

Chapter 2

The Living Constitution

Key Chapter Questions

1. How does power check power in America's constitutional government?
2. What are the origins of judicial review, and what consequences follow from the acceptance that judges are the official interpreters of the Constitution?
3. What developments have modified the way the system of checks and balances works?
4. How have changes in our informal, unwritten Constitution kept our constitutional system up to date?
5. How can the Constitution be amended?
6. Why and how was the Equal Right Amendment for women eventually defeated?

Chapter Outline

- I. Introduction
 - A. As the Constitution won the support of Americans, it began to take on the aura of natural law
 - B. Optimists and pessimists alike have accepted Constitution
 - C. Many Americans revere Constitution, but are unaware of its specific provisions
 - B. Constitution is a supreme and binding law that both grants and limits power
- II. Checking power with power
 - A. Separation of powers
 1. Allocation of constitutional authority to each of the three branches of the national government
 - B. Checks and balances: ambition to counteract ambition
 1. Each branch has a role in the actions of others
 2. Each branch is politically independent of the others
 3. A majority of the voters can win control over only part of the government at one time
 4. Independent national courts are provided
 - C. Modifications of Checks and Balances
 1. The rise of national political parties
 - a. The impact of divided government
 2. Expansion of electorate and changes in electoral methods
 3. Establishment of agencies deliberately designed to exercise legislative, executive, and judicial functions
 4. Changes in technology
 - a. Greater power to press/TV
 - b. Enhanced power of president, organized interests
 5. The emergence of Presidential Power (world problems, perpetual emergencies, high visibility)
- III. Judicial review and the "guardians of the Constitution"
 - A. Introduction
 - B. Origins of judicial review
 1. Framers did not specifically provide for judicial review
 - C. *Marbury v. Madison* (1803)
 1. Court could not enforce an unconstitutional law (Section 13 of Judiciary Act)

2. Chief Justice John Marshall reasoned that judges should interpret the Constitution, not the President or Congress
 3. Judicial review became established due to this case
 4. A single person may challenge an existing law through judicial hearings
- D. The British and American systems: a study in contrasts
1. A good example of a constitutional government without checks and balances
 2. Members of the House of Commons have almost complete constitutional power
 3. Majority party leaders serve in cabinet (prime minister is head of party)
 4. Loss of majority support in House of Commons
 5. No high court to declare acts of Parliament unconstitutional (U.S. Supreme Court can)
 6. Based on majority rule
 7. Whereas United States diffuses control/responsibility, the British system concentrates control/responsibility in the legislature
 8. United States has a written Constitution, Britain does not
 9. In October 2000, England adopted European Convention on Human Rights--gave ordinary citizens first American-style Bill of Rights
- IV. The Constitution as an instrument of government
- A. Congressional elaboration/Impeachment and Removal Power
 1. Congressional elaboration through laws, rules of procedure, practices of Congress
 2. Impeachment and removal power
 - a. Article 1 gives the House power to bring impeachment charges, and the Senate tries all impeachment cases (conviction by two-thirds vote)
 - b. House has impeached 17 of 67 individuals; Senate has convicted seven (all federal judges)
 - c. Article III exempts cases of impeachment from jury trial requirement
 - d. Article I exempts cases of impeachment from the president's pardoning power
 - B. Presidential practices
 1. Executive privilege/executive orders (latter has the force of law)
 2. Impoundment of funds previously appropriated by Congress
 3. Right to send armed forces into hostilities
 4. Right to propose legislation to Congress and work to secure its passage
 - C. Custom and usage
 1. Has democratized our Constitution (presidential and vice presidential TV debates)
 - D. Judicial interpretation
 1. Supreme Court has changed constitutional interpretations to reflect new social economic conditions
- V. Changing the letter of the Constitution
- A. Constitution should not change as an expression of basic and timeless personal liberties, but should adapt to changing conditions (amendment process)
 - B. Proposing amendments
 1. Method by a two-thirds vote of both houses of Congress (only method used so far)
 - a. Congress has proposed 31 amendments
 - b. Increasing number of congressional attempts at constitutional amendments, for example, the Balanced Budget Amendment
 - c. Popularity of proposing amendments is due to trying to make a more responsive system
 - d. The Twenty-seventh amendment took 203 years, a "reasonable time"?

2. Method by a convention called by Congress at the request of the legislatures in two-thirds of the states (has never been used)
- B. Ratifying amendments
1. Two methods
 - a. Approval by three-fourths of state legislatures
 - b. Approval by specifically called ratifying conventions in three-fourths of the states
 2. Seven year period provided for ratification
- C. Ratification politics
1. The Equal Rights Amendment (passed by Congress in 1972)
 - a. Amendment fell three states short of ratification
 - b. Amendment became embroiled over draft, labor, and abortion issues
 - c. Was extended by Congress until 1982, but still fell three state legislatures short
 2. Gregory Watson started ratification movement for 27th Amendment