

# CONSTITUTIONAL UNDERPINNINGS

## What Is Government?

A government is composed of the formal and informal institutions, people, and used to create and conduct public policy. Public policy is the exercise doing those things necessary to maintain legitimate authority and control over society.

## Forms of Government

Greek philosopher Aristotle attempted to classify governments based on the number individuals who participated in making political decisions: rule by one, rule by the few, or by the many. His early classification system is still useful in describing governments today:

- ◆ **anarchy**: lack of government
- ◆ **autocracy**: rule by one
  - absolute monarchy: ruler gains power through inheritance; there are no restrictions on the ruler's power
  - constitutional monarchy: ruler gains power through inheritance; formal restrictions limit power, often restricting the monarch to ceremonial status
  - dictatorship: ruler seizes power, keeps power by force and restricts opposition to regime; no restrictions on dictator's power
- ◆ **oligarchy**: rule by a few
  - aristocracy: rule by the elite, usually determined by social status or wealth
  - theocracy: rule by religious leaders
- ◆ **democracy**: rule by the people
  - direct democracy: citizens meet and make decisions about public policy issues
  - representative democracy: citizens choose officials (representatives) who make decisions about public policy

## Theories of Democratic Government

Theories of democratic government are theories about who has power and influence over public policy and decision making at the local, state, and national levels of government.

- ◆ **traditional democratic theory**: Government depends on the consent of the governed, which may be given directly or through representatives; may include criteria for the measure of "how democratic."
- ◆ **pluralist theory**: Interest groups compete in the political arena, with each promoting its policy preferences through organized efforts. Conflict among groups may result, requiring bargaining and compromise.
- ◆ **elite theory**: A small number of powerful elite (corporate leaders, top military officers, government leaders) form an upper class, which rules in its own self-interest (C. Wright Mills).
- ◆ **bureaucratic theory**: The hierarchical structure and standardized procedures of modern governments allow bureaucrats, who carry out the day-to-day workings of government, to hold the real power over public policy (Max Weber).
- ◆ **hyperpluralism**: Democracy is a system of many groups having so much strength that government is often "pulled" in numerous directions at the same time, causing gridlock and ineffectiveness.

## Articles of Confederation

The Articles of Confederation (1781-1789) became the first national constitution for governing the American states. The Articles created a confederation or "league of friendship" among the states. The Confederation would be composed of a relatively weak national government with a unicameral legislature. Congress would have limited powers such as borrowing money, creating a national army and navy, declaring war, creating post offices, and signing treaties with foreign governments. Congress was not given the power to tax, draft soldiers for military service, or regulate commerce. There was no national executive or judicial branch under the Articles of Confederation. Each state was equal, with one vote, regardless of population or size. The votes of nine of the 13 states were required for legislation to pass the Confederation Congress; amending the Articles of Confederation required a unanimous vote.

The weaknesses evident in the Articles of Confederation allowed the states to focus on their own powers. With no central government to control them, the states taxed each other, printed their own money, made treaties with foreign governments, and often refused to uphold the laws of the Confederation government. The government under the Articles of Confederation, however, could not deal with the nation's problems. Economic chaos and violence broke out, resulting in conferences at Mt. Vernon and Annapolis. These meetings proved to be unsuccessful, and eventually a rebellion of farmers in Massachusetts (Shays Rebellion) led to the calling of a Constitutional Convention.

## Constitutional Convention

The Constitutional Convention was convened in Philadelphia in May of 1787, for the purpose of revising the Articles of Confederation.

<b>Virginia Plan</b>
Bicameral legislature <ul style="list-style-type: none"> <li>◆ lower house elected by the people</li> <li>◆ upper house chosen by lower house from nominees submitted by state legislatures</li> </ul>
Representation in each house based on population and/or monetary contributions to the national government by the state
Single executive chosen by legislative branch, limited to one term only, could veto legislative acts, removal by Congress
Judges chosen by legislative branch

<b>New Jersey Plan</b>
Unicameral legislature <ul style="list-style-type: none"> <li>◆ representatives chosen by state legislatures</li> <li>◆ each state receives one vote</li> </ul>
Representation in house would be equal among the states
Plural executive chosen by legislative branch, no veto powers, removal by the states
Judges appointed for life by the executive

<b>Weaknesses of the Articles of Confederation</b>
◆ Articles created a "league of friendship" between the states
◆ Congress could not tax; it could only request contributions from the states
◆ Congress could not regulate interstate trade or foreign commerce.
◆ No separate executive to enforce the acts of Congress
◆ No national judiciary to handle state disputes
◆ States and the national government had the authority to coin money
◆ Each state had one vote, regardless of size or population
◆ Nine of 13 states required to pass legislation
◆ Unanimous consent required to amend the Articles of Confederation

<b>How the Constitution Remedied Weaknesses</b>
◆ Constitution created a federal system of government between the national and state levels
◆ National government was given the power to tax
◆ Congress was given the power to regulate commerce between the states and with foreign nations
◆ Article II created a separate executive department whose job is to enforce the laws of Congress
◆ Article III created a national judiciary with a Supreme Court and lower courts as established by Congress
◆ Only the national government has the authority to coin money
◆ States are represented based on population in the House of Representatives and equality in the Senate
◆ Bills need a simple majority in both houses of Congress
◆ Two-thirds of Congress and three-fourths of the states are necessary to amend the Constitution

**Compromises**

- ◆ Debate over the various plans presented at the Constitutional Convention resulted in the **Connecticut (Great) Compromise**. This compromise settled the disputes between the states over the structure of the legislative branch. Congress would be a bicameral legislature, with representation in the lower house based on the population of the state and equal representation of the states in the upper house.
- ◆ A second compromise concerned the counting of slaves for the purpose of determining population for representation in Congress and for taxation. Southern states wanted slaves to be counted for representation but not taxation. Northern states wanted slaves counted for taxation but not for representation. The **Three-Fifths Compromise** resolved this issue: each state would count three-fifths of its slave population for purposes of determining both representation and taxation.
- ◆ The **Commerce and Slave Trade Compromise** resolved other differences between southern and northern states. Congress was prohibited from taxing exports from the states and from banning the slave trade for a period of 20 years.
- ◆ Numerous other compromises were made at the Constitutional Convention concerning the executive and judicial branches as well as the electoral process for choosing a chief executive.

### Ratification of the Constitution

Although the delegates at the convention signed the Constitution on September 17, 1787, it still had to be ratified by nine of the 13 states before it could go into effect. In each state, special ratifying conventions would be held over the next two years. Debate over ratification divided citizens into Federalist and Anti-Federalist positions.

- ◆ The **Federalists** stressed the weaknesses of the Articles of Confederation and the government it created. They supported a stronger central government with expanded legislative powers.
- ◆ The **Anti-Federalists** believed that the new Constitution gave too much power to the national government at the expense of the state governments. Another objection was the lack of a Bill of Rights, ensuring fundamental liberties.

Federalists	Anti-Federalists
<ul style="list-style-type: none"> <li>◆ Favored Constitution</li> <li>◆ Led by Madison, Hamilton, and Jay</li> <li>◆ Stressed weaknesses of Articles; strong government needed to protect nation and solve domestic problems</li> <li>◆ Checks and balances would protect against abuses</li> <li>◆ Protection of property rights</li> <li>◆ Constitution is a bill of rights with limitations and reserved powers for the states; state constitutions already had protections in bills of rights</li> </ul>	<ul style="list-style-type: none"> <li>◆ Opposed Constitution</li> <li>◆ Led by Henry, Mason, Samuel Adams</li> <li>◆ Wanted strong state governments; feared a strong national government</li> <li>◆ Created a strong executive similar to monarchy</li> <li>◆ Wanted fewer limits on popular participation</li> <li>◆ Wanted a bill of rights to protect citizens against government</li> </ul>

### Basic Principles within the Constitution

Embodied within the Constitution are the basic principles of:

- ◆ **limited government** - belief that government is not all-powerful; government has only those powers given to it
- ◆ **popular sovereignty** - the people are the source of government's authority
- ◆ **separation of powers** - power is separated among three branches of government; each has its own powers and duties and is independent of and equal to the other branches
- ◆ **checks and balances** - each branch is subject to restraints by the other two branches
- ◆ **federalism** - a division of governmental powers between the national government and the states

<b>Legislative Branch (Passes Laws)</b>	
Over Executive: <ul style="list-style-type: none"> <li>◆ May override president's veto by two-thirds vote of both houses</li> <li>◆ May impeach and remove president from office</li> <li>◆ Senate may refuse to confirm presidential appointments or ratify treaties</li> <li>◆ Creates executive agencies and programs</li> <li>◆ Appropriates funds</li> </ul>	Over Judiciary: <ul style="list-style-type: none"> <li>◆ Creates lower federal courts</li> <li>◆ Sets salaries of federal judges</li> <li>◆ May refuse to confirm judicial appointments</li> <li>◆ May propose constitutional amendments which overrule court decisions</li> <li>◆ May impeach and remove federal judges</li> </ul>
<b>Executive Branch (Enforces Laws)</b>	
Over Legislature: <ul style="list-style-type: none"> <li>◆ President may veto acts of Congress</li> <li>◆ President may call special sessions of Congress</li> <li>◆ President may recommend legislation</li> </ul>	Over Judiciary: <ul style="list-style-type: none"> <li>◆ President appoints federal judges</li> <li>◆ President may grant reprieves and pardons to federal offenders</li> <li>◆ May refuse to enforce court decisions</li> </ul>
<b>Judicial Branch (Interprets Laws)</b>	
Over Legislature: <ul style="list-style-type: none"> <li>◆ May rule legislative acts unconstitutional</li> <li>◆ Chief justice presides over impeachment of president</li> </ul>	Over Executive: <ul style="list-style-type: none"> <li>◆ May rule executive actions unconstitutional</li> </ul>

**Formal Amendment Process**

One major weakness of the Articles of Confederation was the amendment process, which required unanimous approval for amendments to become effective. The framers of the Constitution anticipated the need to change the Constitution and provided a process to amend the Constitution (Article V) that required both state and national action. Amending the Constitution requires proposal, a national function, and ratification, a state function. Amendments may be proposed in Congress by two methods and ratified by two methods, creating four possible methods for formally amending the Constitution.

- ◆ proposed by two-thirds vote of each house of Congress and ratified by three-quarters of the state legislatures (used 26 times)
- ◆ proposed by two-thirds vote of each house of Congress and ratified by special conventions in at least three-quarters of the states (used once, to ratify the Twenty-first Amendment)
- ◆ proposed by a national convention called by Congress at the request of two-thirds of the state legislatures and ratified by three-quarters of the state legislatures (never used)
- ◆ proposed by a national convention called by Congress at the request of two-thirds of the state legislatures and ratified by special conventions in at least three-quarters of the states (never used)

**Formal Amendments**

Formal amendments are written changes to the Constitution. They add to, change the wording of, or delete language from the Constitution. Only 27 formal amendments have been added to the Constitution since its adoption. The first ten amendments, the Bill of Rights, were added in 1791.

**Informal Amendment Process**

Although the United States Constitution has been formally changed only 27 times, there have been many changes in the way in which the American government operates. Most of those changes have come about through the informal amendment process and do not involve actually changing the wording of the Constitution. Informal changes in the Constitution may occur in the following ways:

- ◆ **legislative actions:** Congress has passed various acts that have altered or made clear the meaning of the Constitution. For example, under Article III Congress is given the authority to create lower courts, which they did through the Judiciary Act of 1789.
- ◆ **executive actions:** The manner in which presidents use their powers can create informal amendments and expand presidential authority. The use of executive agreements rather than treaties allows the president to bypass the Senate.
- ◆ **judicial interpretation/judicial review:** The people who serve as judges and the times in which they serve affect how courts interpret laws. The concept of judicial review resulted from *Marbury v. Madison* (1803); it is not mentioned in the Constitution.
- ◆ **custom and usage:** Traditions that have been incorporated into the political system and which have lasted over time have changed the meaning of the Constitution. Senatorial courtesy in the Senate and the "no-third-term" tradition in the Presidency (until the Twenty-second Amendment made it part of the Constitution) are examples.

**The Constitutional Basis of Federalism**

Although the term federalism is not found in the United States Constitution, it is clearly defined in the delegated, concurrent, and reserved power of the national and state governments.

- ◆ **delegated powers:** expressed, or enumerated powers, those specifically given to the national gov't (Articles I-V)
- ◆ **implied powers:** although not expressed, powers that may be reasonably inferred from the Constitution (Article I, Section 8, Clause 18 - the Necessary and Proper or Elastic Clause)
- ◆ **inherent powers:** powers that exist for the national government because the government is sovereign
- ◆ **concurrent powers:** powers that belong to both the national and state governments
- ◆ **reserved powers:** powers belonging specifically to the state because they were neither delegated to the national government nor denied to the states (Article IV; Amendment 10)

National Powers (Expressed, Implied, Inherent)	National and State Powers (Concurrent)	State Powers (Reserved)
<ul style="list-style-type: none"> <li>◆ Regulate <b>interstate</b> commerce</li> <li>◆ Coin and print money</li> <li>◆ Declare war</li> <li>◆ Establish federal courts below the Supreme Court</li> <li>◆ Conduct foreign relations</li> <li>◆ Make all laws "necessary and proper"</li> <li>◆ Acquire and govern U.S. territories and admit new states</li> <li>◆ Regulate immigration and naturalization</li> </ul>	<ul style="list-style-type: none"> <li>◆ Levy taxes</li> <li>◆ Borrow money</li> <li>◆ Spend for general welfare</li> <li>◆ Establish courts</li> <li>◆ Enact and enforce laws</li> <li>◆ Charter banks</li> </ul>	<ul style="list-style-type: none"> <li>◆ Regulate <b>intrastate</b> commerce</li> <li>◆ Establish local governments</li> <li>◆ Establish public school systems</li> <li>◆ Administer elections</li> <li>◆ Protect the public's health, welfare and morals</li> <li>◆ Regulate corporations</li> <li>◆ Establish licensing requirements for certain regulated professions</li> </ul>

**Prohibited powers** - powers that are denied to the national government, state governments, or both (Article I, Sections 9 and 10; Amendments); For example, neither the national government nor state governments may pass an ex post facto law or a bill of attainder.

### Interstate Relations

Article IV of the Constitution addresses the issue of relationships between the states. It offers several provisions:

- ◆ **full faith and credit clause:** States are required to recognize the laws and legal documents of other states, such as birth certificates, marriage licenses, drivers' licenses, wills.
- ◆ **privileges and immunities clause:** States are prohibited from unreasonably discriminating against residents of other states. Nonresidents may travel through other states; buy, sell, and hold property; and enter into contracts (does not extend to political rights such as the right to vote or run for political office, or to the right to practice certain regulated professions such as teaching).
- ◆ **extradition:** States may return fugitives to a state from which they have fled to avoid criminal prosecution at the request of the governor of the state.
- ◆ **interstate compacts:** States may make agreements, sometimes requiring congressional approval, to work together to solve regional problems. Some examples are "hot-pursuit agreements," parole and probation agreements, the Port Authority of New York and New Jersey, and regulating the common use of shared natural resources.

### Guarantees to the States

Article IV of the Constitution provides national guarantees to the states:

- ◆ republican form of government
- ◆ protections against foreign invasion
- ◆ protections against domestic violence
- ◆ respect for the geographic integrity of states

#### Advantages of Federalism

- ◆ Ideally suited to large geographic area because it encourages diversity in local government
- ◆ Avoids concentration of political power
- ◆ Accommodated already existing state governments
- ◆ States serve as training grounds for national leaders
- ◆ Keeps government close to the people

#### Disadvantages of Federalism

- ◆ Inflexibility inherent in a written constitution
- ◆ Complex, with many governments to deal with
- ◆ Duplication of offices and functions
- ◆ Conflicts of authority may arise

### Establishing National Supremacy

Article VI of the United States Constitution contains the **Supremacy Clause**, which helps to resolve conflicts between national and state laws. Because two levels of government are operating within the same territory and over the same people, conflicts are bound to arise. The Supremacy Clause states that the Constitution, its laws and treaties shall be the "supreme law of the land." The Supreme Court upheld this supremacy in *McCulloch v. Maryland* (1819). The Supreme Court continued to expand the powers of Congress over interstate commerce in *Gibbons v. Ogden* (1824).

#### *McCulloch v. Maryland* (1819)

The Supreme Court dealt with the issues of the necessary and proper clause and the supremacy clause when Maryland imposed a tax on the Baltimore branch of the Second National Bank of the United States. Chief cashier James McCulloch refused to pay the tax, Maryland state courts ruled in the state's favor, and the United States government appealed to the Supreme Court. The Marshall court ruled that although no provision of the Constitution grants the national government the expressed power to create a national bank, the authority to do so can be implied by the necessary and proper clause (Article I, Section 8, Clause 18). This ruling established the implied powers of the national government and national supremacy, the basis used to strengthen the power of the national government.

#### *Gibbons v. Ogden* (1824)

At issue was the definition of commerce and whether the national government had exclusive power to regulate interstate commerce. The New York legislature gave Robert Livingston and Robert Fulton exclusive rights to operate steamboats in New York waters and Aaron Ogden the right to operate a ferry between New York and New Jersey. Thomas Gibbons had received a national government license to operate boats in interstate waters. Ogden sued Gibbons and won in the New York courts; Gibbons appealed to the Supreme Court. The Marshall court defined commerce as including all business dealings,

and the power to regulate interstate commerce belongs exclusively to the national government. Today, the national government uses the commerce clause to justify the regulation of numerous areas of economic activity.

### **Federalism Today**

Since the founding of the United States, society has changed, and federalism has evolved to meet the changes and challenges.

### **Dual Federalism**

The earliest (1789-1932) interpretation of federalism is the concept of dual federalism, which views the national and state governments each remaining supreme within their own sphere of influence. This form of federalism is often referred to as "layer cake federalism," because each level of government is seen as separate from the other, with the national government having authority over national matters and state governments having authority over state matters. The early beliefs that states had the sole responsibility for educating their citizens and the national government had the sole responsibility for foreign policy issues are examples of dual federalism.

### **Cooperative Federalism**

In the 1930s the interpretation of federalism shifted to that of the national and state governments sharing policymaking and cooperating in solving problems. Cooperative federalism or "marble cake federalism" as it came to be known, grew from the policies of the New Deal era and the need for the national government to increase government spending and public assistance programs during the Great Depression. The cooperation of the national and state governments to build the national interstate highway system is an example of cooperative federalism. The expansion of cooperative federalism during (President Lyndon B. Johnson's) Great Society required even greater cooperation from the states in return for federal grants.

### **New Federalism**

During the administrations of Richard Nixon, Ronald Reagan, and George H. W. Bush the national government attempted to implement a reversal of cooperative federalism and place more responsibility on the states about how grant money would be spent. The term devolution-a transfer of power to political subunits-has been used to describe the goals of new federalism. An example of new federalism is welfare reform legislation, which has returned more authority over welfare programs to the states.

### **Fiscal Federalism**

The national government's patterns of spending, taxation, and providing grants to influence state and local governments is known today as fiscal federalism. The national government uses fiscal policy to influence the states through granting or withholding money to pay for programs.

- ◆ **grants-in-aid programs** - money and resources provided by the federal government to the state and local governments to be used for specific projects or programs. The earliest grants often covered public works projects such as building canals, roads, and railroads, and land grants for state colleges.
- ◆ **categorical grants** - grants that have a specific purpose defined by law, such as sewage treatment facilities or school lunch programs; may even require "matching funds" from the state or local governments; categorical grants may be in the form of project grants (awarded on the basis of a competitive application, such as university research grants) or formula grants (awarded on the basis of an established formula, such as Medicaid).
- ◆ **block grants** - general grants that can be used for a variety of purposes within a broad category, such as education, health care, or public services; fewer strings attached so state and local governments have greater freedom in how the money is spent; preferred by states over categorical grants.
- ◆ **revenue sharing** - proposed under the Johnson administration and popular under the Nixon administration, a "no strings attached" form of aid to state and local governments; could be used for virtually any project but never exceeded more than two percent of revenues; eliminated during the Reagan administration.
- ◆ **mandates** - requirements that are imposed by the national government on the state and local governments; for example, the Americans with Disabilities Act (1990) mandates that all public buildings be accessible to persons with disabilities. Mandates often require state or local governments to meet the requirement at their own expense (unfunded mandates). After the mid-term elections of 1994, the Republican-controlled Congress passed the Unfunded Mandate Reform Act, which imposed limitations on Congress's ability to pass unfunded mandate legislation.