



PROCLAIM LIBERTY THROUGH
ORDER OF THE ASSEMBLY

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THE FOUNDING AND THE CONSTITUTION

After reading this chapter, you should be able to do the following:

- Explain how the American colonies came into being and describe the influence of British tradition on the rights that the colonists came to expect.
- Describe the factors that led to the American Revolution and explain how the basic principles of the revolution shaped the governments that followed.
- Outline the structure and power of government under the Articles of Confederation and describe the weaknesses that ultimately led to their failure as a form of government.
- Describe the delegates to the Constitutional Convention, including the issues that united and divided them and the compromises among them that led to the final document.
- Identify the four core principles and major provisions of the U.S. Constitution as well as the ways in which it was undemocratic.
- Evaluate the arguments of those on both sides of the ratification battle and the roles of the Federalist Papers and the Bill of Rights in helping to secure ratification.
- Describe the formal process of amending the U.S. Constitution as well as the informal process of amendment through interpretation.

Perspective: What Compromises Are Necessary for Ratifying a National Constitution?

It had been a long, hot summer, and the framers of the Constitution were growing weary. The process of drafting a constitution had led to passionate debates about issues ranging from the role of religion in government to how power would be shared between the national and local governments. Since convening in May, the framers had agreed that the

national government would consist of three branches: legislative, executive, and judicial. The executive branch would be led by a president. A Supreme Court would enforce the Constitution, and the representative government would be elected by the people. Now, as the end of August approached, the framers remained deadlocked on several key issues. Nevertheless, they were determined to find compromises that would allow them to finish their work and send the Constitution on for ratification. Did this scenario take place in Philadelphia during the summer of 1787? No—Baghdad, summer of 2005.

Indeed, there are some significant similarities between the experiences of the framers in 1787 America and 2005 Iraq. Both were engaged in writing what scholars refer to as “post-conflict constitutions”—that is, constitutions written after winning a struggle for independence or overthrowing an existing government. Both the Constitutional Convention in Philadelphia and the Constitutional Drafting Committee in Baghdad (each with fifty-five delegates) were attempting to solve what appeared to be insoluble political problems. In 1787 Philadelphia, the framers, concerned with the weakness of the central government under the Articles of Confederation, were attempting to create a national government strong enough to ensure compliance with national law at a time when the core principles of the recently fought American Revolution had instilled in the populace a profound distrust of coercive government by distant rulers. How could they create a national government strong enough to keep the nation together but not so strong as to undermine core principles such as liberty or to excessively infringe on the autonomy of states? In 2005 Baghdad, the framers were similarly trying to balance a strong central government with regional autonomy. And both sets of framers consisted of rival factions that disagreed fundamentally about core issues. Could consensus be built under such circumstances?

Consider also the significant differences between 1787 Philadelphia and 2005 Baghdad. For one, the American framers were working in uncharted territory. Individual American states had created constitutions in the wake of the Declaration of Independence, but the concept of a written constitution governing an entire nation was new and untested. Moreover, there had never before been a republican (that is, representative) government on the scale of the United States. In contrast, constitution writing had become something of a cottage industry by 2005. In the past 50 years, some 200 new constitutions have been drafted for nations around the world; over 25 since 2005, ranging from Angola to Zimbabwe.¹ This has allowed observers to analyze which processes work best when creating a new constitution.² Another difference was that the Iraqi framers faced a nation much more deeply divided along lines of ethnicity, language, religious sect, and region than did the American framers. Moreover, the post-conflict situations were different: Whereas the American colonists had fought to win their independence from a colonial power, a tyrannical Iraqi government had been overthrown as a result of an invasion by outside forces, and the Iraqis drafted their constitution under the watchful eye of an occupying force.

The Iraq Constitution was ratified later in 2005 and remains in place. The fact that there are similarities between it and the U.S. Constitution is no accident. The U.S. Constitution has endured and become a model for many constitutions around the world. We now take for granted the success of the U.S. Constitution, but that success is really quite amazing. The American colonies were, as historian Joseph J. Ellis put it, “generally regarded as a provincial and wholly peripheral outpost of Western Civilization.” Despite that, it became the breeding ground for a novel approach to governance that has endured the test of time and emerged as an archetype for success.³◀◀

THE AMERICAN COLONIES

In order to understand the factors that eventually led to the American Revolution, it is first necessary to understand how the colonies came into being and why they endured for so long. Europeans “discovered” America through Christopher Columbus in 1492. By then, North America had been populated for as long as forty thousand years and was already home to as many as ten million aboriginal or native people. France, Holland, and England led some explorations of the eastern seaboard of North America in the 1500s, but the road to English settlement did not really begin until 1606, when King James I issued charters to establish American colonies.

MOTIVATIONS FOR COMING TO THE COLONIES

Several factors led to the migration of people from England and other European countries to North America. One factor was religion. As early as the 1560s, French Protestants (known as *Huguenots*) came to what is now South Carolina and Florida to escape religious persecution, and the New England colonies in particular were settled by people seeking religious freedom for themselves. Religious beliefs across the colonies varied considerably. The Pilgrims—a group of religious *separatists* (those who advocated a complete break with, or separation from, the Church of England)—sailed on the *Mayflower* in 1620 and settled the Plymouth colony in Massachusetts. The Puritans—a group of *nonseparatists* (those who sought to reform the Church of England rather than break away from it)—settled the Massachusetts Bay colony, soon outnumbering the Pilgrims. The Maryland colony was originally envisioned as a haven for English Catholics, though in the end, few Catholics settled there. Meanwhile, Huguenots were also drawn to the religiously tolerant Dutch colony of New Netherland (which later became the English colonies of New York and New Jersey) because the Dutch Reformed Church there reflected the Huguenots' Calvinist beliefs.

In addition to religion, economic incentives drew people to the colonies. This was especially true in colonies from Maryland southward, where colonists were lured by the opportunity to make money by growing tobacco. Virginia, for instance, began not as a religious refuge but as a corporate colony financed by a joint stock company. As a result, the southern colonies were more religiously and ethnically diverse than their northern counterparts.⁴ The emphasis on growing crops for profit in the south led to the development of large plantations and inhibited urban development. Initially, these plantations lured young men from England and other European countries to work on them as indentured servants—laborers who entered a contract to work for no wages for a fixed period of time (usually three to seven years) in return for food, clothing, shelter, and their transportation to the colony. Some have suggested that as many as half of all white immigrants to the colonies during the seventeenth and eighteenth centuries may have come as indentured servants. Later, white servitude gave way to slavery when plantation owners resorted to buying slaves from Africa.

BRITISH INFLUENCES ON AMERICAN POLITICAL THOUGHT

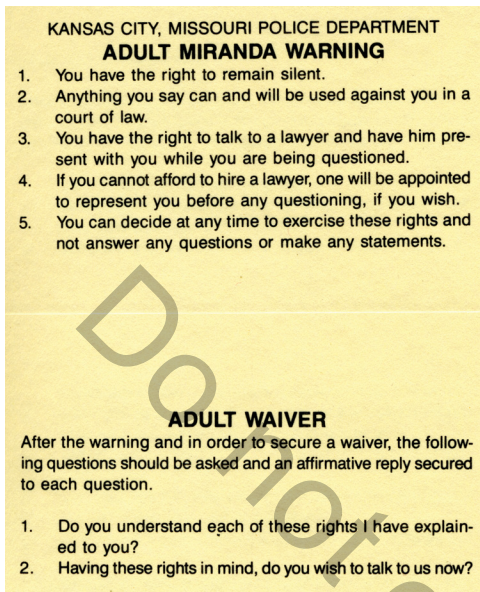
Two documents—the Magna Carta and the English Bill of Rights—greatly influenced American political thought. Each contained principles that the colonists eventually used to justify revolution. Later, those principles served as foundations for the new government they created. Likewise, two events in England in the 1600s—civil war and the Glorious Revolution—served in the short run to preoccupy the British and distract their attention from the colonies while in the long run serving as models for resisting the arbitrary power of kings.

THE MAGNA CARTA The *Magna Carta* (which means “great charter” in Latin, the language in which it was written) dates to 1215, when King John (ruler of England from 1199 to 1216) was forced to sign it by English barons who had revolted after John had imposed heavy taxes, waged an unsuccessful war with France, and quarreled with the Pope. It is one of the great documents in Western civilization, and its articulation of rights strongly influenced the framers of the U.S. Constitution.

The Magna Carta was a practical document designed to remedy specific abuses of King John, so it includes many provisions (or “chapters”) that are not so relevant today. Others, however, stand as a fundamental basis for the rule of law—the idea that even the most powerful leader of government is bound by the law. The most important of these is Chapter 39, which emphatically states the requirement of *due process of law*, or of fair procedures:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.⁵

This provision of the Magna Carta limited the power of kings and later served as the basis for the guarantees in the U.S. Constitution that the government shall not take a person's life,



This Miranda warning card, developed for Kansas City police officers, is intended to ensure Americans' due process rights.

liberty, or property without due process of law. Modern-day Miranda warnings are an outgrowth of this.

The fact that King John was forced to sign this document set an important precedent of free men standing up to the king. In 1297, the Magna Carta was placed in the statute books of England, where it remains to this day. By the end of the fourteenth century, the Magna Carta had come to be viewed not as any ordinary statute but as the fundamental law of the realm. Thus, opponents of King Charles I used it to justify rebellion in 1642.

CIVIL WAR, THE GLORIOUS REVOLUTION, AND THE ENGLISH BILL OF RIGHTS

In 1642, 36 years after King James I had issued the first charters establishing American colonies, civil war erupted in England. James I (who ruled from 1602 to 1625) and his son and successor, Charles I, believed in the divine right of kings—that is, the idea that kings derived their right to rule from God and were not accountable to their subjects. They thus believed that they had absolute control over Parliament (the legislature in England) and could, for example, impose taxes without the consent of Parliament. Charles I took other unilateral steps as well, including arbitrary arrests and detentions, quartering troops in private homes, and even imposing martial law. He summoned and dissolved Parliament at will and claimed an absolute right to veto any legislation it passed. Increasingly angered, Parliament and its supporters waged a civil war against the king and his supporters.

In rising up against Charles I, Parliament invoked the Magna Carta and argued that the king was violating the rights of individuals. For example, opponents of the king argued that if he could tax without the consent of Parliament, then the English people and Parliament, their representative assembly, were in a state of servitude to the king. As we will see, concern about taxation without representation later became a key issue in the road to revolution in the American colonies.

The decades that followed were rocky times in England. Charles I was eventually beheaded. When his son, Charles II, tried to succeed him, another civil war ensued. Charles II fled to France, and Parliament declared England a “free state,” to be governed as a commonwealth without a king. That commonwealth lasted from 1651 until 1659. Charles II returned to England and was restored to the throne in 1660. King Charles II was now careful not to oppose Parliament, but his brother, James II, who succeeded him in 1685, tried to reassert the divine right of kings and to rule without Parliament. As a result, he was run out of the country in what became known as the Glorious Revolution of 1688.

The action of James II led Parliament to enact the English Bill of Rights, a statute that spelled out the basic rights of Englishmen and limited the power of future monarchs. Among other things, the Bill of Rights declared freedom from taxation by royal prerogative: Only Parliament, the representative of the people, could impose taxes. Together, the Magna Carta and the Bill of Rights were considered to be part of the country’s “unwritten” constitution, which came to be seen by British citizens as containing fundamental, inviolable principles.

“NO TAXATION WITHOUT REPRESENTATION”

Some things never change: People hate taxes—or, at least, taxes that seem excessive or otherwise unfair. The colonists seethed at taxes imposed on them by Parliament because they considered them not only unfair but a flagrant violation of parliamentary power. Since the colonists had no elected representatives in Parliament, they believed that these taxes violated a fundamental principle of the English Bill of Rights: no taxation without representation. The Bill of Rights declared freedom from taxation by royal prerogative and instead gave Parliament the power to tax *because that body represented the people*. Anger over taxation without representation is, in no small measure, what led to the American Revolution.

THE SUGAR ACT AND STAMP ACT The first seeds of revolution were planted in 1764 when Parliament enacted the American Revenue Act, better known as the Sugar Act. People in

England had been complaining of too many taxes, and so Parliament used the act to shift some of the tax burden to the American colonists. The Sugar Act imposed duties on certain foreign goods imported into the American colonies—sugar and other goods, including coffee, some wines, and pimiento.

The timing could not have been worse, as the colonies were facing a bad economy. Not only did the new duties on imported goods increase prices for the colonists, but they also hurt American manufacturers of rum by making ingredients more expensive. As a result, the American rum trade was threatened to be priced out of the market; foreign buyers who had previously imported American rum now turned to other sources. Colonists reacted harshly to the Sugar Act. They quickly took up the rallying cry of “no taxation without representation.” The Massachusetts assembly proclaimed that the act deprived the colonists of “the most essential Rights of Britons.”⁶

Parliament made matters even worse for the colonists by imposing the Stamp Act the following March. From 1756 to 1763, the British had fought the French and Indian War in Canada and on the western frontier of the colonies; these battles were part of a larger struggle among a number of countries that transpired in Europe and elsewhere. British victory in the French and Indian War had left the country deep in debt, and the Stamp Act was an attempt by Parliament to raise money, ostensibly to pay for Britain’s continued military presence in North America after the war. The act imposed a direct tax on a wide array of printed materials in the colonies, including everything from legal documents to newspapers to playing cards. Such materials had to either be printed on specially marked paper or have tax stamps affixed to them to indicate that the tax had been paid.

The Stamp Act galvanized the colonies. Several colonial assemblies adopted resolutions denouncing the tax. The first and most famous was a series of resolutions passed by the Virginia House of Burgesses on May 29, 1765. These Virginia Stamp Act Resolutions (also known as the “Virginia Resolves”) stated that “the taxation of the people by themselves, or by persons chosen by themselves to represent them, . . . is the distinguishing characteristic of British freedom.”⁷ In so doing, the Virginia Resolves invoked the spirit of the Magna Carta and the English Bill of Rights.

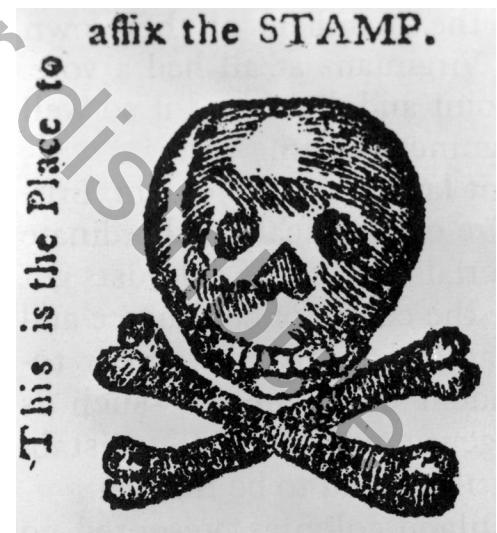
The Stamp Act also provoked representatives from nine of the thirteen colonies to gather at Federal Hall in New York in October 1765.⁸ This so-called **Stamp Act Congress** was the first official meeting of representatives from the various colonies, and it resulted in a Declaration of Rights. The declaration rejected the claim by the British Prime Minister, George Grenville, that as British subjects, the colonists enjoyed “virtual representation” in Parliament even if they did not formally elect representatives to Parliament. In direct defiance of Grenville, the declaration made it clear that “the only representatives of these colonies are persons chosen therein,” adding that “no taxes can be constitutionally imposed on [the colonies] but by their respective legislatures.”⁹

Representative bodies were not the only ones motivated by the Stamp Act to take action. Throughout the colonies, individuals formed associations known as the Sons of Liberty to attack British authority and resist taxation without representation by whatever means necessary. In some places, violent protests erupted. Those who distributed the hated stamps on behalf of the British government were hung in effigy, and in some cases, their homes were attacked. Defiant colonists refused to use the stamps and boycotted British goods.

THE BRITISH RESPONSE The reaction of the colonists to the Stamp Act alarmed the British, and in February 1766, Parliament repealed the act. But, in March, it also passed the Declaratory Act, stating that colonial bodies had “against law” claimed “the sole and exclusive right of imposing duties and taxes” in the colonies. Noting that “all [colonial] resolutions, votes, orders, and proceedings” that denied Parliament’s power to tax (including the Virginia Resolves and the Stamp Act Congress’s Declaration of Rights) were “utterly null and void,” the act reiterated that the colonies were “subordinate unto, and dependent upon the imperial crown and Parliament of Great Britain.”¹⁰

Stamp Act Congress

The first national meeting of representatives from the colonies in 1765. In response to duties (taxes) imposed by Parliament on the colonies through the Stamp Act, this Congress passed a Declaration of Rights that denounced taxation without representation—an important step toward the American Revolution.



American newspapers bitterly opposed the Stamp Act. The Pennsylvania Journal showed its displeasure by marking the location where the stamp would be placed with a skull and crossbones in its October 24, 1765 edition.



Is Revere's depiction of the Boston Massacre—British soldiers firing point-blank into a small crowd of unarmed colonists and their dog—an accurate portrayal of the event? If not, what is inaccurate about it?

Then Parliament enacted the Revenue Act of 1767, the first of the so-called Townshend Acts, named after Charles Townshend, the chancellor of exchequer (treasury), who advocated them. Whereas the Stamp Act was a direct tax on goods in the colonies, the Revenue Act (similar to the earlier Sugar Act) was an indirect tax that placed duties on imported goods, including the paper, paint, glass, and tea the colonies imported from England. Townshend assumed that indirect taxes would be more palatable to the colonists than direct taxes, but he was wrong. The Massachusetts House of Representatives reiterated the now-familiar protest: no taxation without representation.

This time, Britain's response was harsh. It ordered the royal governor to dissolve the Massachusetts legislature. Soon thereafter, it sent regiments of British troops to Boston. The troops, known as "Redcoats" for their bright uniforms, became a hated fixture there. One cold night in March 1770, a group of several hundred men and boys pelted a small band of nine Redcoats with rocks, snowballs, chunks of ice, and oyster shells. Alarmed, the soldiers fired back, killing five men. The British soldiers had been provoked, but the incident was quickly dubbed the "Boston Massacre" and used to rally opposition to the oppressive force of the British. Nonetheless, John Adams—a future president of the United

States—defended the British soldiers when they were tried for murder. He secured a verdict of "innocent" for the captain, who was tried first. In a subsequent trial of the remaining eight soldiers, six were acquitted and two were found guilty of the lesser charge of manslaughter.¹¹

THE BOSTON TEA PARTY As it had done with the Stamp Act, Britain backed down in the face of the colonial reaction to the Revenue Act. The colonists boycotted the imported goods that were subject to duties, and in 1770, Britain rescinded the duties for all goods except tea. Colonists evaded the remaining tea tax by buying smuggled tea from Holland, but Parliament foreclosed that option in 1773 when it passed the Tea Act. The primary purpose of that act was to save the nearly bankrupt East India Company by giving it a monopoly to sell tea in the colonies. Parliament lowered the price of tea so much that the tea from the East India Company—even after the tea tax—was cheaper than smuggled tea. Parliament assumed that the colonists would welcome the inexpensive tea. Instead, the colonists viewed it as a trick to get them to accept British taxation and tried to block British ships bringing the tea from the East India Company. In many cases, this blockade worked, but in Boston, a British ship refused to leave the harbor without unloading its cargo of tea and collecting the duty on it. The showdown led, on December 16, 1773, to the Boston Tea Party, in which a group of colonists disguised as Mohawk Indians boarded the ship and dumped all 342 chests of tea into the harbor. This act of defiance marked an important step toward revolution.¹²

Parliament responded to the Boston Tea Party by passing a series of measures in 1774 known as the *Coercive Acts* (or, as the colonists liked to call them, the *Intolerable Acts*), designed to punish Massachusetts. Among other things, the Coercive Acts closed Boston Harbor to all commerce until Britain received payment for the destroyed tea, brought the Massachusetts government under full British control, forbade most town meetings, and allowed British troops to be quartered in private buildings and homes in Boston.

THE FIRST CONTINENTAL CONGRESS

Though aimed at Massachusetts, the Coercive Acts had potential ramifications for all of the colonies. As a result, representatives from all of the colonies except Georgia met in Philadelphia in September and October 1774 to decide how to respond. The delegates at these meetings of

the First Continental Congress, in essence, represented twelve different nations. Although they came together in response to the common threat to their liberties posed by Great Britain, the colonies remained deeply divided on many issues. As historian Merrill Jensen put it, “The large colonies were pitted against small ones; colonies with many slaves were in opposition to those with fewer; colonies that had no western lines contended with those that did.”¹³ Despite these differences, the First Continental Congress resulted in an agreement by the colonies to engage in a total boycott of British goods.

The First Continental Congress also produced a declaration of rights and grievances. Among other things, the declaration—drawing on the language of the English philosopher John Locke—asserted the right to “life, liberty, and property”; denounced the keeping of British troops in the colonies in times of peace as “against law”; and reiterated that “the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council.”¹⁴ Since the colonists were not represented in Parliament, they claimed the right to a “free and exclusive power of legislation” in their own colonial assemblies, subject only to veto by the king.

The rallying cry of “no taxation without representation” had evolved into something far more significant: All legislation produced by a parliament in which the colonists were not represented was now considered suspect. And colonies with disparate interests and outlooks were uniting against Great Britain and around the cause of liberty. The liberty that the colonists sought was a direct outgrowth of rights espoused by the British tradition. England’s failure to enforce those rights precipitated revolution.

REVOLUTION AND INDEPENDENCE

Although some members of the First Continental Congress still hoped for reconciliation with Britain, war loomed. In anticipation of rebellion, British troops fortified Boston. Colonists also prepared for conflict by organizing small groups of armed militias known as *minutemen*. On April 19, 1775, fighting broke out in Massachusetts in the towns of Lexington and Concord.

THE SECOND CONTINENTAL CONGRESS

After the violence in Lexington and Concord, the colonies quickly sent representatives to the Second Continental Congress to oversee steps toward independence and manage the impending war. By the time the Second Continental Congress convened in Philadelphia on May 10, 1775, full-fledged war had already erupted. The congress officially created the Continental Army and appointed George Washington to command it. But more than a year would pass before the Second Continental Congress voted to approve the Declaration of Independence. The congress then turned to writing the first, ill-fated national constitution: the Articles of Confederation.

The delay in formally declaring independence occurred because many colonists, who came predominantly from Britain, remained reluctant to make a full break with their homeland. Breaking their allegiance to the king—a powerful symbolic figure—proved especially difficult. Then, in January 1776, Thomas Paine anonymously published his 48-page pamphlet, *Common Sense*. Saying, “I offer nothing more than simple facts, plain arguments, and common sense,” Paine provided a compelling justification for independence, and did so—as historian Joseph J. Ellis put it—“in language that was simultaneously simple and dazzling.”¹⁵ Paine took aim at King George III himself and sharply dismissed the institution of monarchy. The pamphlet’s timing could not have been better: Colonists had just learned that the king had rejected any effort to resolve the dispute with them diplomatically and would instead seek to smash the rebellion with military force.¹⁶ Breaking allegiance to the crown no longer seemed so difficult. And even though Parliament had been the source of the legislation that had prompted the dispute between Britain and the colonies, the king now became the symbolic enemy.

Common Sense was an instant best seller, with some 120,000 copies sold in the first three months alone and 500,000 copies sold within a year. This was at a time when the official population count of the colonies (excluding slaves and Native Americans) was only about 2.5 million.¹⁷ A work would need to sell nearly 62 million copies to reach a proportionate number of Americans today.¹⁸ Clearly, Paine’s rallying cry for independence had hit a nerve.



This British cartoon dismisses Thomas Paine as a radical revolutionary. His best-selling pamphlet *Common Sense* (skewered on the scroll he is holding as “Common Nonsense”), helped fuel the fight for revolution.

Declaration of Independence A statement written by Thomas Jefferson and approved by the Second Continental Congress on July 4, 1776, that asserted the independence of the American colonies from Great Britain.

social contract The idea, drawn from the writings of John Locke and others, that government is accountable to the people and bound to protect the natural rights of its citizens. If the government breaks this contract, the people have the right to rebel and replace the government with one that will enforce it.

THE DECLARATION OF INDEPENDENCE

In May 1776, only four months after the publication of *Common Sense*, the Virginia House of Burgesses instructed its delegates to the Second Continental Congress to propose independence—making Virginia the first of the colonies to call for such a resolution. That same month, the Continental Congress urged colonies to adopt constitutions in anticipation of impending independence and statehood. Then, on June 7, Virginia’s Richard Henry Lee proposed before the Continental Congress “that these United Colonies are, and of right ought to be, free and independent States.”¹⁹ To implement Lee’s resolution, the Continental Congress created a committee consisting of John Adams, Benjamin Franklin, Thomas Jefferson, Robert Livingston, and Roger Sherman to prepare what would eventually become the American **Declaration of Independence**.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights,²⁰ that among these are Life, Liberty, and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government.

In writing these words, Jefferson drew upon John Locke’s *Two Treatises of Government* (1689). Locke believed that people enjoy certain natural rights, including “life, liberty, and property,” that cannot be taken away without their consent. Through a **social contract**, people come together in a society under a government whose authority they agree to obey. If, however, a government deprives them of their natural rights without their consent, the social contract is broken, and the people have a right to rebel and replace that government with one that will honor the terms of the social contract. This concept of a social contract led the newly independent states, and eventually the new federal government, to adopt written constitutions. These constitutions served as contracts spelling out the powers of government and the rights of the people.

In making his case for rebellion in the Declaration of Independence, Jefferson listed a specific set of grievances against Britain. In doing so, he did not even mention Parliament but rather took aim exclusively at King George III: “The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.” Jefferson listed 27 specific grievances and, finally, declared that

these United Colonies are, and of Right ought to be Free and Independent States, that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved.

Meanwhile, some delegates to the Continental Congress thought it premature to declare independence. South Carolina and Pennsylvania opposed independence in a preliminary vote on July 1, and New York abstained because its delegates did not have clear instructions from home about how to vote. (Each colony had a single vote in Congress determined by a majority vote of the delegates from that colony.) In an attempt to secure unanimity among the colonies,

Congress delayed the final vote on Lee's resolution until the next day. The tactic worked. South Carolina reversed its vote and, as the result of strategic abstentions by two of its delegates, Pennsylvania now voted 3–2 in favor of independence instead of 4–3 against it. New York still abstained, but the New York Provincial Congress formally voted to support independence a few days later. Congress approved the final language of the Declaration of Independence on July 4, 1776, and the first public reading of the Declaration took place four days later in Philadelphia. The next day, July 9, George Washington ordered that the Declaration be read to members of the Continental Army in New York.

Independence had been declared, but the Revolutionary War dragged on for five years. The official peace accord, in which Great Britain recognized the independence of the United States, was not signed until 1782.

THE ARTICLES OF CONFEDERATION

With the Declaration, the colonies asserted their independence but still mostly lacked a formal government. In the months preceding the Declaration, would-be states had begun drafting their own written constitutions. By the end of 1776, all but three of the states had drafted and ratified constitutions. Georgia and New York followed suit in 1777, as did Massachusetts in 1780. These constitutions created state governments. However, a new national government to oversee the 13 states was also needed. The problem—similar to the one faced in Iraq in 2005—was how to balance regional autonomy with national power.

In the short run, the Second Continental Congress operated as the national government. The Continental Congress also took responsibility for writing a national constitution and, in fact, had appointed a committee for this purpose even before voting to approve the Declaration of Independence. But the process of drafting the constitution proved to be slow. The problem, above all, was that the new states were understandably wary of central authority. Furthermore, differences among the states led to heated debates. Large states wanted proportional representation in the national government, while small states wanted equal representation. Similarly, there was debate about whether states should supply funds to the national government in proportion to their population. If so, did the slave population count? Southern states, with large slave populations, said no. Later, during the Constitutional Convention of 1787, southern states would take a contradictory stance and argue that their slave population should count for purposes of representation in Congress. At this juncture, however, the issue did not arise because all states had equal representation in the Continental Congress and the states assumed that this practice would continue.

Debate also revolved around control of the land west of the colonies. The western boundaries for some states were not yet established. Should the new national government have the power to set those boundaries?²¹ As a result of such debates, the drafting of the first national constitution, known as the **Articles of Confederation**, took well over a year; on November 17, 1777, the Continental Congress finally voted to approve the Articles. Ratification by the states was an even slower process, and the Articles of Confederation did not officially take effect until March 1, 1781.²²

As its title indicates, the relationship that the Articles of Confederation established among the states was that of a **confederation**, a union of independent, sovereign states. In a confederation, the primary power, especially with regard to domestic affairs, rests with the individual states; the central government is limited to such functions as leading the nation's defense and foreign affairs. Confederations are relatively rare. A recent example is the State Union of Serbia and Montenegro, a confederated union of two former republics of Yugoslavia. Serbia and Montenegro maintained autonomous governments; they were united only for the purpose of defense. Their confederation lasted only from 2003 to 2006, when it was dissolved as the result of a referendum.



Kieran Ridley / Getty Images

Popular uprisings, such as the Yellow Vest movement in France, which calls for economic justice for the working class, illustrate citizens claiming a broken social contract in the contemporary world.

Articles of Confederation

The first constitution of the United States (1781–1788), under which states retained sovereignty over all issues not specifically delegated to the weak central government, comprising a unicameral (one-house) legislature and no independent executive or judicial branch.

confederation A union of independent, sovereign states whose central government is charged with defense and foreign affairs but where the primary power—especially with regard to domestic politics—rests with the individual states.

THE STRUCTURE AND POWER OF GOVERNMENT UNDER THE ARTICLES OF CONFEDERATION

The Articles of Confederation were designed to protect the power and autonomy of the states coming together in this confederation. The national government consisted solely of a weak *unicameral* (one-house) legislature; there was no executive or judicial branch. It had only those powers expressly delegated to it by the states, such as appointing army officers, waging war, controlling the post office, and negotiating with Indian tribes. Any powers not specifically given to the national government by the Articles of Confederation were reserved to the states.

Delegates to the Confederation Congress were appointed by state legislatures. To ensure equality among the states, each state—regardless of its size or the number of delegates it sent—had a single vote in Congress (as had been the practice in the First and Second Continental Congresses). A state cast its vote in accordance with the votes of the majority of its delegates; if a state could not achieve a majority among its delegates on a particular vote, it would abstain from voting.²³ Passage of legislation required at least nine of the thirteen votes, and amendment of the Articles of Confederation required a unanimous vote.

WEAKNESSES OF THE ARTICLES OF CONFEDERATION

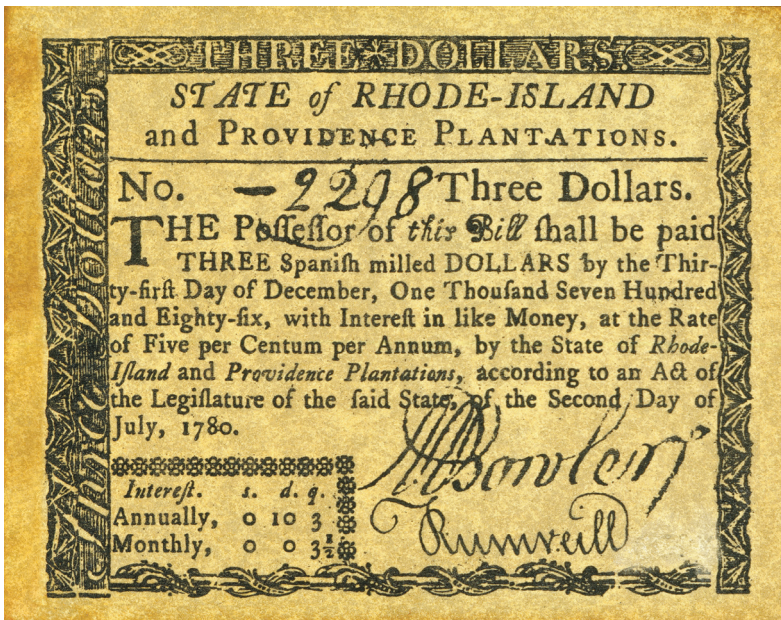
When drafting the Articles of Confederation, the delegates to the second Continental Congress focused more on the potential threats posed by a national government than on the benefits such a government might provide. After all, their bitter experience with Great Britain was fresh on their minds. Therefore, they were more concerned with limiting government than empowering it.²⁴ Moreover, people still thought of themselves as citizens of their particular state: They were Virginians or New Yorkers rather than Americans. Worse, states fundamentally mistrusted each other. They also had widely divergent economic interests and often saw each other as competitors. These factors led to the creation of a governing document with fundamental weaknesses.

The most obvious weakness of the Articles was that the national government had too little power. For example, Congress had no power to tax. This severely limited the ability of the national government to raise money to pay for debts incurred during the Revolutionary War. Congress requested money from the states, but payment was voluntary and compliance was poor.²⁵ To modern eyes, not giving Congress the power to tax seems strange, but if you remember that the American Revolution was a revolt against taxation by a distant government, then

withholding of this power from the unfamiliar and distant national government (as opposed to familiar and near state governments) becomes more understandable.²⁶

Congress also lacked the power to regulate commerce among the states. As a result, states jostled for economic advantage, routinely using protective tariffs (taxes imposed on imported goods) against one another as well as against foreign nations. Trade was further hindered by the fact that the new nation had no common currency. Although the new national government could, and did, print money to pay war debts, each state also produced its own currency. Since some states printed more money than others, currency from different states had different values, complicating trade and hurting the economy.

Significantly, Congress did not even have a permanent home. It originally sat in Philadelphia, but the delegates fled to Princeton, New Jersey, in June 1783 when a mutinous group of



Rhode Island's \$3 bill came to be worth no more than the paper it was printed on.

hundreds of Revolutionary War veterans mobbed Independence Hall, where the Confederation Congress was then meeting, to demand pay for their war service. After a little more than four months in Princeton, the Confederation Congress then moved to Annapolis, Maryland, before proceeding to Trenton, New Jersey, in 1784, and finally to New York City in 1785. Historian David O. Stewart has noted that Congress's homelessness was a potent symbol of its frailty, adding, "Vagabondage is not the hallmark of a great government."²⁷

Another notable weakness was the fact that there was no separation of powers at the national level: All power, such as it was, lay in the legislature. The lack of a federal judiciary compounded the problems associated with trade wars among the states. For example, some states passed legislation cancelling their debts to other states. With no federal judiciary to turn to, those affected by such legislation sometimes had no legal recourse. Likewise, the lack of a federal judiciary made it difficult to resolve boundary disputes among the states. The lack of an executive branch meant that the national government had no real ability to execute its laws. Early attempts to administer laws through ad hoc committees, councils, and conventions were unsuccessful.

In short, the new national government had no power to lead, and often did not even have enough power to do what little it was supposed to. The national government seemed to be little more than a "rope of sand" holding the confederation together.²⁸ The states did not help the situation. They encroached on the authority of the national government by raising their own militaries, ignoring the nation's treaties with foreign powers, and waging war with Native Americans. Sometimes states did not even bother to send delegates to Congress, making it difficult to muster the necessary quorum for passing legislation.²⁹

SHAYS' REBELLION

By the mid-1780s, the new nation was in the midst of an economic depression. Farmers, in particular, had gone into debt to rebuild their farms after the Revolutionary War, in which many of them had served as soldiers. The combination of a bad growing season, high interest rates, and high state taxes to pay off the war debt made it impossible for many farmers to pay their bills. Foreclosures (losing one's property due to failure to pay a loan) skyrocketed, and imprisonment for debt was common. In Massachusetts, desperate farmers turned to the state for help. When help did not come, the farmers—led by Daniel Shays, who had been a captain in the Continental Army—banded together and tried, by force, to shut down the courthouses where foreclosures were issued. This armed rebellion by more than 2,000 farmers, which began in August 1786 and continued into 1787, came to be known as **Shays' Rebellion**.

Massachusetts appealed to the national government for help in restoring order. Congress requisitioned states for money to fund a national militia to quell the rebellion, but only Virginia complied. Without money, Congress was powerless to act. Massachusetts did not have enough money in its own state treasury to fund a state militia, and therefore had to rely on money from private donors. The whole event was unsettling, and it proved to be an important turning point. By highlighting the impotence of the national government, Shays' Rebellion galvanized the nation. Those who had long feared that the Articles of Confederation were deficient now had a dramatic example of Congress's inability to maintain order and protect the safety of the people.

STARTING OVER: THE CONSTITUTIONAL CONVENTION

Before Shays' Rebellion, Virginia had already called for a convention to discuss a uniform regulation of commerce to remedy one of the primary defects of the Articles of Confederation. Only five states sent delegates to the convention, which convened in Annapolis, Maryland, in the fall of 1786. One of the delegates was Alexander Hamilton, who had previously served in the Confederation Congress; frustrated by the weakness of the national government, he had resigned in 1783. Long opposed to the Articles of Confederation, Hamilton now drafted a resolution that called on Congress to authorize a convention to examine the need either to amend the Articles of Confederation or to replace them altogether. Shays' Rebellion provided the

Shays' Rebellion An armed rebellion by farmers in Massachusetts who, facing foreclosure, tried using force to shut down courthouses where the foreclosures were issued. The national government's inability to quell the rebellion made the event a potent symbol of the weakness of the Articles of Confederation.

impetus for the Annapolis Convention to support Hamilton's resolution. Congress now felt pressure to act. On February 21, 1787, it passed a resolution to convene a Constitutional Convention in Philadelphia for the sole and express purpose of revising the Articles of Confederation.

THE DELEGATES AND THEIR MOTIVES

All of the states except Rhode Island (which opposed changing the Articles of Confederation) sent delegates to the Constitutional Convention. Of the 74 delegates the states had appointed, only 55 actually attended the convention, and far fewer stayed for the entire convention. The attendees included two of the most famous men in America, George Washington and Benjamin Franklin, and other luminaries such as James Madison and Alexander Hamilton. Notably absent were John Adams and Thomas Jefferson, who were abroad serving as ambassadors to Great Britain and France, respectively. Some passionate advocates of states' rights, such as Patrick Henry, also stayed away.

In 1913, influential political scientist and historian Charles A. Beard proposed a controversial thesis: In writing the constitution, the framers' primary goal had been to protect their property holdings and financial self-interest.³⁰ Beard argued that the framers were a group of wealthy elites who had been adversely affected by the type of government created under the Articles of Confederation (see Table 2.1 for an overview of the delegates' characteristics).³¹ Beard argued that in establishing property rights and protecting the economic interests of elites, the framers had purposely limited the ability of the majority to exercise real power.

In the 1950s, historians such as Robert E. Brown and Forrest McDonald suggested that a rigorous analysis of the data debunked Beard's thesis. They pointed out that the framers were not as monolithic in their interests as Beard suggested (for example, some *opponents* of the Constitution also came from the privileged wealthy class, and not all supporters were wealthy creditors), and that a broader array of interests than Beard recognized had influenced the framers.³²

Nonetheless, debate continues. Reality may rest somewhere between Beard's clear-cut assumptions and the views of critics such as Brown and McDonald. The framers, after all, were politicians influenced by a range of factors. Economics was undoubtedly one of them, but not the only one—or even, necessarily, the most significant one.

A bare quorum of delegates attended the opening session of the Constitutional Convention on May 25 in what is now called Independence Hall (the room where the members of the Second Continental Congress signed the Declaration of Independence). Thirteen tables—one for each state's delegation—were arranged in a semicircle. Rhode Island never sent delegates, and New Hampshire's arrived two months late. No more than 11 state delegations were ever in attendance at any one time. As had been the practice in Congress, each

TABLE 2.1

Characteristics of the Delegates to the Constitutional Convention

All were white and male.
Thirty-five were lawyers.
Almost three-fourths of them had served in the Confederation Congress.
Twenty-five had served in the Continental Congress during the Revolution.
Fifteen had participated in drafting their own state's constitution.
Eight had signed the Declaration of Independence.
At least one-third owned slaves (12 owned or managed plantations with slave labor).
Most were young, with many still in their twenties and thirties (Franklin, at 81, was a notable exception).

state delegation had one vote. The group deliberated in absolute secrecy so that delegates could express their views without fear of outside retaliation or pressure. Despite the heat, they kept the large windows closed that summer and posted sentries outside to ward off eavesdroppers.³³

LARGE STATES VERSUS SMALL STATES: THE VIRGINIA AND NEW JERSEY PLANS

The Virginia delegation quickly took the reins after arriving in Philadelphia. Virginian James Madison issued a detailed critique of the Articles of Confederation entitled “Vices of the Political System of the United States,” and further argued that confederations were, by their very nature, doomed to failure.³⁴ Most significantly, the group of Virginia delegates met every morning at a local boardinghouse to plot strategy for how to convince the other delegates to construct a new constitution rather than merely amend the Articles of Confederation. They also met each afternoon to greet arriving delegates.

The drafting of the Constitution was, after all, a distinctly political process, which involved consensus on some issues (such as the need for a limited, republican form of government) and conflict on others (such as what system of representation to adopt). Ultimately, compromise (on issues such as slavery, representation, presidential selection, and the court system) and creativity (the embrace of federalism, for example) led to success. Keep these “4 Cs” in mind—consensus, conflict, compromise, and creativity—as you read the rest of this chapter.

Once the convention formally assembled on May 25, Virginia’s power became immediately evident. The delegates unanimously chose Virginian George Washington as its presiding officer. After the group had established the rules of the convention, Edmund Randolph, the head of the Virginia delegation, rose and introduced his delegation’s proposal for a new constitution, the result of the daily strategy sessions they had held. This so-called **Virginia Plan**, primarily

Virginia Plan A plan, favored by large states, to replace (rather than amend) the Articles of Confederation and create a strong national government consisting of three branches. It also called for replacing the one-state/one-vote system used under the Articles of Confederation with proportional voting power in the legislature.

FIGURE 2.1

Central Government Under the Virginia Plan

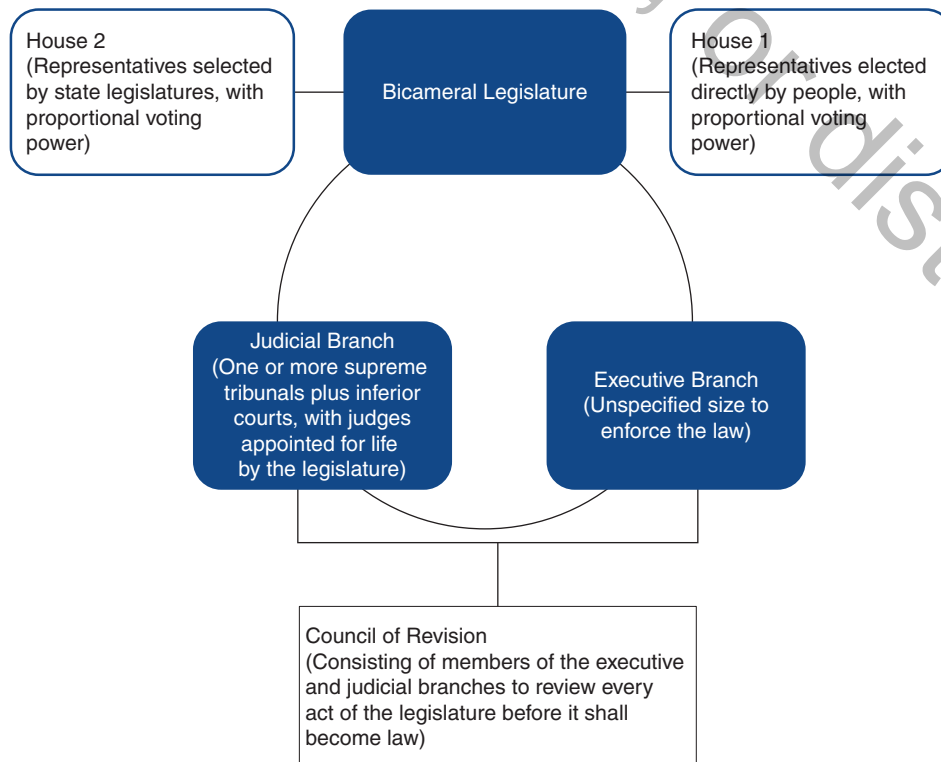
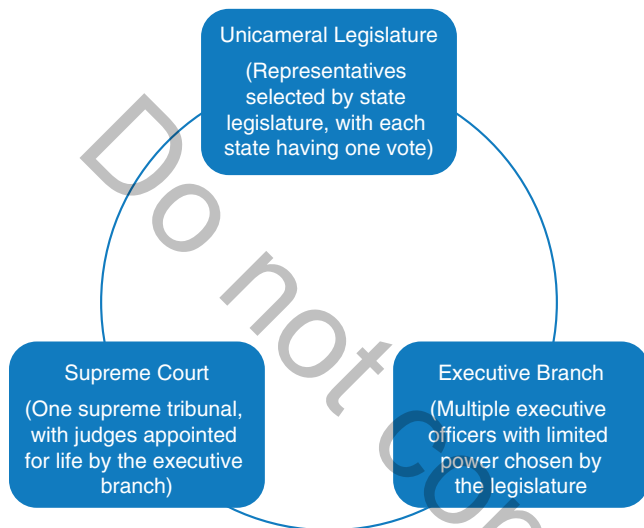


FIGURE 2.2

Central Government Under the New Jersey Plan



authored by Madison and consisting of 15 draft resolutions, was designed to replace rather than amend the Articles of Confederation and to establish a strong central government consisting of three branches: a bicameral legislative branch, an executive branch, and a judicial branch (see Figure 2.1).

The Virginia Plan called for members of the lower house of the legislature to be elected by the citizens of each state. Members of the lower house would, in turn, select members of the upper house. In addition to replacing the unicameral legislature that existed under the Articles of Confederation with a bicameral legislature, the Virginia Plan also called for the replacement of the one-state/one-vote system with proportional voting power in both houses: the number of representatives from each state would be based on the state's population, and each of their representatives would have one individual vote. This new voting plan would increase the power of more populous states at the expense of less populous states. It also raised a nasty question: Were slaves to be included when counting the population of a state? Bluntly put, were they to be counted as people or property?³⁵

Small states strongly opposed the Virginia Plan. On June 9, William Patterson of New Jersey stood and proclaimed that he was “astonished” and “alarmed” at the Vir-

ginia Plan's proposal to base a state's voting strength on its population.³⁶ He then introduced an alternative set of proposals that came to be known as the **New Jersey Plan**, aimed at merely amending the Articles of Confederation. It, too, called for three branches, but unlike the proposals under the Virginia Plan, the New Jersey Plan called for maintaining a unicameral legislature, a weak executive branch comprising multiple officers (elected by Congress and subject to removal only upon majority vote of the state governors) rather than a single president, and a Supreme Court whose members would be elected by the executive officers (see Figure 2.2). Representatives to the legislature would continue to be chosen by state legislatures rather than being elected by the people. The New Jersey Plan also retained the one-state/one-vote system, thereby garnering support from small states.

THE THREE-FIFTHS COMPROMISE AND THE GREAT COMPROMISE

The two questions of state representation dominated the next few weeks of discussion at the convention: (1) Should there be proportional representation in Congress, as called for in the Virginia Plan, or equal representation (one state/one vote), as called for in the New Jersey Plan? (2) In the event that proportional representation was chosen, who would be counted in determining the number of representatives? The Virginia Plan called for representation in Congress to be based on the “numbers of free inhabitants” in a state. This concerned smaller southern states because slaves made up such a large proportion of their populations (see Figure 2.3); if slaves were not counted, those states' power in Congress would be diminished.

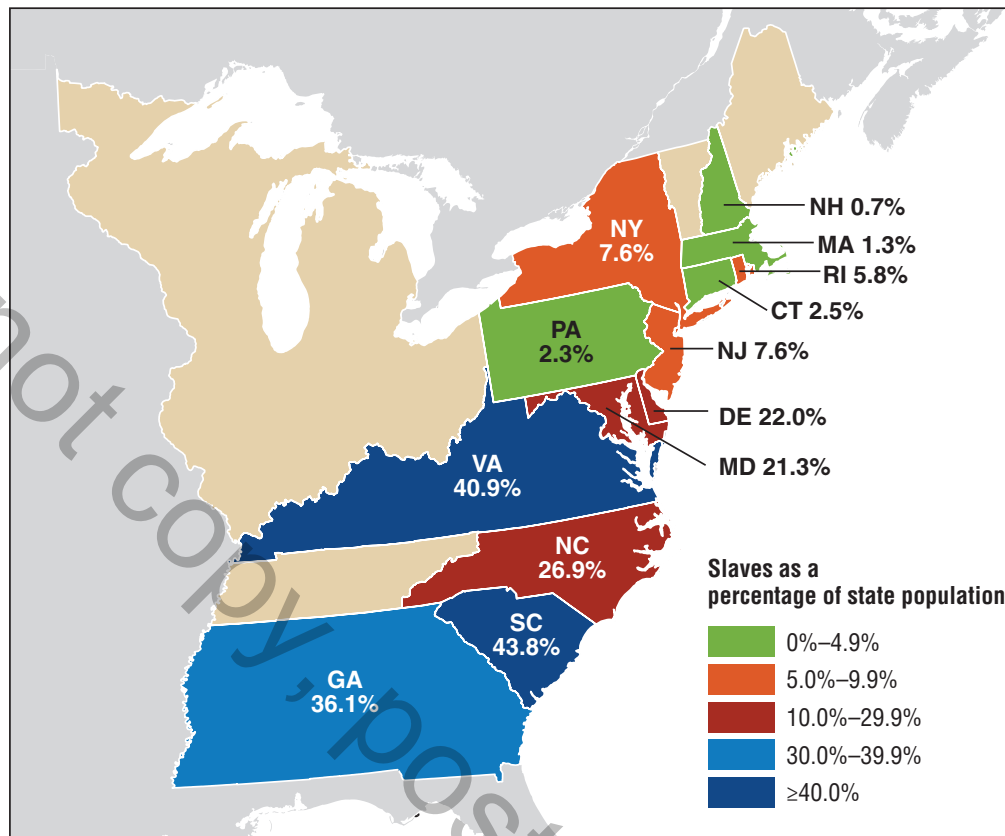
To lure small southern states to accept the idea of proportional representation, James Wilson of Pennsylvania, a supporter of the Virginia Plan, introduced the so-called **Three-Fifths Compromise**: Each slave would count as three-fifths of a person for purposes of representation. This obviously deplorable solution would give southern states strong enough influence in Congress to prevent the legislature from abolishing slavery (a possibility that was already a concern to these states), but not as much influence as they would have if slaves were fully counted. (Of course, slaves did not have the right to vote and therefore would not be represented in Congress. Women did not have the constitutional right to vote either, but white women *did* count as full persons toward determining the number of representatives a state would have.) On June 11, the convention endorsed the Three-Fifths Compromise by a vote of 9–2, with only Delaware and New Jersey voting against it.³⁷

New Jersey Plan A plan, favored by small states, to amend (rather than replace) the Articles of Confederation. It would have retained the one-state/one-vote system of voting in the national legislature, with representatives chosen by state legislatures.

Three-Fifths Compromise The decision by the Constitutional Convention to count slaves as three-fifths of a person for purposes of representation.

FIGURE 2.3

Slaves as a Percentage of State Populations, 1790



Source: "1790 Census: Return of the Whole Number of Persons Within the Several Districts of the United States," United States Census Bureau, accessed July 21, 2019, <https://www.census.gov/library/publications/1793/dec/number-of-persons.html>

It soon became clear, however, that even with the Three-Fifths Compromise, proportional representation was not a done deal. Quite to the contrary, that issue continued to dominate discussion for weeks and threatened to deadlock the convention. Finally, another compromise ended the impasse. Devised by Roger Sherman and Oliver Ellsworth of Connecticut, this so-called **Great Compromise** (sometimes referred to as the *Connecticut Compromise*) called for a bicameral legislature, as in the Virginia Plan, with a different method for determining representation in each house and different procedures for selecting representatives in each house.

In the lower house (which eventually became the House of Representatives), the Virginia Plan would prevail:

- Representation would be proportional.
- Representatives would be elected by the people.

In the upper house (which eventually became the Senate), the New Jersey Plan would prevail:

- Representation would be equal (each state would have two representatives).
- Representatives would be selected by state legislatures.

In keeping with the principle of "no taxation without representation," all legislation dealing with raising and spending money would originate in the lower house.

Great Compromise The decision by the Constitutional Convention to resolve the debate over equal versus proportional representation by establishing a bicameral (two-house) legislature with proportional representation in the lower house, equal representation in the upper house, and different methods of selecting representatives for each house.

The Convention debated the Great Compromise for 11 days, and, on June 29, finally passed it. The compromise ended the deadlock and resolved the fundamental question of representation in the legislature. Now the delegates shifted their attention to the other two branches of government.

CREATING THE EXECUTIVE AND JUDICIAL BRANCHES

The Articles of Confederation did not provide for an independent executive branch. Furthermore, most state governors were selected by the legislature, had little or no veto power over legislation, and served short terms.³⁸ By the time the Constitutional Convention met in 1787, some believed the pendulum had swung too far in the direction of limiting executive power. For example, Thomas Jefferson had served as governor of Virginia for two years and experienced firsthand the powerlessness of that position. Though still wary of a strong executive (or governor), Jefferson wrote that his experience with the 173 members of the Virginia legislature had convinced him that “173 despots would surely be as oppressive as one.”³⁹ This concentration of power in the legislature ran counter to the idea of separation of powers and resulted in unchecked legislative authority. Rising concern about this issue made arguments for a strong executive branch at the Constitutional Convention more palatable than they would have been immediately after finalizing the Declaration of Independence.

The Virginia Plan had called for an executive branch to be selected by Congress, without specifying its size or tenure or its specific powers. The New Jersey Plan called for a plural, rather than a single, chief executive to be selected by Congress. In discussions, some individual delegates led the charge for a stronger, more independent executive branch than that contemplated by either the New Jersey Plan or the original Virginia Plan, but the delegates remained divided on the issue of executive power through August.

The delegates eventually agreed to a single chief executive, to be called the *president*—a strategic choice to diffuse concerns about a strong executive. A derivation of the Latin word *praesidere*, *president* means “to sit at the head of” and “to defend.” *President* therefore implied passive guardianship rather than aggressive leadership. George Washington, who served a mostly passive, ceremonial function at the Constitutional Convention, had been its president. Despite agreement on what to call the chief executive, the delegates remained divided over what powers to give, and how to select, the president.⁴⁰

In a compromise that helped to establish our current system of checks and balances, the convention agreed to split a number of traditionally executive powers, such as declaring war, making treaties, and appointing officials, and allow the president and Congress to share them. Thus, Congress would declare war, but the president would wage it. Presidents would negotiate treaties, but those treaties were subject to ratification by the Senate. The president would nominate ambassadors and other officials, but they could serve only if the Senate confirmed them. Nonetheless, the question remained: Who would select the president?

No issue perplexed the delegates more than determining how the president should be chosen.⁴¹ Additionally, how long should the president serve? Should he be eligible for reelection? Selection by Congress had been the default position throughout the summer. Advocates of a more powerful executive feared that this method of selection would perpetuate a model of executive subservience to the legislature. Popular election—a natural alternative—posed its own problems. First, it would give the large states an advantage over the small ones. The three most populous states had nearly as many eligible voters as the remaining ten states combined.⁴² Small states thus feared that they would have little influence in the selection of a president. Second, the framers assumed that voters would be ill-informed and motivated more by local interests than the common good (an example of consensus among the delegates). George Mason scoffed that letting the people choose the president would be “as un-natural” as referring “a trial of colours to a blind man.”⁴³

The Committee on Postponed Matters finally proposed a compromise that won the support of the delegates: the president (and vice president—the first time this post had been recommended) would be chosen by an Electoral College consisting of electors from each of the states. The number of electors from each state would be equal to the combined total of that state’s

representatives and senators in Congress. Each state would select these electors according to rules established by its own state legislature.

Similar debates ensued about the federal judiciary. Most delegates agreed that some sort of federal judiciary was necessary. But should it consist of one court of last resort or a broader system of federal courts? How should judges be selected—by Congress or the president? If Congress had the power to select, should both houses of Congress participate or only one house? If only one of them participated, which one should it be?

Answers to these questions, as to others, came in the form of compromises and creative solutions. The Constitution created one Supreme Court but left it to Congress to decide whether to create other, lower federal courts. Judges for the court were to be nominated by the president, but the nomination was to be subject to confirmation by the Senate. (See Chapter 14.) The framers also embraced federalism (see Chapter 3)—a creative solution that gave some powers to the national government and others to the states. Federalism allowed proponents of a strong national government as well as proponents of states' rights to feel that they had won on some issues.

THE CONSTITUTION

After almost three months of debate, the Convention completed a final draft of the Constitution. It consisted of a preamble followed by seven articles. When the Constitution came to a vote, 39 of the 55 delegates voted to support it. However, the supporters constituted a majority of each of the 12 state delegations in attendance and each state had one vote, so the final vote in favor of the Constitution was 12–0.⁴⁴ Thirty-nine delegates signed the document on September 17, 1787—the last day of the convention. Of the delegates in attendance, only three refused to sign the Constitution.

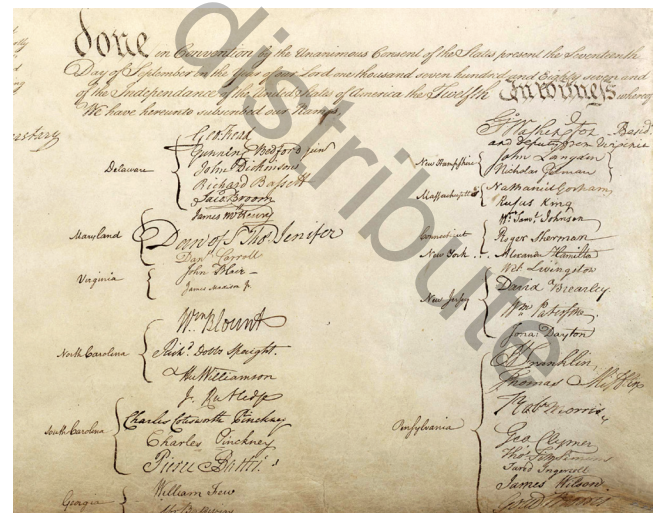
CORE PRINCIPLES

The establishment of the Constitution represented a significant break from the past. This break is evident from the first three words of the Preamble to the Constitution, “We the people,” which stood in marked contrast with the Articles of Confederation’s “We the undersigned delegates of the states,” signifying that America was now one people rather than 13 individual states. No one could predict how successful and influential the Constitution would be, but more immediately apparent was how pathbreaking it was.

The governmental design created by the Constitution can be understood in terms of four core principles (see Table 2.2). **Republicanism**, the first of these principles, stands in contrast with both direct democracy and monarchy. A republican form of government is one in which power rests with the people (as opposed to a monarch or, as under the Articles of Confederation, the states), but the people rule only indirectly, through elected representatives bound by the rule of law. Rule by representatives was expected to temper the passions of public opinion associated with a direct democracy, while elections would assure that those representatives remained accountable to the people for their actions. Republicanism had never been tried in a country as vast as the United States, and some feared that elected representatives would be tempted to act tyrannically rather than according to the rule of law.

Second, the Constitution instituted a system of federalism. In contrast with both a *confederation*, where the primary power is left to the states, and a *unitary system*, where all areas of power belong to the central government, a *federation* is a system in which power is divided between the central

republicanism A form of government in which power rests with the people but where the people rule only indirectly through elected representatives bound by the rule of law.



The Constitution was a work of compromise, but it was controversial even after being completed and only 39 of 55 total delegates signed the final document.

TABLE 2.2

Four Core Principles of the U.S. Constitution

Republicanism: Power rests with the people, but the people rule indirectly.

Federalism: Power is divided between the central and state governments.

Separation of powers: Power is divided across all three coequal branches of government.

Checks and balances: Power is both divided and shared among the three branches, with each branch having some control over the other two.

government and the state (or other regional) governments. The Constitution listed the powers of the national government, and it also listed the powers denied to the states, implying that all other powers were retained by the states. The Tenth Amendment (part of the American Bill of Rights, ratified in 1791) later clarified this, stating: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Dividing powers between the national government and the states was another check designed to prevent tyranny.

As we will see in Chapter 3, debate continued even after the ratification of the Tenth Amendment about precisely what powers were reserved to the states and when, if ever, Congress could interfere with those powers. It was clear, however, that whenever it was exercising its constitutionally enumerated powers, the national government was supreme: If conflicts arose between national and state law in such cases, national law would always prevail. As the **supremacy clause** of Article VI, Clause 2 put it, the Constitution, as well as acts of Congress and federal treaties passed pursuant to the Constitution, were “the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

Third, the Constitution instituted a **separation of powers** across branches of the national government. Similar to federalism, this was designed to prevent the concentration of power in any one part of government. Thus, the framers divided the national government into three coequal branches and gave each a separate function. The legislative branch was given the power to make the laws, the executive branch was given the power to enforce (or execute) the laws, and the judicial branch was given the power to interpret the laws. This stands in contrast with parliamentary systems such as the United Kingdom, where the prime minister and the cabinet, who together perform the executive function, are drawn from the legislature.

Finally, to further ensure that power would not become concentrated, the Constitution set up a system of **checks and balances** in which each of the three branches among which power was divided would have some degree of control over the other two. In other words, power is both divided and shared, as shown in Figure 2.4. We have already discussed how war powers, appointment power, and treaty power are each shared between the president and Congress. There are also other checks. For example, the president is given the power to veto legislation. Moreover, that veto can be overridden only by a two-thirds majority of both houses of Congress (as opposed to simply getting the most votes, which is required for passing legislation in the first place). Thus, the president has a check on Congress, but this check is itself limited. Similarly, courts have a check through their power to interpret laws passed by Congress, and—by means of judicial review—to strike down laws and executive actions that violate the Constitution. Though not specifically enumerated in the Constitution, judicial review—as discussed below—has become an accepted part of our constitutional system. And, Congress has the power to impeach—remove from office—the president, vice president, and other civil officers, including federal judges and Supreme Court justices.

THE ARTICLES OF THE CONSTITUTION

The Constitution has only seven articles, preceded by a preamble and followed by the 27 amendments that have been made since its ratification. The preamble spelled out the justification for the

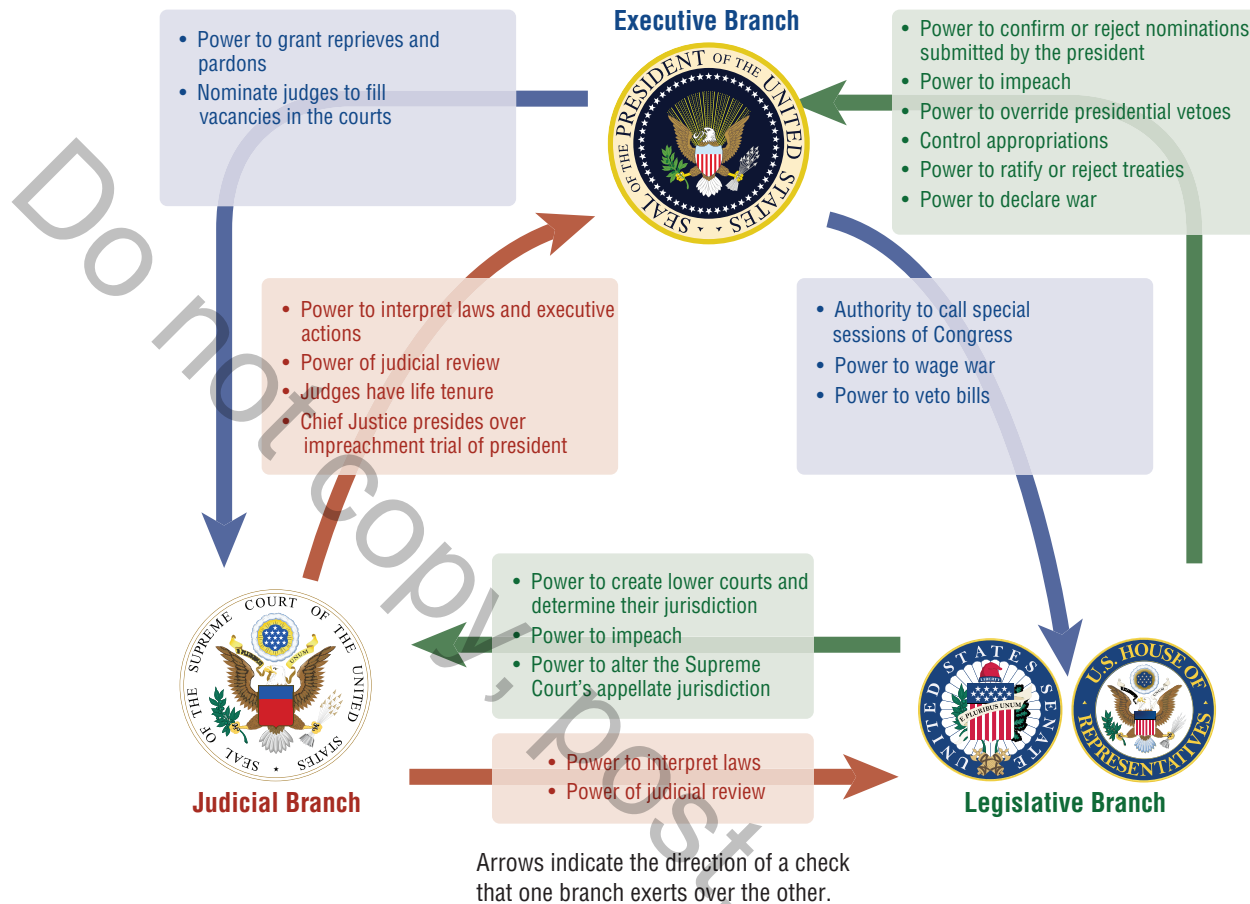
supremacy clause Article VI, Clause 2 of the Constitution specifying that federal laws and treaties passed pursuant to the Constitution trump contradictory state laws dealing with the same topic.

separation of powers The division of governmental powers among three separate and coequal branches—legislative, executive, and judicial.

checks and balances A method to protect against unrestrained governmental power by dividing and sharing powers among the legislative, executive, and judicial branches.

FIGURE 2.4

System of Checks and Balances in the U.S. Federal Government



Constitution (“to form a more perfect Union”), its fundamental goals (which included establishing justice and “securing the blessings of Liberty”), and made clear that the new Constitution and the government established by it were created by “We the people” (as opposed to being created by the states, as had been the case with the Articles of Confederation). The first three articles that follow the preamble each spell out the power of one of the three branches of government. The remaining articles are concerned with federal–state relations as well as with the relations among the states and provide procedures for ratifying the Constitution and amending it.

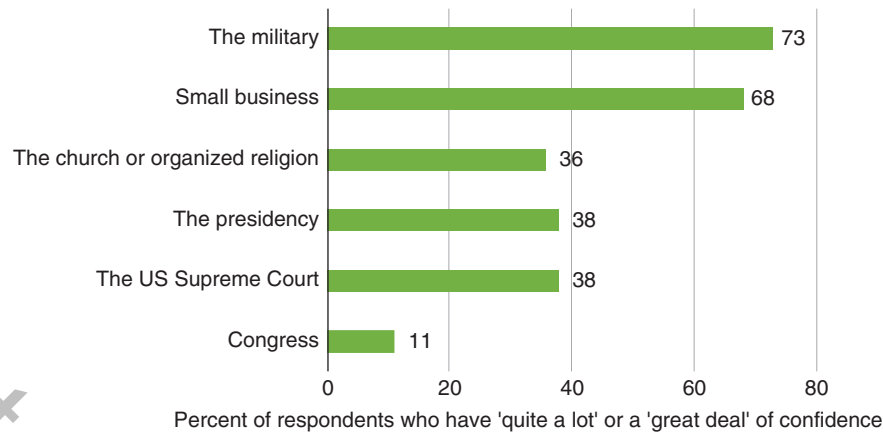
ARTICLE I: THE LEGISLATIVE BRANCH Because legislators are the representatives of the people, the framers thought of the legislative branch as being the most important and presented it first (see Figure 2.5). Article I opens by stating, “All legislative Powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives” [emphasis added]. In other words, Congress is limited to those powers given to it by the Constitution. Those powers fall into two broad categories: enumerated powers and implied powers.

Enumerated powers are those powers specifically listed. Most enumerated powers are in Article I, Section 8, which contains a laundry list of specific powers given to Congress, including the power to impose and collect taxes, to borrow money, to regulate commerce, and to declare war. Some of these powers were lacking under the Articles of Confederation, notably the power to collect taxes and regulate commerce. Legislative powers not given to Congress, and not covered under implied powers, were presumably retained by the states, a presumption that was made explicit by the Tenth Amendment.

enumerated powers Powers specifically listed in the Constitution, such as congressional powers outlined in Article I, Section 8.

FIGURE 2.5

Confidence in Government and American Institutions



The framers thought that Congress would be the most important governmental institution. How do people feel about it today, based on the findings shown here?

Source: "Confidence in Institutions," Gallup, 2019, <https://news.gallup.com/poll/1597/confidence-institutions.aspx>

Implied powers are those authorized by the "necessary and proper clause" of Article I, Section 8, Clause 18. The necessary and proper clause (discussed in Chapter 3) expands the enumerated powers by saying that Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." This clause is sometimes also referred to as the *elastic clause*, because it serves to expand Congress's power. The controversial question of how much the clause can—or should—expand Congress's power is discussed in more detail in Chapter 3 (see also Figure 2.6).

Article I, Section 9 places certain specific limits on the power of the national government. For example, it prohibits Congress from passing a bill of attainder (legislation declaring one or more people guilty of a crime) or ex post facto laws (those that retroactively criminalize behavior), limits when Congress may suspend habeas corpus (a recourse for unlawful imprisonment), and—in the so-called emoluments clause—prevents any government official (in any branch) from receiving any gift, payment, or items of value from a foreign state or its representatives without the consent of Congress.

Finally, Article I, Section 10 lists the powers that are withheld from the states. For example, states are forbidden to enter into treaties with foreign nations, coin money, or impose duties on imports and exports without the consent of Congress.

ARTICLE II: THE EXECUTIVE BRANCH Article II vests the executive authority in the president. In other words, it gives the president the power to carry out the laws. However, the ambiguity of the opening sentence of Article II has led to considerable debate about the precise scope of executive power. Unlike the opening of Article I, the opening of Article II does not limit powers to those "herein granted," even though Article II does contain enumerated powers. It simply says, "The executive Power shall be vested in a President of the United States of America." Does the omission of the words "herein granted" give presidents greater leeway than Congress? People disagree about the answer to this question. As we shall see in Chapter 12, three quite different interpretations of the scope of presidential power have emerged.

Article II, Section 2 enumerates specific powers of the president, such as serving as commander-in-chief of the armed forces, granting pardons, negotiating treaties, and appointing specified officials with the advice and consent of the Senate. In addition, Article II spells out the way in which presidents will be elected and eligibility requirements for the office (Section 1); it requires

implied powers Powers that are not specifically enumerated in the Constitution but are considered "necessary and proper" to carry out the enumerated powers.

that the president give information to Congress about the state of the union and recommend for its consideration such measures as he deems necessary and expedient and that he “take Care that the Laws be faithfully executed” (Section 3); and it provides guidelines for the president’s impeachment and removal from office (Section 4).

ARTICLE III: THE JUDICIAL BRANCH Article III is the shortest of the articles delineating the three branches of government. It creates a Supreme Court and says that the judges will hold office “during good Behaviour”—in other words, unless they are impeached, they will have life tenure (the method for selecting Supreme Court justices was spelled out in Article II). Life tenure was designed to promote judicial independence, as was a guarantee that justices receive a compensation for their services that would not be reduced during their tenure. No federal courts existed under the Articles of Confederation, and some members of the Constitutional Convention feared that a large federal judiciary with expanded jurisdiction would interfere with decisions that they felt should be left to the states. Therefore, the delegates postponed the decision about creating federal courts in addition to the Supreme Court by, in Article III, giving Congress the authority to establish lower federal courts if it chose to do so (which it quickly did, in the Judiciary Act of 1789; see Chapter 14).

ARTICLES IV–VII The remaining four articles of the Constitution cover a wide range of issues. Article IV deals with the states and their relations. It requires states to give “full faith and credit” to the laws and judicial proceedings of other states, prohibits discrimination by one state against citizens of another state, guarantees a republican form of government in every state, and delineates procedures for admitting new states. Article V spells out the processes by which the Constitution can be amended. Article VI contains the supremacy clause, forbids the use of any religious test as a qualification for holding any office (in other words, candidates could not be disqualified because of their religious views or lack thereof), and guaranteed that debts incurred by the Confederation would be honored under the Constitution. Finally, Article VII spelled out the procedure for ratifying the Constitution.

RATIFYING THE CONSTITUTION

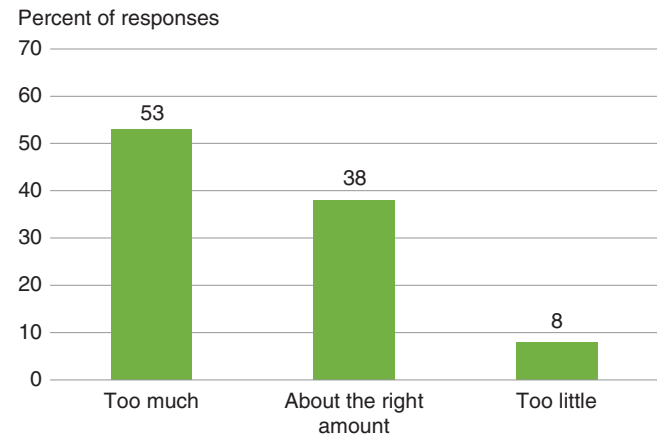
The vote to approve the Constitution at the Convention was only the beginning of the battle. The document still had to be ratified by the states. Article VII of the Constitution spelled out the procedure: Each state would hold a ratifying convention. For the Constitution to take effect, at least nine of the thirteen conventions would have to vote in favor of approval. Once nine states voted to approve the Constitution, any states failing to vote for approval would exist as independent nations. The process ended up lasting more than two and a half years, during which time the Articles of Confederation remained in place. Unlike the deliberations at the Constitutional Convention, which were shrouded in secrecy, debate over the ratification of the Constitution was a distinctly public affair and the conventions were widely covered by the press.

FEDERALISTS VERSUS ANTI-FEDERALISTS

Supporters of the Constitution and of the stronger national government it created quickly dubbed themselves **Federalists**. Opponents, who feared that the proposed national government would be too strong and who preferred that more power remain with the states, came to be known as **Anti-Federalists**. As Joseph J. Ellis has noted, however, both sides were really

FIGURE 2.6

Does the Federal Government Have Too Much Power, Just Enough, or Too Little Power?



What does this figure tell us about how Americans view the power of the central government today? Are the concerns expressed in this poll valid?

Source: “Government,” Gallup, 2018, <https://news.gallup.com/poll/27286/government.aspx>

Federalists Those who supported ratification of the Constitution and the stronger national government that it created.

Anti-Federalists States’ rights advocates who opposed the ratification of the Constitution.

“Federalists,” which literally meant favoring a federal system wherein power would be shared between a central government and state governments. The two sides simply disagreed over how power should be allocated in that system.⁴⁵

Federalists started out with the upper hand in the debate. Their opponents lacked any substantive alternative to the Constitution except the Articles of Confederation, which were tainted with the stench of failure. Federalists were also aided by the fact that early ratifying conventions were in states that supported the Constitution; this would help to build momentum for ratification. Nonetheless, the Anti-Federalists probably reflected the sentiments of a majority of the American people, who remained deeply distrustful of a new and unfamiliar central authority and of its power to tax. Furthermore, many people still thought of themselves as citizens of their particular state rather than citizens of the United States. Indeed, ratification of the Constitution might well have failed had it depended on a national referendum (the method used by a number of countries in recent years, including Iraq in 2005).

A month after the Constitutional Convention ended, Federalists began publishing pro-Constitution articles in newspapers in New York, where ratification was in doubt. The articles appeared under the pseudonym “Publius” (Latin for “the people”), and in 1788, they were gathered together and published in two volumes as *The Federalist*. Now commonly known as the **Federalist Papers**, these 85 articles, written by James Madison, Alexander Hamilton, and (to a lesser extent) John Jay, provided not only a vigorous defense of the Constitution but also rich theoretical insights that still serve as a basis for understanding the Constitution today. In contrast with the populist tract *Common Sense*, which in 1776 helped to galvanize mass support for independence, the *Federalist Papers* failed to have a mobilizing effect among the general populace because they proved to be too dense and erudite for the average reader. They did influence and mobilize elites—Federalist delegates at the ratification conventions—but their greatest impact has been on subsequent generations who have used them as guides for interpreting the Constitution.

Those opposed to the Constitution penned their own articles under pseudonyms such as “Brutus” and “Cato” (the names of ancient Roman senators who decried tyranny when Julius Caesar took control away from the Senate and assumed power over the Roman Republic). These articles were written by a larger number of people than the *Federalist Papers*. The leaders of the Anti-Federalists included prominent individuals who had played important roles in the creation of the United States, such as George Mason and Patrick Henry. Their critique focused on the dangers of centralized power, which they worried would become despotic and infringe not only upon states’ rights but also upon individual liberties. The fact that the Constitution lacked a bill of rights fueled their concern. Having so recently fought a war of independence to secure liberty, many readers shared these writers’ wariness of a strong national government.

ANOTHER COMPROMISE: A POST-RATIFICATION BILL OF RIGHTS

Delaware was the first state to ratify the Constitution in December 1787. Pennsylvania, New Jersey, Georgia, and Connecticut quickly followed suit. Massachusetts, however, derailed this momentum with a chief Anti-Federalist concern: that the new central government would run roughshod over the rights of the people.

During the Constitutional Convention, George Mason, a delegate from Virginia, had proposed that the Constitution include a bill of rights. The majority of the framers rejected this proposal, however, reasoning that since government was limited to those powers granted by the Constitution and the Constitution did not empower government to infringe upon those rights, a bill of rights was unnecessary. They further argued the potential danger of such a list: Failure to include a specific right might imply that that right was unprotected. These arguments did not convince Mason, who was so upset at the omission that he refused to sign the Constitution. Mason went on to become a leading opponent of its ratification.

As the debates played out, it became clear that without a bill of rights, the Constitution would not be ratified. But Federalists feared that calling another Constitutional Convention to modify the existing document would lead to new debates about issues far afield from a bill of rights. Therefore, Federalists conceded the issue by promising that if the Constitution was ratified, they would support an amendment to provide a bill of rights. This broke the logjam in Massachusetts, which voted for ratification in February 1788, followed by the required ninth state, New Hampshire, in June of that same year.

Federalist

Papers Essays by James Madison, Alexander Hamilton, and John Jay supporting ratification of the Constitution. Originally published in newspapers under the pseudonym “Publius” (Latin for “the people”), they were gathered together in 1788 and published in two volumes as *The Federalist*.

Although approval by nine states led to ratification of the Constitution, four states still remained opposed and thus not part of the new nation. Not only would their failure to ratify leave the United States geographically split, but two of the four states were seen as key to the nation's success: Virginia and New York. The outcome was not clear in either state. Virginia, whose ratifying convention convened before New York's, became the focus of attention. At Virginia's convention, a debate between the Anti-Federalist Patrick Henry and the Federalist James Madison proved to be a defining moment. Indeed, Joseph Ellis argues that it might be "the most consequential debate in American history."⁴⁶

Of the two men, Henry was, by far, the better orator. But Madison was, by far, the more prepared. In the end, Madison's soft-spoken, point-by-point rebuttal of Henry's theatrical criticisms of the Constitution won out. Virginia voted to ratify by a vote of 89 to 79 on June 25. Without this important turning point, Virginia would not have joined the United States, assuring a division between northern and southern states. Had the Anti-Federalists won in Virginia, the confidence of other states in the new national government might well have been shaken. Still, it is worth remembering that although Madison's position prevailed in the vote to ratify the Constitution, Henry's passionate defense of liberty strongly influenced the eventual decision to amend that Constitution to add a bill of rights.

AMENDING THE CONSTITUTION

The Articles of Confederation had all but precluded amendments by requiring that they receive unanimous support from all the states. The framers now made the process easier, but not so easy that amendments would overwhelm the Constitution. Indeed, the U.S. Constitution stands out not only for its longevity but also for its relatively few amendments as compared with the constitutions of the states and many other countries. Plenty of amendments have been suggested (well over 10,000), but only 33 have been formally proposed to the states and only 27 of those have been ratified. The first 10 of these make up the Bill of Rights.⁴⁷ (See Table 2.3 for descriptions of the six formally proposed amendments that were never ratified.)

As a stark contrast, consider France, which has had 15 different constitutions since 1789 and has existed under monarchy and dictatorship as well as under various republics. France's current constitution was introduced in 1958 and, as of 2018, had already been amended 18 times. Or take an example from within the United States: The state of Alabama has had six constitutions since becoming the twenty-second state in 1819, and its current one—adopted in 1901—has been amended 928 times⁴⁸ as of 2018. The stability of the U.S. Constitution is partly attributable to its ambiguity. That ambiguity has allowed flexibility in interpreting the Constitution, and flexibility of interpretation has helped to ward off frequent amendments.

TABLE 2.3

The Six Failed Amendments

Congressional Apportionment Amendment (1789). More specifically delineated the number of people to be represented by each member of the U.S. House of Representatives. Ratified by 11 states.

Anti-Title Amendment (1810). Any U.S. citizen who received a title of nobility from a foreign power or who—without the consent of Congress—accepted any gift from a foreign power would be stripped of citizenship. Ratified by 12 states.

Slavery Amendment (1861). Prohibited Congress from passing laws that would abolish or interfere with slavery or other "domestic institutions" of the states. Ratified by 3 states.

Child Labor Amendment (1926). Granted Congress the power to regulate the labor of children under the age of 18. Ratified by 28 states.

Equal Rights Amendment (1972). Prohibited both the national government and the states from denying or abridging any rights on the basis of sex, thereby establishing the equality of men and women. Ratified by 35 states.

District of Columbia Voting Rights Amendment (1978). Granted the residents of the District of Columbia full representation in both houses of the U.S. Congress as well as full participation in the Electoral College. Ratified by 16 states.

Source: Mount, Steve. "Constitutional Topic: The Census." (<http://www.usconstitution.net/constamfail.html>).



PICTURE YOURSELF . . .

Amidst Constitutional Change in Hungary

How can a democracy handle a democratically elected government that intends to change the constitution in ways that make the country a less viable democracy? After the fall of Communism in 1989, Hungary embraced democracy and capitalism. But in the country's April 2018 parliamentary election, the right-wing coalition government led by Prime Minister Viktor Orbán won its third consecutive two-thirds legislative majority since 2010. That two-thirds majority is significant, because that is what it takes to amend the constitution in Hungary. Orbán, who in 2016 had been the first global leader to endorse Donald Trump's candidacy for president of the United States, ran on a vigorously anti-immigration platform in 2018. In 2015, Orbán had built a wall along the border between Hungary and Serbia in the name of border security and to prevent asylum seekers from entering Hungary. Once reelected, he secured legislation in 2018 that criminalized any attempts by individuals or groups to help illegal immigrants claim asylum, as well as a controversial constitutional amendment that prohibited foreign nationals from outside Europe (any "alien population") from settling in Hungary.

That 2018 amendment was the seventh to Hungary's 2011 constitution (itself written by Orbán and his coalition), and Orbán promised more would come. Each had been secured by a two-thirds party-line vote of parliament. Earlier (equally controversial) amendments had weakened the power of Hungary's Constitutional Court (the equivalent of our Supreme Court) by limiting judicial independence and the Court's power to interpret laws; curtailed religious liberty by declaring

that the government has a fundamental duty to protect Christian culture and granting Parliament the sole power to decide which religious organizations count as churches; and helped to solidify Orbán's ruling coalition by banning political advertising in any venue except the state media (which happened to be controlled by Orbán's Fidesz party)—an action the Constitutional Court had previously declared unconstitutional when passed by ordinary legislation.

Such amendments were condemned by the opposition party within Hungary, and led to protests in the streets of Budapest, but—unlike amendments to the U.S. Constitution—Hungary's amendments did not require ratification beyond passage in parliament. Critics claimed the amendments were a threat to democracy and human rights, yet they were passed by super-majorities of Parliament whose ruling coalition had won resounding victories in three democratic elections.

Questions to Consider

1. How important is the balance between majority rule and minority rights? Does Hungary's method of constitutional amendment achieve that balance?
2. What would be the consequences if the U.S. Constitution could be amended by a two-thirds vote of Congress without the need for ratification by the states?
3. What impact might Hungary's mode of constitutional amendment have on separation of powers? The rule of law?
4. Hungary's constitution has no separation of church and state. Is that good or bad? Why?

THE FORMAL AMENDMENT PROCESS

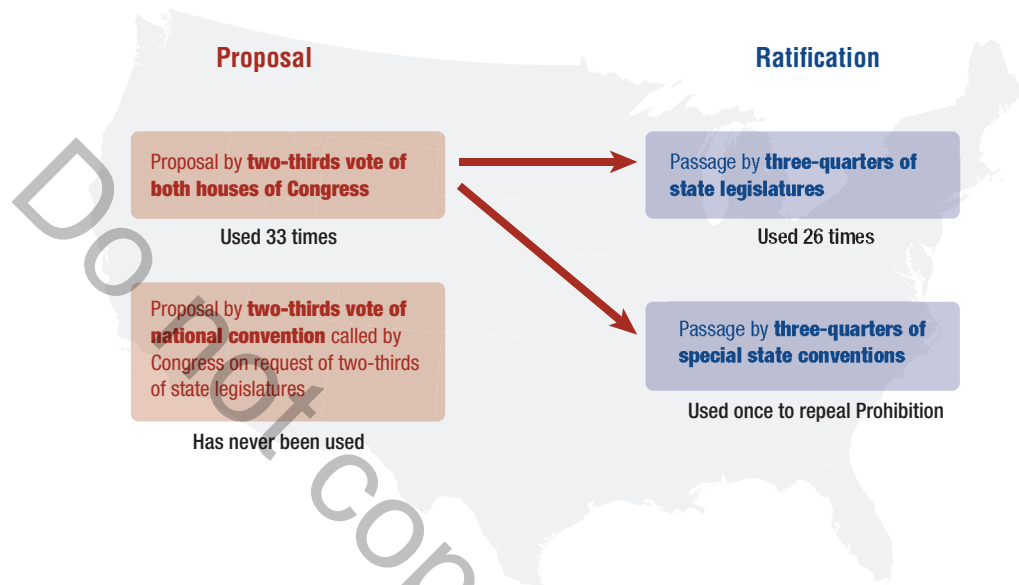
As specified by Article V, the process of amending the Constitution consists of two stages: proposal and ratification. As shown in Figure 2.7, proposals can be made in either of two ways:

- by a two-thirds vote of both houses of Congress or
- by a request to Congress from two-thirds of the state legislatures to call a convention to propose amendments.

To date, all 33 amendments were proposed by Congress. The alternative route—a convention convened by a vote of the state legislatures—poses several problems. The Constitution does not specify how delegates to the convention should be chosen, how many delegates there should be, or what rules such delegates should follow. In addition, such a convention could presumably introduce as many amendments as it wanted. The last time we had a convention, in 1787, we ended up with an entirely new constitution. Fears that another convention could lead

FIGURE 2.7

The Constitutional Amendment Process



to similarly radical change, together with uncertainty about the mechanics of such a convention, make amendment proposals by Congress a safer and easier option.

Whether proposed by Congress or a convention, amendments must then be ratified by the states. Like proposals, ratification can come about in either of two ways (with Congress specifying the method for each amendment proposed):

- by a vote of three-fourths of the state legislatures or
- by a vote of three-fourths of specially convened state ratifying conventions.

As of 2019, only one of the 27 amendments ratified—the Twenty-First Amendment, repealing prohibition—was ratified by state conventions. In that case, Congress predicted that passage by state conventions was more likely than passage by conservative state legislatures.

INFORMAL METHODS OF CONSTITUTIONAL CHANGE

In addition to changes to the Constitution through formal amendment, changes—subtle and not so subtle—have come about as a result of interpretation by the other branches of government. We usually think that such interpretation is done by federal courts, particularly the Supreme Court, but Congress and the president also share a role in interpreting the Constitution. The ambiguity of so much important constitutional language makes interpretation essential.

JUDICIAL INTERPRETATION The Supreme Court engages in judicial interpretation in the course of exercising its power of judicial review—that is, its power to strike down acts of government that violate the Constitution, the supreme law of the land. To decide whether an act violates the Constitution, the Court must, of course, interpret relevant constitutional language. For example, weighing the constitutionality of a law providing for the death penalty in serious criminal cases requires the Court to determine what is meant by the Eighth Amendment’s ban on “cruel and unusual” punishment. Even if



George Frenkel / Getty Images

Only one constitutional amendment has been passed to repeal another: the Twenty-First Amendment, which ended Prohibition. It was also the only amendment to be ratified by state conventions rather than state legislatures.

the Court determines that the death penalty itself is not cruel and unusual, other questions may arise: Is it cruel and unusual to execute children or the mentally disabled? Answers to such questions may change over time as the national consensus evolves and membership of the Court changes, even if the Constitution itself is not formally amended.

Judicial review is an important way of enforcing the rule of law—the idea that government is limited in its actions by the nation’s constitution. Despite this vital function, judicial review was not a power specifically granted by the Constitution. Rather, it was established by the Supreme Court in the 1803 case *Marbury v. Madison*⁴⁹ (see Chapter 14).

Ambiguous constitutional language complicates the task of judicial interpretation. For example, the Fourth Amendment bans “unreasonable searches and seizures,” but what exactly does that mean? Judges disagree not only about what the word *unreasonable* means but also about what constitutes a *search* (for instance, is a wiretap a search?). Similar difficulties extend to many of the most important clauses of the Constitution.

Even seemingly straightforward clauses, such as the First Amendment command that Congress shall make no law abridging freedom of speech, can lead to widely divergent interpretations. What, exactly, does constitutionally protected *speech* entail? Is every verbal utterance protected (including libel, obscenity, false advertising, and verbal threats to assassinate the president or overthrow the government)? Is speech even limited to verbal utterances, or does the First Amendment also protect symbolic speech, such as burning an American flag? And if it protects symbolic speech, what does *that* entail? (For more on interpretations of protected speech, see Chapter 4.)

Some argue that this ability of the Court to adjust its interpretation without the long and difficult process of constitutional amendment is a good thing. The ambiguity—and therefore the flexibility—of the Constitution allows phrases such as *cruel and unusual punishment* and *unreasonable searches and seizures* to evolve over time to comport with changing societal values and technological advances. This flexibility, they say, has helped the Constitution to endure. Others, however, fear that judges will exploit that flexibility and use it to “legislate from the bench.” Why, they ask, should unelected judges be allowed to pick which interpretation of ambiguous clauses is correct? Won’t their choices be based on their personal values and ideological predilections? Shouldn’t such ambiguities be resolved by legislators who are accountable to voters? Those who favor judicial interpretation say no because they fear the “tyranny of the majority” and believe judges will be more dispassionate guardians of constitutional principle and minority rights precisely because they are unelected (and thus independent). This debate will be discussed in more detail in Chapter 14.

COORDINATE CONSTRUCTION Members of all three branches of government take an oath to uphold the Constitution. Even though neither Congress nor the president has the power of judicial review, both end up interpreting the Constitution. Such interpretation by Congress and the president is known as **coordinate construction**.⁵⁰

Whenever Congress passes any law, it must be mindful of constitutional limitations on its power. Consider, for example, the First Amendment command that Congress shall make no law abridging the freedom of speech. Congress must interpret that language before enacting a law dealing with speech. The Supreme Court, of course, may disagree with Congress’s interpretation and strike the law down, but since so few laws make their way to the Supreme Court, these initial determinations by Congress are important and can influence prevailing understandings of what constitutional clauses mean.

Once laws are passed, the president is charged by Article II, Section 3 of the Constitution to take care that they are “faithfully executed.” However, Article II, Section 1, Clause 8 specifically directs presidents to “preserve, protect, and defend the Constitution of the United States.” Based on that language, could presidents refuse to execute laws they believe are unconstitutional? Some argue that these clauses require coordinate construction: The president must interpret the Constitution to make sure that it is upheld and faithfully executed.

In recent years, presidents have attempted to use signing statements to do just that. The use of presidential signing statements, issued by presidents when they sign legislation into law, dates back to President James Monroe in 1822. Traditionally, such statements were ceremonial in nature, used to celebrate the passage of the law. More recently, presidents such as Ronald Reagan used signing statements to clarify how they believed executive branch officials should interpret ambiguous parts of the law.

coordinate construction Refers to constitutional interpretation by Congress or the president. Proponents of coordinate construction believe that all three branches of government (not only the judiciary) have the power and duty to interpret the Constitution.

Increasingly, however, signing statements have come to be used by presidents to identify portions of the law that they believe to be unconstitutional. Some laws passed by Congress are hundreds, even thousands, of pages long. The president cannot strike a particular line or clause from a bill before signing it. He must accept the full bill or use his veto power and reject the bill in its entirety. A signing statement allows the president to sign the bill but express his belief that one or more parts of it are unconstitutional. In using signing statements in such a way, a president would note the portion they believed to be constitutionally suspect but would enforce the law in its entirety unless the Supreme Court struck down that portion of the law.

George W. Bush used signing statements in a more controversial manner. He routinely used signing statements to express his intent not to enforce certain provisions of the law he was signing. In one famous example, Bush signed with much fanfare the so-called McCain Amendment banning the use of torture by U.S. officials, but quietly issued a signing statement claiming the power to disregard the law when he, as commander in chief, deemed it necessary to do so. After the *Boston Globe* publicized Bush's use of signing statements in an April 2006 article,⁵¹ a report by a Task Force of the American Bar Association concluded that Bush had already used signing statements to challenge more than 800 specific provisions of laws he had signed. In one signing statement alone, Bush raised 116 specific objections involving almost every part of the Consolidated Appropriations Act of 2005 that he had just signed.⁵² In short, Bush claimed the power to disobey portions of laws he had signed whenever he felt that those provisions conflicted with his interpretation of the Constitution. Critics claimed the president had exceeded his powers by imposing his own interpretation of the Constitution without waiting for a ruling from the courts.

Shortly after taking office, Barack Obama instructed government officials not to enforce Bush's signing statements unless they had clearance to do so from the attorney general. However, Obama indicated that he might use signing statements himself in some instances, and he did.⁵³ For example, in June 2009, President Obama issued a signing statement accompanying a war spending bill. In it, he said that he could ignore restrictions that Congress had placed on U.S. aid provided to the World Bank and International Monetary Fund. Some Democrats in Congress expressed concern that President Obama had used a tool that he and fellow Democrats had criticized President Bush for using.⁵⁴ However, Obama's use of signing statements was less frequent and less controversial than Bush's had been; by the end of his eight years in office, he had issued 37 signing statements challenging 114 specific provisions. In comparison, George W. Bush issued 161 signing statements challenging over 1,100 specific provisions during his eight years in office, and Donald Trump had—in only his first two years in office—issued 33 signing statements challenging 306 specific provisions.⁵⁵ For example, after signing the 2018 Defense Appropriations bill, Trump issued a signing statement challenging 52 provisions of the law.⁵⁶

CONSEQUENCES FOR DEMOCRACY

Drawing on John Locke's idea of the social contract, Americans embraced a written constitution to delineate the powers of government and the rights of its citizens. In contrast, Great Britain had an "unwritten" constitution that consisted of some written documents (such as the English Bill of Rights and Acts of Parliament) but also unwritten parliamentary conventions and royal prerogatives. Americans did not believe Britain's more amorphous constitution had done enough to protect the rights of its citizens, in part because Parliament could alter the constitution through simple legislation. The fact that we have a written constitution embodying a republican form of government designed to protect individual liberty and to prevent concentrations of power in government is, in no small measure, a direct outgrowth of the history and influences discussed in this chapter.

Today, written constitutions (largely based on the U.S. example) are the norm. Unwritten constitutions, such as those in the United Kingdom, Israel, and New Zealand, are now the exception. Yet the success of our Constitution depends not only on the strength and flexibility of its own structure but also on the convergence of other less-definable factors, including timing and luck, coupled with an underlying commitment to the rule of law. This makes it more difficult to determine how, when, or even whether the success of the U.S. Constitution can be duplicated in other countries.

We tend to take the success of our system of government for granted and forget that its structure was not preordained. As we have seen, the framers of the Constitution had

fundamentally different views on many issues. Many aspects of our government could have been different if competing arguments had won at the Constitutional Convention, state ratifying conventions, or any number of other points in our history.

For example, think of how things might have been different if the United States had not approved a written Constitution and embraced judicial review as a mechanism to enforce it. We could have survived—and probably survived quite well—without either of them (the United Kingdom has), but the consequences to you and our democratic system would have been quite profound. We will see in future chapters how much judicial review touches all of our lives. School desegregation, abortion rights, and free speech protections—to name just a few things shaped by judicial review—would have had to come from political action rather than the courts. That means that some of the rights you now expect might have been delayed or never even granted. But it also means that politicians would have had to confront some issues on which they now defer to courts. The result would have been a system worse in some ways and perhaps better in others, but the result would have had a direct impact on your life.

As a final cautionary note, it is worth remembering that at the end of the day, the words of the Constitution are not enough to guarantee either liberty or the rule of law. Those words must be enforced. Many governments—including dictatorial regimes—have had constitutions with lofty but often meaningless language protecting basic rights. Even in our own country, African Americans were denied fundamental rights, such as the ability to vote, long after the Thirteenth Amendment to the Constitution had abolished slavery, the Fourteenth Amendment guaranteed the equal protection of the laws, and the Fifteenth Amendment proclaimed that the right to vote would not be abridged because of race, color, or previous condition of servitude. As the great twentieth-century American judge Learned Hand once wrote: “Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.”⁵⁷

Critical Thinking Questions

1. Constitution making often takes place in crisis-laden, post-conflict situations that provide disincentives to cooperation and make the creation of a successful constitution difficult. Remember that the first attempt to create a constitution for the United States—the Articles of Confederation—failed. What factors account for the successful drafting and ratification of the subsequent U.S. Constitution?
2. Imagine if round-the-clock cable news networks, attack ads, and the Internet had existed when our Constitution was written and ratified. How might they have changed the process? Would it have been harder for James Madison to prevail over Patrick Henry in today’s media environment? Why or why not?
3. Identify ways in which the original Constitution was undemocratic. Assess the strengths and weaknesses of those provisions. How have amendments made the Constitution more democratic? What undemocratic features remain? Should any of these remaining features be altered or abolished? If so, which ones, and how?
4. Think about the four core principles of the Constitution discussed in this chapter: republicanism, federalism, separation of powers, and checks and balances. Each influences the way government operates and the policies it enacts. Now think about a policy issue that is important to you—for example, education, health care reform, or the legalization of marijuana—and assess how each of these principles affects the development and implementation of that policy.

Key Terms

Anti-Federalists 43
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checks and balances 40
confederation 31
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