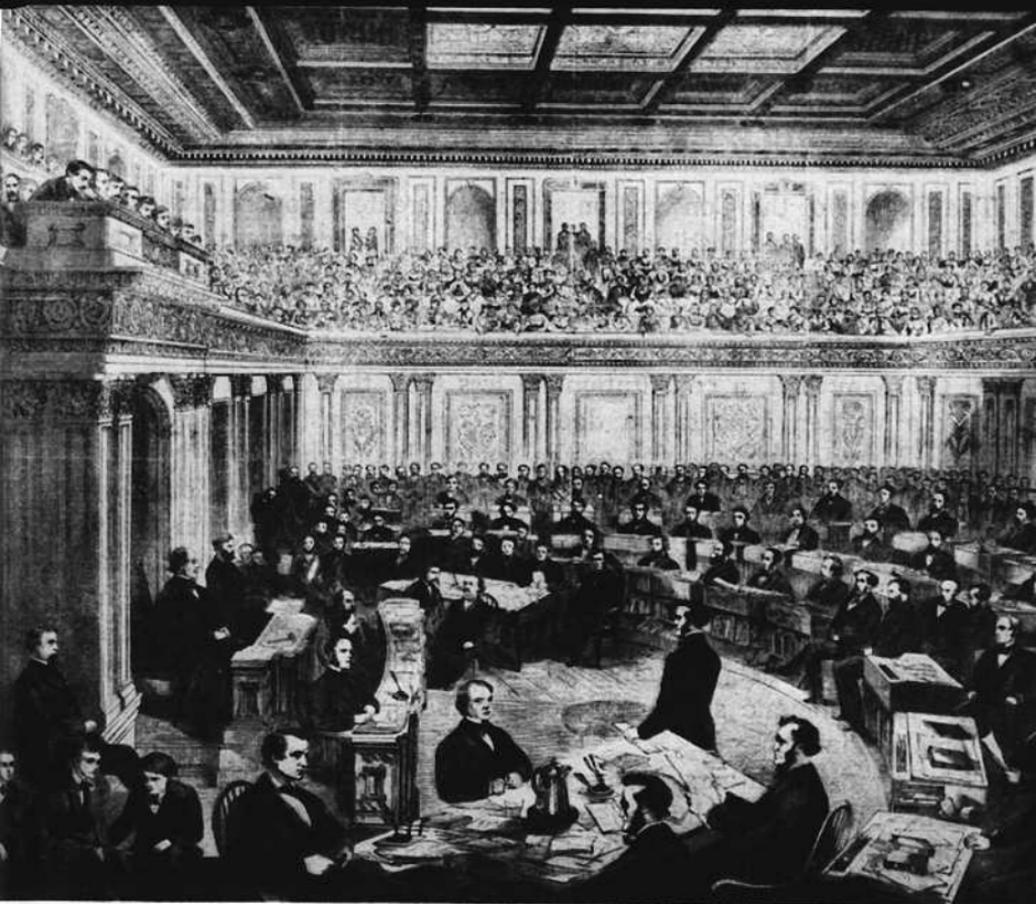


6. Principles of the Constitution



Bettman Archive (Engraving by Theo. J. Davis, 1868)

THE Constitution provides the fundamental law under which the national government operates. It establishes the several branches of the government. It confers certain powers upon the government, and denies it others. It outlines the relationships between the national government and the States, and the national government and the citizens. It sets forth means for amending the national law.

The major principles

At the time of its adoption the Constitution was unique. It possessed certain salient principles: the rule of law, or constitutionalism; popular sovereignty; the republican form of government; a federal system; the separation of powers, coupled with checks and balances; and the protection and extension of free enterprise. Each and every one of these principles helped to produce a "limited government." Alone, each of these principles was

known at least in theory, if not in practice. The uniqueness of the American Constitution lay in their combination in a single document proposing to organize a government for a country of continental dimensions. Subsequently the American Constitution has been imitated often in form but never in spirit nor in operation.

THE RULE OF LAW, OR CONSTITUTIONALISM

The Fathers of the Constitution sought to create a government based on the rule of law, or constitutionalism. This latter term must be carefully distinguished from *constitution*, for there is no necessary correlation. A *constitution* is the organic or fundamental law of a state. Every country with an established government has a constitution; Soviet Russia has, and Nazi Germany had, a constitution no less than the United States. Even having a written constitution does not confer constitutionalism upon a nation. Many countries, such as the Soviet Union, that have written constitutions do not possess constitutionalism. *Constitutionalism*, or its virtual equivalent, the rule of law, may be defined as a legal order in which the laws are stable, can be known to all, and cannot be subverted by the caprice of a ruler or official. For instance, constitutionalism is the trait of a government in which every person charged with the same crime will be tried in the same fashion and, if convicted, will receive the same sentence regardless of his economic status, political attitudes, or any other ground for personal distinction.

The Founding Fathers, along with many other contemporary political theorists, drew a sharp line between the rule of law and its opposite, the rule of men. The numerous tyrannies of George III alleged in the Declaration of Independence typified for them the spirit of the rule of men. They felt that a government should be based on a rule of law which could prevent despotic behavior by their governors. The social compact, incarnated in a written constitution, seemed to be the best mode of irrevocably guaranteeing the rule of law. It should be borne in mind that for this period law had a much greater dignity, a more impressive source, than it has today. Numerous modern legists hold that law is but the expression of the moral and ethical code of the community. To the Founding Fathers, law comprised a universal code bequeathed by the Creator. This notion had been expounded by Aristotle in ancient times and by St. Thomas Aquinas in the medieval era. It had been widely accepted throughout Western Civilization by political philosophers; it reached America primarily by means of such writings as those of John Locke in England and François Voltaire in France. American leaders were imbued with this belief not merely because they were conversant with the writings of Locke and Voltaire but also, perhaps more important, because the principle of natural

The Senate as a Court of Impeachment of Andrew Johnson. So marked is the physical separation of the branches of government in the Constitution that the impeachment and trial of the President is the only occasion that formally assembles the three branches together, and then, of course, the President is an unhappy party.

law had permeated American intellectual life. The Declaration of Independence is an outstanding statement based upon a doctrine of natural law. The Constitution was an effort to actualize a doctrine of natural law.

POPULAR SOVEREIGNTY

The Constitution envisions a government based upon the active consent of the people. This is the doctrine of popular sovereignty; the people are deemed the fountainhead of political authority. It should at once be pointed out that the term "people" had a rather restricted sense in the eighteenth century. The Federalists confined the term to the well-to-do; even Thomas Jefferson perhaps would have excluded the urban workers. Within these limitations, the idea of popular sovereignty was current and enjoyed the respectability of tradition; it was derived not only from John Locke but also from as ancient a document as the Magna Carta. Its premise was that political authority, descending from the Creator, was conferred upon the people, who in turn granted a portion of it to their rulers. It was to be contrasted with the belief, then still prevailing on the European continent, that authority was extended by the Creator to the king or emperor, to be exercised at his discretion subject only to divine restraint. The principle of popular sovereignty in those days was the instrument for limiting the powers of government. Since all power was held to be inherent in the people, and since only a portion of this power was transferred to the rulers, the authority of the rulers was limited to that delegated part. The other powers still resided in the people. Whereas this doctrine was only implicit in the original Constitution, it was more clearly declared in the Tenth Amendment.

The Constitution itself simply erected a government in which more or less democratic rule was possible. It has been noted above that popular sovereignty did not in the eighteenth century mean universal adult suffrage, or rule by all the people. The conventions which ratified the Constitution were elected by fewer than ten per cent of the population. The authors of the Constitution feared an extensive electorate; and they established numerous safeguards against it in the Constitution itself. Only the House of Representatives was to be directly elected; the President and the Senate were to be indirectly elected, and the judiciary appointed and confirmed by indirectly elected officers. Even the electors of the House of Representatives were subject to limitations by State laws and constitutions, which often set property-owning, taxpaying, or religious qualifications for the suffrage. Quite probably this use of varying means for choosing public officials in part comprised another effort to achieve a balance among interests, in this instance between the economically prosperous and those who were not so fortunate.

The full emergence of the democratic creed in the nineteenth century did not upset the general functioning of the American government, nor did it require lengthy formal amendment of the Constitution. Beginning first at the level of the State governments, and later in the national government,

the people won an increasingly greater political power within constitutional bounds. For example, one important formal constitutional change was the adoption of the Seventeenth Amendment, providing for the popular election of the Senate; and in practice, through their power to nominate candidates for the Senate, the voters of more than half of the States already had some voice in senatorial elections. Thus a constitution drafted with the ideals of an enlightened eighteenth-century aristocratic group was readily adapted to the principles and behavior of a twentieth-century democratic people.

A REPUBLICAN FORM OF GOVERNMENT

The Constitution creates a republican form of government. The Founding Fathers thought such a form necessary in order to insure the principle of popular sovereignty. In the twentieth century several monarchies, such as those of Great Britain, Holland, Belgium, and Sweden, have acknowledged the ultimate authority of the people. Two centuries ago, however, monarchic government was closely associated with the principle of rule by divine right. As the Declaration of Independence attests, George III's ministers were held to be responsible to him, and equally reprehensible in their actions toward the colonies. Hence it was felt that only a republican government, in which public officials are subject to frequent change, or at least criticism, through direct or indirect election, could safeguard the rule of law. Denied permanent tenure, officials could not lay claim to ruling by divine right.

A FEDERAL SYSTEM

The Constitution establishes a federal system of government, based on the two levels of State and nation. Figure 13 presents the contrast between the new federal and old confederative systems. This system affords a geographical distribution of powers, some being entrusted to the federal government, a second group to the States, and a third group to both the federal government and the States. In a purely practical sense this form of government was almost inevitable at the time the Constitution was drafted, since the thirteen States had become accustomed to viewing themselves as sovereign nations. Their people and their governments could not be expected to surrender voluntarily all their powers to the new central regime. Furthermore, considering the speed of transportation and communication at the time—European travelers often complained about the poor condition of American roads—it would have been well-nigh impossible for the central government at New York to have supervised matters of sheerly local importance.

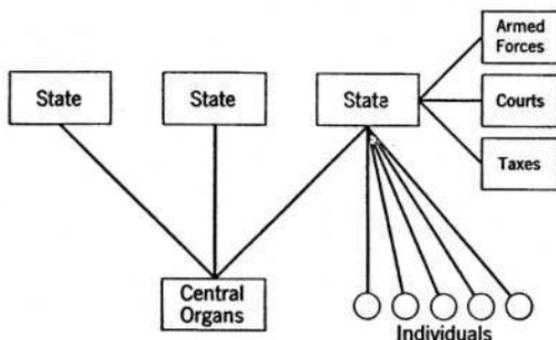
Hence the national government was granted only such powers as were thought to be of national interest, those of conducting war and peace, managing foreign relations, regulating interstate and foreign commerce, coining money, and the like. The remaining powers were left to the States,

or to the people. The federal system allows representation to local, State, and regional claims that could be stifled in a centralized, unitary state. The American federal system should be compared with the unitary framework in Great Britain, France, and the American States themselves, where the central government creates all local governments and endows them with their powers.

THE SEPARATION OF POWERS; CHECKS AND BALANCES

The Constitution provides a government in which the different powers of ruling are separated among various governing organs. Following Locke and the Baron Charles de Montesquieu, author of the influential work, *Spirit of the Laws* (1748), it creates a functional distribution of powers. In this way the Founding Fathers discerned three principal powers: legislative, executive, and judicial. To implement these powers they established three branches of government: Congress, the presidency, and the federal

Confederative Government



Federal Government

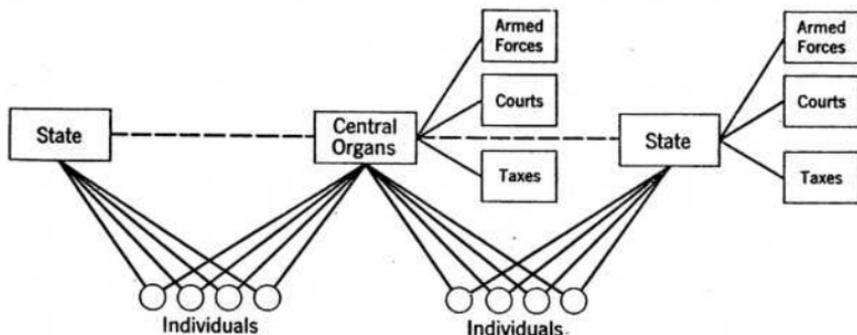


Figure 13. Confederative and Federal Government.

judiciary. It was held to be a great peril to the rule of law that any two of these powers be conferred primarily upon the same organ. Therefore each of the three organs was entrusted chiefly with one of the three powers.

This type of government, the *presidential republic*, which is commonest among the nations of the Americas, is often contrasted with the *parliamentary* system that characterizes the representative governments of Europe. In the parliamentary system political power appears to be concentrated in the legislative assembly; the legislature names as an executive a cabinet whose members are drawn from the majority party or coalition of the legislature; and it dismisses the cabinet by registering an adverse vote on a measure proposed by the cabinet. Under this system, it is argued, there is no separation of powers; all power belongs to the legislative branch.

This is an erroneous view so far as the British government is concerned. Whereas no constitutional separation of powers exists, there does occur a functional division. Members of the cabinet perform three quite distinct functions: (1) as members of Parliament, they vote to enact laws; (2) as members of the executive, they carry out the laws; and (3) unless they are ministers without portfolio, as heads of government departments they convey the policy of the majority party to the various administrative agencies of the state. Moreover, it has been many years since Parliament by an adverse vote has ousted a British cabinet. For decades the British executive has been so strong that it has called elections for a new Parliament rather than yield to the incumbent Parliament. Finally, the strength of the British party system has made the Prime Minister, as head of the majority party, comparatively independent of Parliament. Thus there is a greater separation of powers under the British parliamentary system than appears on the surface.

On the continent, however, and especially in France, for a number of reasons the cabinet has never won the power and quasi-independence that it enjoys in Great Britain; as a result it is often overthrown by a parliamentary vote. Consequently the chief executive is often at the mercy of the legislature. On the other hand, precisely because the executive is so weak, the permanent high officials of the bureaucracy gain everyday powers of great importance; this process creates in effect an unofficial separation of powers.

Even in the United States the authors of the Constitution were not so doctrinaire as to attempt a complete separation of powers. What they sought was to avoid the control of any two powers by one governmental organ. Hence each of the organs of the national government, while chiefly concerned with one of the three powers, participates to some degree in each of the other two. For example, Congress enters the executive function by approving treaties, and the judicial through its power to impeach the President. The President enters the legislative field through his power to sign or to veto laws, and the judicial through his powers of pardon and reprieve. The judiciary participates in both executive and legislative functions through its power of interpreting the laws, in a large number of specific cases, in ways that are not invariably agreeable to the other two branches.

(The Index to this book under "checks and balances" points to a number of additional illustrations.)

Thus the separation of powers is spanned by the checks and balances which each branch of the government offers the other two, so that no one branch possesses a monopoly of even one of the governing powers. By refusing to sign a law the President may bar legislation which he considers unjust. Through particular interpretations of the laws, the federal courts may on occasion alter the will of the President and Congress. By refusing to approve a treaty the Senate may impair the President's power to conduct foreign affairs in a way congressmen think improper. In theory the principle of the separation of powers coupled with the system of checks and balances makes each organ of the government a perpetual sentinel over the other two.

Figure 14 depicts the separation of powers and the system of checks and balances in the American government.

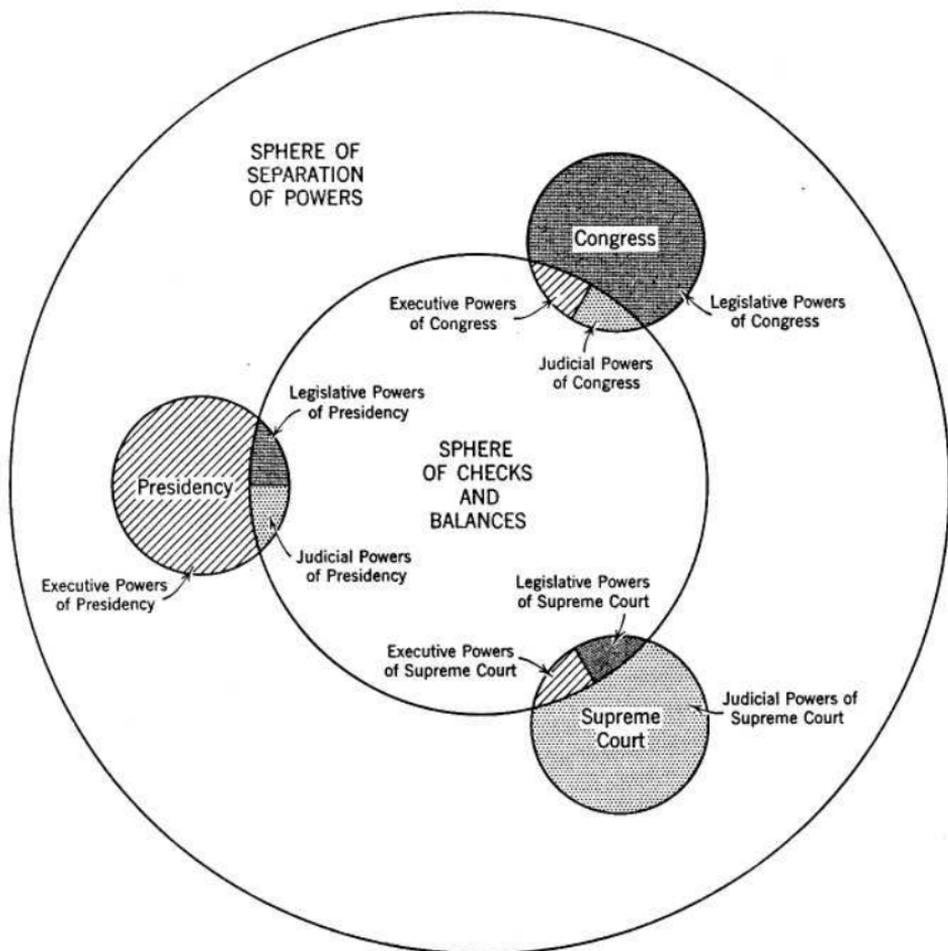


Figure 14. The Separation of Powers and Checks and Balances. Each major branch of the government has a large sphere of powers clearly its own, plus some powers of the type possessed by the other two branches.

THE PROTECTION AND EXTENSION OF FREE ENTERPRISE

The five principles just described are mainly political: they determine the kind of government machinery and how the machinery will work. But they also are very important to the economic order of society. Thus constitutionalism gives hospitable surroundings to businessmen because they can know the rules under which they may operate. The rules are stable, and will not be twisted to the desires of the government. Popular sovereignty, especially as it was first conceived, gave to the middle classes the justification for insisting that the government follow their wishes. A republican form of government guaranteed bankers, merchants, and manufacturers freedom from hereditary discrimination and relief from the unsympathetic dominion of a nobility.

The system of the separation of powers and of checks and balances gave the businessman (1) a free judiciary that decided cases without political abuse; (2) a legislature springing only partially from the mass of people that might become unfriendly to business; and (3) an executive who could check the legislature by his veto, who had no powers to hamper business, and who was efficiently set up to protect business and commerce in ways prescribed by the Constitution. The federal system, insofar as it was State-controlled, limited the scope of operations of those men interested in national and international business; however, insofar as it was nationally-controlled, and thus a great step away from the Confederation, it promoted those same interests.

This inviting political home for free enterprise was then fitted out with substantial economic furniture. Some major clauses and many minor ones demonstrate the concern of the Constitution with protecting and expanding free enterprise. A guiding principle of most of its authors and of the provisions themselves was, "What is good for business is good for the country." Examine the Constitution: patents are protected; copyrights are protected; contracts are protected; property is protected; payment of the national government debt is guaranteed; a uniform monetary system is provided, and the States are restrained from the coinage of money; standards of weights and measures are provided for; even the slave trade is protected for a certain period of time despite the humanitarian feelings that were shocked by the idea of "human chattels." The national government is granted the great power to regulate interstate and foreign commerce; it is allowed to levy customs and excise taxes. In sum, the Constitution was not only a pioneering venture into the mechanics of government; it was also a deep expression of faith in the good of economic free enterprise.

In recent years some restraints have been placed upon the complete freedom of private business, and the government itself has become active in some economic undertakings. Yet, too, much of the later development of the Constitution redefined and strengthened the principle of free enterprise as well as the other principles heretofore described. A description of this later evolution is the task of the next chapter.

QUESTIONS AND PROBLEMS

1. Which is more important to a nation, according to your set of values, a written constitution or constitutionalism? Explain your answer.
2. Discuss the differences between the principle of *popular sovereignty* as found in the Constitution, and *democracy*, defined formally as "rule by the many" in Chapter 2.
3. Do you believe that any one of the several principles underlying the Constitution could be dispensed with without destroying constitutionalism? Explain your answer.
4. Discuss the differences between the separation of powers as it is known in the United States and as it functions to a greater or lesser degree elsewhere.
5. Reread the Constitution. Are there any other principles similar to those outlined in this chapter, perhaps not quite so important, that should be emphasized?