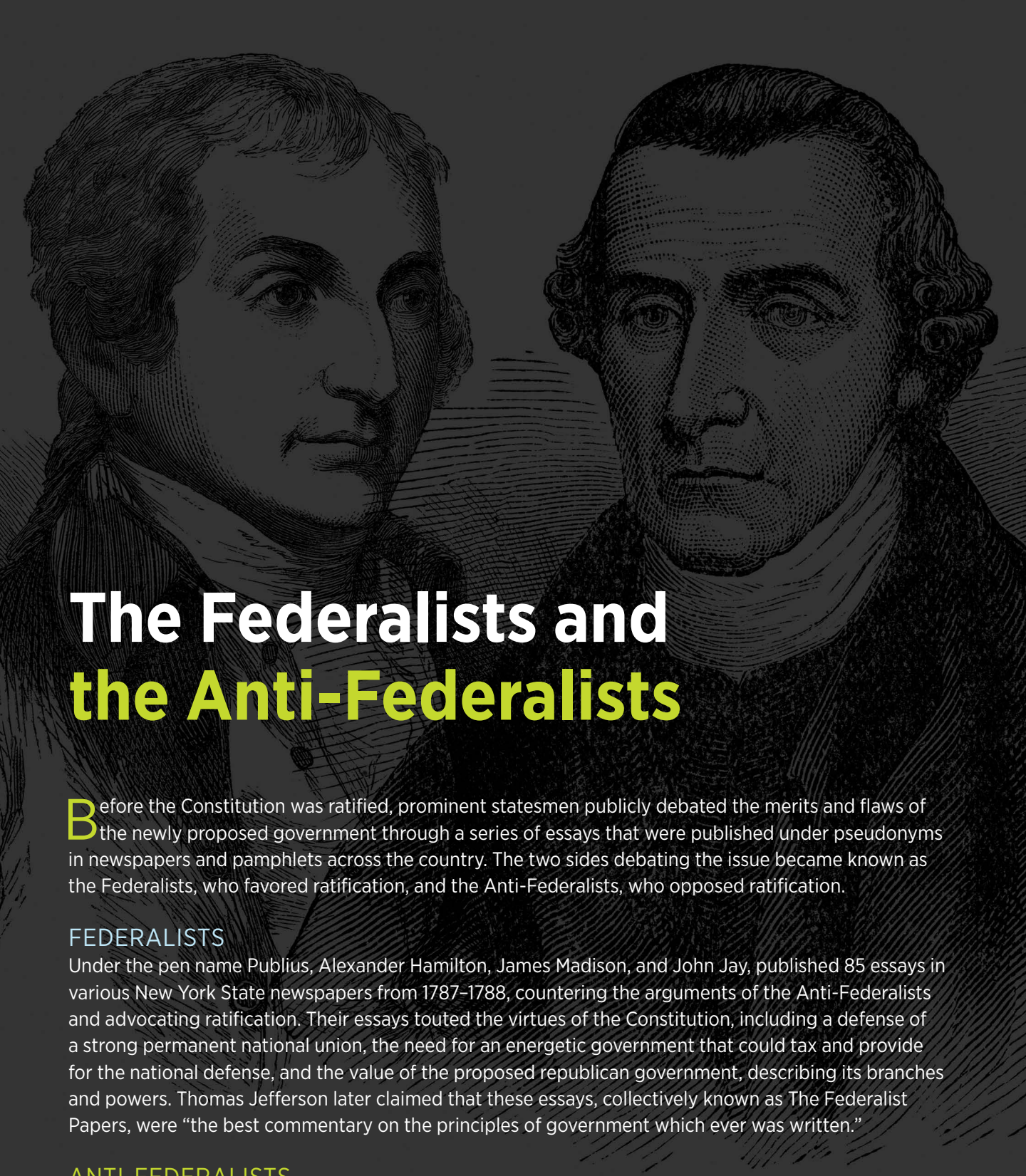
The main reason for using any approach other than originalism is simply to make the Constitution mean something other than what its authors intended. Since the 1930s, some legal scholars, judges, and even Presidents who want the Constitution to mean something else have suggested criteria or standards other than originalism. President Franklin Roosevelt, for example, said in 1937 that the Constitution should be interpreted "in the light of present-day civilization."[25] Others have suggested using such vague standards as "distinctive public morality"[26] or the "well-being of our society."[27] While originalism is focused on finding the Constitution's meaning in an identifiable source that is independent of judges, these alternate standards originate solely from judges' preferences, allowing judges to reach any result that they desire.

Imagine the chaos if the Constitution's rules that limit government power meant whatever the government wanted them to mean. Nobody would or should feel safe if that were the case. While the Supreme Court in Marbury v. Madison said the Framers wrote the Constitution down so that its rules for government "may not be mistaken, or forgotten," any approach other than originalism would treat those rules as if they had been written in disappearing ink.

Robert Bork had the better view when he wrote that "any defensible theory of constitutional interpretation must demonstrate that it has the capacity to control judges."[28] Originalism—seeking to determine the Constitution's original meaning—does that because it is rooted in the principle that the Constitution's meaning comes from "the authority that made it." Until the people change it through the amendment process, the Constitution says what its authors said and means what its authors meant.

# A Model for Other Nations

The idea of a written constitution based on the sovereignty of the people, enshrining fundamental principles like limited government, separation of powers, checks and balances, and judicial review, was exceptional and an entirely American innovation. These principles have influenced and inspired freedom-loving people all over the globe. Beginning in 1791 with Poland and France and expanding through the years to include numerous other countries, including Germany, Switzerland, Australia, Canada, Yugoslavia, Hungary, and the Philippines, among others, these countries imported American constitutional principles into their own governing documents. While not all have experienced successful results, people of nearly every nation now understand the value of a written constitution and they often use the American experience as a template. A credible case can be made that our most valuable export has been our Constitution.[29]



# The Federalists and the Anti-Federalists

Before the Constitution was ratified, prominent statesmen publicly debated the merits and flaws of the newly proposed government through a series of essays that were published under pseudonyms in newspapers and pamphlets across the country. The two sides debating the issue became known as the Federalists, who favored ratification, and the Anti-Federalists, who opposed ratification.

## FEDERALISTS

Under the pen name Publius, Alexander Hamilton, James Madison, and John Jay, published 85 essays in various New York State newspapers from 1787–1788, countering the arguments of the Anti-Federalists and advocating ratification. Their essays touted the virtues of the Constitution, including a defense of a strong permanent national union, the need for an energetic government that could tax and provide for the national defense, and the value of the proposed republican government, describing its branches and powers. Thomas Jefferson later claimed that these essays, collectively known as The Federalist Papers, were "the best commentary on the principles of government which ever was written."

## ANTI-FEDERALISTS

Initially using pen names like Brutus and Federal Farmer, Anti-Federalists, including Robert Yates, Patrick Henry, and Samuel Bryan, published articles and gave speeches highlighting potential flaws in the new government. Their main fear was that the new Constitution gave too much power to the federal government relative to the states and that it lacked a Bill of Rights.

# Threats to the Constitution

Because the people use the Constitution to remain the masters of government, the most serious threats to the Constitution are the ones that allow government to ignore rather than follow it. These threats can come from each of the three branches of government.

## THE "LIVING CONSTITUTION" AND JUDICIAL ACTIVISM

Recall that the Constitution is the meaning of its words. Judges cannot change the Constitution's words, but they threaten the Constitution just as much by changing what those words mean. Rather than seeking to understand what the Constitution's authors meant, some activist judges, under the guise of interpretation, substitute what they want the Constitution to mean as if they were creating a different Constitution in their own image. These judges and those scholars who support them are sometimes referred to as "living constitutionalists" because they believe that the Constitution is an ever-changing and evolving document that should bend to the whims of public opinion and contemporary society's values.

In 1937, Justice George Sutherland warned that this might happen, explaining that while courts have the power of interpretation, they do not have the power of "amendment in the guise of interpretation."[30] By maintaining this distinction, courts can respect the fact that the Constitution belongs to the people and not to government.

The notion of a "living Constitution" is antithetical to our Founding Fathers' intention for the limited role of the judiciary. It abandons the principle of government by consent and replaces it with arbitrary rule. The role of judges is to interpret the Constitution, not to make law.

In the 1980s, then-Attorney General Edwin Meese warned that abandoning originalism would threaten the Constitution. Substituting vague ideas about the Constitution's "spirit" for the concrete meaning of its words, he said, treats the Constitution "as an empty vessel into which each generation may pour its passion and prejudice."[31] A judge who will not seek to find the Constitution's meaning from "the authority that made it" will look "inside himself and nowhere else."[32]

President Ronald Reagan made this point when he administered the oath of judicial office to Supreme Court Justice Anthony Kennedy. "[T]he framers knew," Reagan said, that "unless judges are bound by the text of the Constitution, we will, in fact, no longer have a government of laws, but of men and women who are judges."[33]

## ATTEMPTS TO "PACK" THE SUPREME COURT

Another threat to the Constitution comes from the legislative and executive branches working together to "pack the courts." Presidents, with Senate approval, can fill judicial vacancies, but they cannot control when those vacancies occur. "Packing" happens when Congress creates additional judicial positions, and therefore new vacancies, so that a President of the same party can quickly fill them. These new positions are not created, nor are they needed, to enable courts to handle their workload. Rather, they are created to

pack the courts with judges who will likely change the meaning of the Constitution and statutes "in the guise of interpretation" to better suit the political needs of the party that created positions in the first place.

The term "court packing" was coined in 1937, when President Franklin Roosevelt wanted to move quickly to add new federal judges, especially to the Supreme Court, who would approve his New Deal legislation. The plan could have increased the Supreme Court's membership from its current nine to 15. Even with Roosevelt's party solidly in control, however, Congress said no. The Senate Judiciary Committee's report on Roosevelt's bill called it a "dangerous abandonment of constitutional principle" that "violates every sacred tradition of American democracy."[34] The committee said that the long-term independence of the judicial branch was more important than any immediate political objective.

Today, some politicians and activists want Congress to do the same thing, and for the same reason, that Roosevelt attempted. The political branches would then control not only who is appointed to fill judicial vacancies, but when and where those vacancies occur. This would fatally politicize the courts and threaten the Constitution.

## THE GROWTH OF THE FEDERAL GOVERNMENT—THE ADMINISTRATIVE STATE

Another threat to the Constitution involves all three branches of government. The Framers separated government power into those branches, allowing the President to appoint "Officers of the United States" to staff various "executive Departments." Congress initially created only three small departments of State, War, and Treasury. As recently as 1900, there were only eight departments, and two-thirds of the federal workforce was employed by the Post Office or General Lands Office.[35] Today, approximately 120 executive agencies and another 60 independent entities employ more than one million federal workers.[36]

The growing administrative state threatens the Constitution because all three branches have worked together to undermine the separation of powers. This happened in a few steps. First, through a series of cases, the Supreme Court changed the meaning of the powers granted to Congress by the Constitution. For example, Congress's power to regulate interstate "commerce" (commercial activity between two states) now includes regulating whatever might "affect" commerce even if that commercial activity takes place wholly within one state. But the management and implementation of these regulations is in the hands of administrative agencies, which means that this expanded congressional power has been passed along to the executive branch in ways that the Framers could not have imagined and certainly did not intend.

Second, Congress has expanded its own opinion about what it can accomplish, believing that so-called experts can solve virtually any problem. As a result, Congress gives administrative agencies not only the responsibility to carry out Congress's programs, but also the authority to come up with programs and rules themselves. These rules and programs often end up having the force of law, obligating all of us to comply with them or face civil or criminal penalties if we don't. Congress often gives such legislative authority to executive branch agencies that are run by unelected and unaccountable government employees with only the vaguest of instructions—for example, to devise rules that serve "the public interest, convenience, or necessity." This violates the separation of powers which protects our individual liberties.

Third, both the Supreme Court and Congress have cemented this rearrangement of government powers. The Court, for example, says that an agency's own interpretation of an ambiguous or uncertain statute, even if it is wrong, must be followed so long as it is "reasonable."[37] Congress has also created new agencies but limited the President's ability to change their leadership and thereby hold those officials accountable, and

courts have upheld this arrangement.[38] These actions by the Court and Congress have helped to create what Justice Robert Jackson described as "a veritable fourth branch of Government."[39]

Fourth, by interpreting statutes, writing substantive regulations based on those interpretations, enforcing those regulations, and in essence acting as judges and juries in lawsuits or enforcement actions involving those regulations, administrative agencies often wield all three powers—to make law, to enforce law, and to interpret law—with little, if any, democratic oversight. This is precisely the "accumulation of all powers, legislative, executive, and judiciary, in the same hands" that James Madison called "the very definition of tyranny."[40]

## THE POWER OF THE PRESIDENCY

Sometimes the President himself assumes power that the Constitution does not give him. These unconstitutional power grabs undermine the principles of limited government that are at the heart of the Constitution.

Consider, for example, President Harry Truman's attempt to nationalize several steel mills during the Korean War.[41] The Constitution does not give the President the power to take over businesses, and Congress had not passed a law granting the President that power, but Truman claimed that the power was "inherent" in the presidency. The Supreme Court rightly disagreed, recalling the Framers' "fears of power and the hopes for freedom" upon which they based their decision to limit and separate power.[42]

In the past few decades, it has become increasingly common for Presidents to push their agendas by executive action rather than by working with Congress to pass legislation. Not only does this risk undermining the separation of powers, but it also decreases the government's ability to govern effectively as laws and policies become unstable and subject to being reversed with each new administration.

# Constitutional Knowledge: An Uninformed Citizenry

More than one in three Americans (37%) **could not name a single right protected by the First Amendment.**

Only one in four (26%) can **name all three branches of the government.**

One in three (33%) **can't name any branch of government.**[43]

# Debunking Myths
# About the Constitution

Fully understanding and appreciating our essential Constitution includes knowing what is both true and false about it.

## MYTH: Congress may legislate on any subject.

FACT: Most Americans assume that Congress has the power to do whatever it wants to do when it comes to passing laws. The Framers assumed no such thing. While acknowledging that government was necessary, they recognized the importance of limiting government power to protect our liberty. As discussed above, the genius of the Constitution includes limits like the separation of powers and federalism. In addition, using originalism as a guide to constitutional interpretation limits what the Framers called "arbitrary discretion" by judges.

Federalism divides government power from the bottom up. States can exercise power that is not explicitly given exclusively to the national government. The national government, in contrast, can exercise only the particular powers it receives. Those "enumerated" powers are listed in Article I, Section 8, of the Constitution. This is an example of, as the Declaration of Independence instructs, organizing powers to pursue the purpose of government in a proper manner.

Supreme Court Justice Louis Brandeis once described federalism as allowing each of the states to "serve as a laboratory" and "try novel social and economic experiments" to address issues and solve problems "without risk to the rest of the country."[44] Other states can observe what works or fails as they address public policies that are designed to address their specific needs.

## MYTH: If the U.S. Supreme Court overruled Roe v. Wade, abortion would automatically become illegal nationwide.

FACT: In 1973, the Supreme Court held in Roe v. Wade[45] that the Due Process Clause of the Fourteenth Amendment gave women a constitutional right to have an abortion. This decision, as modified by the Planned Parenthood v. Casey[46] decision in 1992, sets rules for abortion-related legislation. Simply overruling those decisions would mean that the Court no longer interprets the Constitution as providing rules for such legislation. Were that to happen, each state, as it did before Roe, would have the opportunity to decide for itself how to address abortion within its own borders.

## MYTH: The Constitution mandates the "separation of church and state."

FACT: No matter how hard you look in the Constitution, you won't find the words "separation of church and state." The First Amendment says this: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The two clauses of the amendment complement one another and have a single overriding purpose: to protect religious freedom for every person, regardless of religious belief. It was the Supreme Court that claimed, almost 140 years after the First Amendment was ratified, that it built a "wall of separation between church and State."[47] That phrase was lifted from a letter written by Thomas Jefferson (who was in Paris serving as our Minister to France when the Constitution was being drafted in Philadelphia) to the leaders of a Baptist church. Many of the Framers believed that if the federal government "established" religion—for example, by subsidizing the salaries of ministers or the construction of churches—it ultimately would corrupt and control religion. They regarded religious freedom as the "first freedom" of republican government and fully expected people of faith to participate in civic and political life.

## MYTH: Article 1, Section 2 indicated that the Founders considered African Americans as 3/5ths of a person.

FACT: While it is widely known that slavery was hotly debated during the drafting and ratification process of the Constitution, the intent of the 3/5ths Clause is often misunderstood. The issue was whether slaves should count as part of the Census, which, in turn, determined how many representatives each state would have in Congress and how many votes each state would have in the Electoral College. During the Convention, the Northern delegates—who came from states that gave rights to some black residents and who wanted slavery banned—argued that representation should be based on free persons only. If slaves did not have any rights, they reasoned, why should they be counted for purposes of determining representation in Congress? The Southern delegates—who would ratify the Constitution only if slavery were preserved—wanted slaves to be included in the count, even though the Southern states had no intention of giving slaves any rights at all. If the Southern states had their way, they would gain more seats in the House of Representatives, thereby making it harder to pass abolitionist legislation, and would also gain votes in the Electoral College, making it more likely that they could elect a President who favored their views. Instead of settling on all-or-none representation for slaves, the delegates agreed on a 3/5ths count, a compromise that was all about political power and not about the rights of black people.

## MYTH: The original Constitution protected slavery.

FACT: Although the Declaration of Independence asserted that "all men are created equal," no state outlawed slavery in 1776; neither did the Articles of Confederation (our first national charter) nor the Constitution that eventually succeeded the Articles as our governing document. That slavery existed when the Constitution was ratified is a tragic historical fact, as is the fact that, in order to persuade Southern states to join the Union, it included certain provisions that protected slaveowners' interests, at least temporarily.

But it is incorrect to say that the Constitution itself protected slavery or the rights of slaveholders to possess a property right in other men and women.

Before the Constitution was ratified, Congress enacted the Northwest Ordinance to govern new territories and expressly prohibited slavery in those territories. The Constitution itself never mentions slavery and never suggests that it guarantees slave owners that right on a permanent basis. As Princeton University Professor Sean Wilentz puts it, the Constitution initially "tolerate[d]" the institution "without authorizing it."[48] That distinction, far from being a "mere technicality," actually "proved enormously consequential."[49] If the Constitution itself protected slavery, Congress could not have passed legislation outlawing it. Instead, Article V of that original Constitution provided a process for amending the charter, and following a long and bloody Civil War, the Thirteenth Amendment, which explicitly banned slavery, was ratified and made part of our Constitution.

## MYTH: Women could not vote before the 19th Amendment.

FACT: While is true that this Amendment guaranteed the right of all women to vote, before its ratification, the Constitution was silent about women's suffrage. Put another way, not only did the Constitution not explicitly prohibit women's suffrage, but women could vote in some states. For example, New Jersey's 1776 State Constitution granted both women and African Americans the right to vote.

## MYTH: The Supreme Court may create new constitutional rights.

FACT: Like the myth that Congress may pass any law it wishes, many Americans believe that the Constitution means whatever the Supreme Court says it does, allowing for the creation of new constitutional "rights." Many scholars and some activist judges insist that the Supreme Court may take a word such as "liberty," which does appear in the Constitution, and, "in the guise of interpretation," give that word all sorts of additional meaning that the Framers never intended and could not have imagined. The creation of individual rights, of course, means more restrictions on the ability of the people, acting through their elected representatives, to devise laws or forge compromises on controversial and consequential issues that might conflict with those "rights."

The Framers, however, believed in limits for all government officials, including judges. It would make no sense to say that only "the authority that made it" can change the Constitution or for Article V to provide a process to amend it if judges could change the Constitution's meaning whenever they saw fit to do so. Public officials, including judges themselves, take an oath to support and defend "the Constitution." They do not pledge fidelity to the personal values or political preferences of judges.

# Why Should the Constitution Matter to You?

The men who met in Philadelphia in 1787 to draft a new Constitution for the United States were utterly realistic about the corrupting effects of unchecked power. "A dependence on the people is, no doubt, the primary control on their government," wrote James Madison, "but experience has taught mankind the necessity of auxiliary precautions."[50] The Framers wrote such "auxiliary precautions" into the Constitution to prevent our national experiment in human liberty from collapsing into tyranny.

Yet the threat of authoritarian government is always with us. Widespread ignorance of the Constitution, efforts to dissolve the separation of powers, attempts to ignore the plain meaning of the constitutional text—all of these factors are undermining democracy. The need to renew our national commitment to the Constitution has never been greater. Former Attorney General Edwin Meese has put the matter this way: "At a time when more and more Americans are searching for a cornerstone of principle in the midst of calls for fundamental change to the structure of our government, *The Essential Constitution* is a timely countermeasure against threats to our basic foundation of ordered liberty."

The Framers would agree. "[U]nless we can return a little more to first principles, & act a little more upon patriotic ground," warned George Washington, "I do not know…what may be the issue of the contest…."[51] The contest to preserve both freedom and order is in our hands—exactly where the Framers intended it to be.

# Resources to Learn More

**The Federalist Papers—Online**
*Library of Congress*
https://guides.loc.gov/federalist-papers

**The Heritage Guide to the Constitution**
www.heritage.org/constitution

**First Principles Essays | Center for American Studies at The Heritage Foundation**
www.heritage.org/article/first-principles-essays

**Primary Sources | The Heritage Foundation**
https://www.heritage.org/article/primary-sources

**The Great Debate: Interpreting Our Written Constitution**
*The Federalist Society | November 1, 1986*
fedsoc.org

**Originalism: A Quarter-Century of Debate**
*Regnery Publishing | August 21, 2007*
Edited by: Steven G. Calabresi

**The National Constitution Center**
*525 Arch Street*
Philadelphia, PA 19106
constitutioncenter.org

# Endnotes

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