

# THE NATIONALIZATION OF POLITICS

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During the early days of the coronavirus pandemic shutdown, a protester holds a copy of the U.S. Constitution as he drives in protest to call on the state to lift the stay-at-home order and reopen the economy.

Drew Angerer/Staff/Getty Images

## 2

## THE CONSTITUTION

## CHAPTER OBJECTIVES

- 2.1 Describe how the colonies' experience in self-government contributed to their willingness to revolt.
- 2.2 Explain how the challenges of collective action under the Articles of Confederation undermined early American independence.
- 2.3 Describe the Framers' early debates during the Constitutional Convention.
- 2.4 Summarize the key features of the Constitution.
- 2.5 Identify the issues the Founders considered when drafting the Constitution.
- 2.6 Discuss the debates over ratification of the Constitution.
- 2.7 Summarize the influences of *Federalist* Nos. 10 and 51 on the underlying theory of the Constitution.
- 2.8 Define the five design principles that contribute to the framework and functions of our government.
- 2.9 Discuss how the Constitution put mechanisms in place that allowed subsequent U.S. political development to lead to the nationalization of American politics.

## KEY QUESTIONS

- The Constitution has not changed much over the past two hundred years. Were the Framers really geniuses, or are Americans simply very lucky?
- Why is the U.S. Constitution so complicated, where even the word *majority* has several meanings?
- How can the United States call itself a democracy when so many features of its national political system are designed to frustrate majority rule?

The year 1780 was a disastrous one for the American Revolution. Three years into the war the Continental Army, the revolutionary fighting force, teetered on total collapse. In May an entire garrison of five thousand men surrendered to the British at Charleston, South Carolina. In late summer, across the state in Camden, nearly nine hundred Continental soldiers were killed, and one thousand were taken prisoner in a single engagement. When the army regrouped, only seven hundred of the original four thousand men showed up. The fall brought no respite from the army's woes. Indeed, the young nation learned that one of its few illustrious military commanders, General Benedict Arnold, had switched sides; his name became a byword for treason.

By the end of 1780, General George Washington's American forces had shrunk from twenty-six thousand to fifteen thousand. New Year's Day 1781 saw even further deterioration

in the campaign—thirteen hundred mutinous Pennsylvania troops, camped in Princeton, New Jersey, demanded Congress give them a year's back pay and an immediate discharge. A congressional committee met the soldiers outside Philadelphia and agreed to some of their demands.

Although all of these difficulties appeared to stem from unfit commanders or unwilling troops, the real problem was the fledgling national government, the Continental Congress. It simply was unable to act decisively or rapidly because all matters of consequence (such as taxes) required the approval of all the state governments. And it had virtually no administrative apparatus to implement policy, even those that enjoyed unanimous support. As a result, members of congressional committees sometimes found themselves deadlocked over how many uniforms the army needed. Long into the war the army remained underfed, ill clothed, poorly armed, unpaid (at least in currency of value), and despised by civilians uncompensated for requisitioned supplies. The troops struggled just to survive as a unit. Ultimately, of course, this depleted army had to confront the well-equipped British on the battlefield. During the winter of 1780, General Washington desperately exhorted Congress, "Where are the Men? Where are the provisions? Where are the Cloaths?"

The bitter irony was that many of the desperately needed provisions existed in ample supply. The war caused shortages, but they were not severe enough to account for the deprivations hampering the army. Nor was the problem the strictly logistical exercise of keeping a traveling army supplied. Despite the difficulty of that task, British troops and their German mercenaries were reasonably well provisioned. Undermining the Revolution's cause was an epidemic of free riding by Americans—from political leaders to ordinary soldiers. States agreed to contribute money and supplies but failed to do so in a timely fashion, if at all. Contractors, paid with a currency that was losing about 10 percent of its value every month, sold the American army spoiled food, shoddy clothing, and poorly manufactured arms, and then shortchanged the Continental Army even on those inferior provisions when the suppliers thought they could get away with it. Many recruits enlisted, received their requisitions, and then deserted with their new booty.

Although all of the politicians, merchants, and soldiers involved in the war effort may have been patriots, they were unprepared to shoulder the costs of serving the public good while their neighbors and colleagues conspicuously shirked the same duties. If, as we argued in Chapter 1, the enforcement of contracts and other collective agreements is the fundamental responsibility of government, then we must blame ineffective government for the free riding and other shirking that sap a community's will to achieve its collective goals. General Washington understood the problem and warned darkly that if the Continental Congress did not soon take charge, "our Independence fails, [our government] will be annihilated, and we must once more return to the Government of Great Britain, and be made to kiss the rod preparing for our correction."<sup>1</sup> Over the next year Washington continued to endure the government's ineptitude, narrowly avoiding a catastrophic military defeat. Then, with time, the Revolution gained credibility abroad. France, England's archrival, agreed to loan Congress money to continue the war effort and, finally, to commit French naval and land forces to the battlefield. On October 17, 1781, the collaboration paid off with a decisive victory at Yorktown, Virginia, which ended the war.

The year 1783 brought a formal end to the hostilities and independence for the American colonies. But the young nation was still saddled with a government that could not act as it

confronted many of the same problems it had labored under during the Revolution. Indeed, many observers feared that independence, won in war, would soon be lost in peace as the nation threatened to unravel into thirteen disputatious nation-states.

In the summer of 1787 fifty-five delegates from all the states except Rhode Island assembled in Philadelphia to consider revising the nation's constitution, known as the Articles of Confederation. (Content with the Articles, the citizens and politicians of Rhode Island feared correctly that their small state would lose influence under any reforms.) General Washington, presiding over this convention, and the twenty other delegates who had served under him in the field, knew firsthand the failings of the current government. The rest of the delegates similarly drew on their varied governing experiences, some stretching back into the colonial era, as they worked together first to revise the Articles and then to formulate an entirely new constitution. How did these delegates use their experience and their familiarity with the new nation's struggle to solve the problems inherent in collective action? A closer look at the events leading up to the Constitutional Convention and the creative process it spawned reveals the thinking that gave birth to America's constitutional system (covered in Table 2.1).

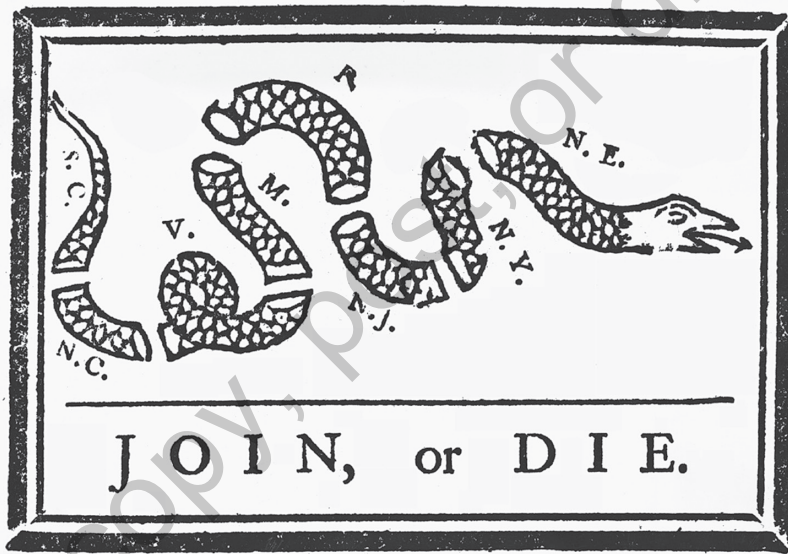
**TABLE 2.1** ■ Countdown to the Constitution

Date	Event	Colonial Action
1750s	French and Indian War (1754–1763) drains the British treasury	Albany Congress calls for colonial unity (1754)
1760s	Stamp Act enacted by British Parliament (1765)	Stamp Act Congress levied new taxes on government documents (1765)
1770s	Tea Act (1773)	Boston Tea Party (1773)
	British adopt Coercive Acts to punish colonies (1774)	First Continental Congress rejects plan of union but adopts Declaration of American Rights denying Parliament's authority over internal colonial affairs (1774)
	Battles of Lexington and Concord (1775)	Second Continental Congress assumes role of revolutionary government (1775); adopts Declaration of Independence (1776)
	Thomas Paine's <i>Common Sense</i> (1776) published	Congress adopts Articles of Confederation as constitution for new government (1777)
1780s	British defeat Americans at Camden and Charleston (1780)	
	Hartford Convention (1781)	Articles of Confederation ratified (1781)
	British surrender at Yorktown (1781)	
	Shays's Rebellion (1786)	Constitutional Convention drafts blueprint for new government (1787)
	<i>The Federalist</i> (1787–1788) published	Constitution ratified (1789)

Source: Created by authors from data.

## THE ROAD TO INDEPENDENCE

Geographically, America was well situated to be the first nation to break with monarchy and embrace republicanism; distance limited Britain's capacity to govern the colonies—a problem that gained painful significance during the Revolutionary War. Beginning early in the colonial era, Britain had ceded to Americans responsibility for managing their domestic affairs, including taxation. The colonists enjoyed this **home rule**, and the British also found it agreeable. After all, Britain's first concern was to control America's foreign commerce, thereby guaranteeing itself a market for British manufactured goods and a steady supply of cheap raw materials. Thus, for more than a century before independence the colonists had routinely elected their own leaders and held them accountable for local policies and taxes. Breaking with Great Britain may have been emotionally wrenching for many Americans, but unfamiliarity with self-governance was not a factor in their hesitancy to seek independence.



In what is recognized as America's first political cartoon, Benjamin Franklin's drawing depicts the colonies as caught in a classic collective action dilemma. If united, the colonies represent a formidable force for England to reckon with. But if any colony attempts to free ride, the collective effort will survive no better than a dismembered snake.

Courtesy of the Library of Congress Prints & Photographs Division

### A Legacy of Self-Governance

The first colonial representative assembly convened in Virginia in August 1619. By about 1650 all of the colonies had established elective assemblies, which eventually gained the authority to initiate laws and levy taxes. The British appointed governors, colonial councils, and judges in most colonies, and some of these officials vigorously resisted the expansion of local prerogatives. But because the elective assemblies paid their salaries and funded their offices, these officers of the Crown found that they, too, had to accommodate popular opinion. The colonial experience

thus taught Americans that a popularly elected legislature in control of the purse strings could dominate other governmental institutions. The next generation of leaders recalled this important and enduring lesson as they convened in Philadelphia to revamp the new nation's constitutional system.

In addition to experience in self-governance, the state assemblies supplied the nation with another vital resource: elected politicians experienced in negotiating collective agreements. As the vanguard of the independence movement, these politicians provided the nation with an era of exceptional leadership.

Americans also entered independence well versed in constitution writing. A royal charter or contract between the Crown and a British company or business entrepreneur had provided the foundation for most colonies. Later, the colonists themselves wrote constitutions, which they periodically revised. When in 1776 and again in 1787 the nation's leaders confronted the task of designing new government institutions, a written constitution was, not surprisingly, the instrument of choice.

Home rule may have had its benefits for the American colonies, but as training for self-governance, it shortchanged the nation. As with the rest of its far-flung empire, Britain regulated all of its colonies' commerce and provided them with military security by means of its navy, the world's largest. Under this arrangement the colonies prospered and managed their own local affairs, but this ingrained free riding and gave them little experience in managing collective action. Britain preferred to deal with the thirteen colonies individually rather than through some national assembly that might discover and pursue their common interests. Later, after the nation had declared its independence, politicians who had stridently resisted the Crown's incursions into their local authority found themselves incapable of addressing their collective problems as a nation. With nationhood, the free ride on Britain would end.

Home rule experienced its first strains during Britain's war with France in the 1750s. Known in America as the French and Indian War and in Europe as the Seven Years' War, this lengthy, multicontinental conflict drained both Britain's treasury and its military resources. Searching for assistance, Britain in 1754 summoned delegates from each of the colonies to a conference in Albany, New York, to invite their collective assistance in defending the western frontier against the French military and its Indian allies. Because six of the thirteen colonies failed to send delegates, this would-be first national assembly failed even before it convened.

Yet the Albany Congress produced the first serious proposal for a national government. One of Pennsylvania's delegates, Benjamin Franklin, already renowned throughout the country as the man who had tamed lightning, proposed a "Plan of the Union" that would have created a national government. The plan called for an American army to provide for the colonies' defense, a popularly elected national legislature with the power to levy taxes, and an executive appointed by the British king. (On learning of Franklin's plan, King George II declared, "I am the colonies' legislature.") But none of the colonial assemblies could muster much enthusiasm for Franklin's ideas. Why should they share their tax base with some dubiously mandated new governmental entity? And why should they undertake Britain's burden of providing for the colonies' security and overseeing trade? For them, free riding made eminent sense as long as they could get away with it. And they did get away with it; another decade would pass before Britain tried to force Americans to contribute to their defense. Only then did Franklin's proposal attract interest.





On March 5, 1770, British troops fired into a crowd of men and boys in Boston, killing five and wounding others. The massacre, depicted in this classic engraving by Paul Revere, gave the word *tyranny* new meaning. These and other events were instrumental in rousing colonial resistance to British rule on the eve of the American Revolution.

Courtesy of the Library of Congress Prints & Photographs Division

## Dismantling Home Rule

France's 1763 defeat in the French and Indian War ended its aspirations for extensive colonization of America. The British, relishing their victory, had little idea, however, that the war would trigger events that would severely compromise Britain's claims in America over the next decade.

By the end of the war Britain was broke. With its citizenry already among the most heavily taxed in the world, the British government looked to the colonies to share in the empire's upkeep. At the time, the only British taxes on the colonies were duties on imports from outside the British Empire, designed less to raise revenue than to regulate commerce. To raise needed revenues, Britain decided to impose taxes. Moreover, to consolidate its power Britain began to violate home rule. Every revenue law the British government enacted during the decade after the French and Indian War contained provisions tightening its control over the internal affairs of the colonies.

The most aggressive challenge to home rule came in 1765 with passage of the Stamp Act.<sup>a</sup> This law imposed a tax on all printed materials, including legal documents, licenses, insurance papers, and land titles, as well as a variety of consumer goods, including newspapers and playing cards. (Proof of payment of the tax was the stamp affixed to the taxed document.) The tax had long been familiar to the British public, but it inflamed American public opinion, not so much because of the money extracted but because of the instruments used to extract it. Americans had paid taxes before, but they had been self-imposed, levied by the colonial assemblies to provide local services. Thus the American response, “No taxation without representation,” was not simply the rallying cry of a tax revolt. In fact, Americans were not genuinely interested in representation in the British Parliament. Rather, the colonists were asserting home rule. A more accurate rallying cry would have been “No taxation by a government in which we want no part!”

The colonial assemblies passed resolutions demanding the tax be repealed, and most sent delegates to a national conference, the Stamp Act Congress, to craft a unified response. For the first time they united against Britain by agreeing unanimously on a resolution condemning the tax. They could not agree, however, on a course of action.

The organized resistance of ordinary citizens was more successful.<sup>b</sup> Throughout the colonies local groups confronted tax collectors and prevented them from performing their duties. Over the next decade these scenes were repeated as Britain imposed a half-dozen new tax and administrative laws designed to weaken the colonial assemblies. Americans countered by boycotting British products and forming protest organizations, such as the Sons of Liberty, the Daughters of Liberty, and the more militant Committees of Correspondence. Vigilantism and public demonstrations overshadowed assembly resolutions.

The most famous of these demonstrations was the Boston Tea Party. No colony had chafed under Britain's new rules and import taxes more than Massachusetts, whose economy depended heavily on international trade and shipping. On a winter night in 1773 a group of patriots donned Native American dress and dumped 342 chests of tea owned by the East India Company into Boston Harbor to protest a new tax on Americans' favorite nonalcoholic beverage.

<sup>a</sup> Earlier, the Sugar Act of 1764 had levied new duties on certain foreign imports and introduced new efforts to interdict Yankee smuggling to circumvent import duties. At the same time Parliament passed another inflammatory law, the Currency Act, which forbade the colonies from printing their own currency, thus requiring merchants to raise scarce hard cash to do business.

<sup>b</sup> “Nothing else is talked of,” wrote Sally Franklin to her father, Benjamin, in London. “The Dutch [Germans] talk of the stompt act the Negroes of the tamp, in short every body has something to say.” Mary Beth Norton et al., *A People and a Nation: A History of the United States* (Boston: Houghton Mifflin, 1990), 117.



In this eighteenth-century satirical drawing by a British artist, Bostonians gleefully pour tea down the throat of a customs official, who has just been tared and feathered. In the distance colonists dump tea into Boston Harbor, just as they did in 1773 at the Boston Tea Party. And, lest one British misdeed go unnoticed, a symbol of the hated Stamp Act, passed in 1765, appears on the tree.

Courtesy of the Library of Congress Prints & Photographs Division

Britain responded with the Restraining Acts and Coercive Acts, which closed the port of Boston to all commerce, dissolved the Massachusetts assembly, decreed that British troops in Boston must be quartered in American homes, and ordered that Americans charged with protest crimes and British soldiers charged with crimes against the colonists be sent to England for trial. Colonists viewed these last provisions as ensuring serious punishment for the first group and lax punishment for the second.

### The Continental Congresses

When colonists elsewhere witnessed Britain's heavy-handed policies in Massachusetts, they recognized their own vulnerability. Without hesitation, they answered the call of Boston resistance leader Samuel Adams to assemble at Philadelphia in the fall of 1774 for what became the

First Continental Congress. Each colony sent its leading professionals, merchants, and planters. These men had mostly known one another only by reputation, but at this meeting they would form a nucleus of national leadership for the next decade. Among them were the future nation's first presidents: George Washington, John Adams, and Thomas Jefferson.

The Continental Congress promptly passed resolutions condemning British taxes and administrative decrees. When the idea of creating a national government was raised, Franklin's plan of union, the only existing proposal for unification, was introduced and briefly but inconclusively debated. The most significant actions of the First Continental Congress were adoption of a Declaration of American Rights, which essentially reasserted home rule, and endorsement of an agreement to ban all trade with Britain until it rescinded the despised taxes and regulations. To enforce the boycott against the prospect of massive free riding, Congress called for the formation of local elective "committees of observation" in every county, town, and hamlet in the country. Soon many of these newly formed organizations began imposing patriotic morality with investigations of "treasonable" conversations and public rebukes of more ordinary vices. Earlier import boycotts had been modestly successful—enough to alter British policy—but with the capacity to identify and sanction potential free riders, the new boycott won almost total compliance.

The eight thousand or so members of these local committees provided a base for the state-wide conventions that sprang up throughout the colonies when the British prevented the colonial assemblies from meeting. Unhampered by local British authorities, these conventions quickly became *de facto* governments. (When some colonies' assemblies were enjoined from meeting, they would adjourn to a local tavern and resume doing business as an unofficial provincial convention.) They collected taxes, raised militias, passed "laws" forbidding the judiciary from enforcing British decrees, and selected delegates to the Second Continental Congress, which met in Philadelphia in May 1775.

By the time the Second Continental Congress gathered, war had broken out. Spontaneous bloody uprisings in the spring of 1775 at Lexington and Concord in Massachusetts had provoked the state conventions to mobilize local volunteer militias and disarm suspected British loyalists. Events demanded concerted action, and the Second Continental Congress responded by acting like a national government. Congress had no legal authority to conduct a war effort, but throughout the colonies patriots desperately required coordination, and it was the only national institution available.

Congress first instructed the conventions to reconstitute themselves as state governments based on republican principles. Using their former colonial governments as a model, most states adopted **bicameral** (two-chamber) **legislatures**, and all created governorships. Accustomed to difficult relations with the royal governors, the states severely limited the terms and authority of these newly minted American executives. This antiexecutive bias would persist and influence deliberations at the Constitutional Convention a decade later.

Then, acting even more like a government, the Second Continental Congress issued the nation's first bonds and established a national currency. It also authorized delegate George Washington to expand the shrinking Massachusetts militia into a full-fledged national army. (As if his colleagues had needed a hint, Washington attended the convention in full military dress of his own design.)

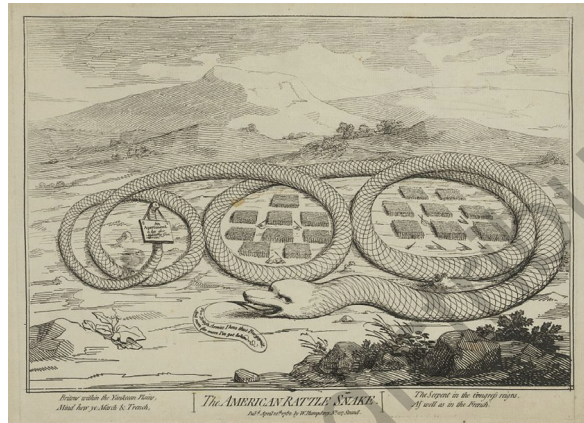
## The Declaration of Independence

During its first year's work of creating states and raising and financing an army, Congress did not consider the fundamental issue of separation from England. But it was discussed on street corners and in taverns throughout the nation. In January 1776 the pamphleteer Thomas Paine published *Common Sense*, which moved the independence issue to center stage. Within three months 120,000 copies had been sold, and Americans were talking about Paine's plainly stated, irresistible argument that only in the creation of an independent republic would the people find contentment.

The restless citizenry's anticipation that Congress would consider a resolution of separation was realized in June when Virginia delegate Richard Henry Lee called for creation of a new nation separate from Britain. Congress referred his proposal to a committee of delegates from every region with instructions to draft the proper resolution. One member of this committee was a thirty-three-year-old lawyer from Virginia, Thomas Jefferson. Asked to draft a statement because of "his peculiar felicity of expression," Jefferson modestly demurred. This prompted the always-direct John Adams of Massachusetts to protest, "You can write ten times better than I can."<sup>2</sup> Jefferson's qualifications to articulate the rationale for independence extended well beyond his writing skills. Possessing aristocratic tastes but democratic values, he never wavered from an abiding confidence in the innate goodness and wisdom of common people. "State a moral case to a ploughman and a professor," he once challenged a friend. "The former will decide it as well, and often better than the latter, because he has not been led astray by artificial rules."<sup>3</sup> In the end, Jefferson agreed to draft the resolution of separation.

Jefferson concurred with the other delegates in many of the specific grievances itemized in the resolution he drafted, but for him the real rationale for throwing off British rule rested on the fundamental right of self-government. Such conviction produced this famous passage:

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, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are



In this 1782 British cartoon at the close of the Revolutionary War, Benjamin Franklin's diminutive, garden-variety snake, struggling to stay whole (cartoon at the beginning of this section), has become through unity a voracious "American rattlesnake," eager to consume British armies. "Two British Armies I have thus Burgoynd, And room for more I've got behind," it boasts. A sign posted on its rattle advertises ominously to British readers, "An Apartment to Let for Military Gentlemen."

Courtesy of the Library of Congress Prints & Photographs Division

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 abolish it, and to institute new Government.

Jefferson's colleagues made only slight changes in this centerpiece of the **Declaration of Independence**, but they did amend his list of grievances. Foreshadowing the future conflict over race, Jefferson's last indictment of Britain was the introduction of slavery into the colonies. Most of the "execrable commerce" (Jefferson's phrase) in enslaved people was conducted by the British. In language more in keeping with the Declaration's preamble, Jefferson attacked the slave trade as "waging war against human nature itself, violating its most sacred rights of life & liberty." He goes on to point out that when some colonial legislatures passed bills banning the slave trade, the King vetoed them. The general grievances and platitudes were fine with everyone, but once Jefferson applied the Declaration to slavery, it offended the sensibilities of southern delegates who used forced labor. At their insistence, this grievance was stricken from the final resolution.<sup>c</sup> (The full text of the Declaration of Independence, including this deleted section, appears in the appendix.)

In a solemn ceremony on July 4, 1776, the Second Continental Congress officially accepted the document. Rebellious against a colonial power with a huge occupation army was a dangerous enterprise. The conclusion of the Declaration—"we mutually pledge to each other our lives, our Fortunes, and our sacred Honor"—was not mere rhetoric.

## AMERICA'S FIRST CONSTITUTION: THE ARTICLES OF CONFEDERATION

With the Declaration of Independence in hand, the delegates to the Second Continental Congress proceeded to "institute a new Government," as called for in the Declaration. Over the next several weeks they drafted and sent to the new states for ratification the nation's first constitution, the **Articles of Confederation**. Although not ratified until 1781, the Articles served as the nation's de facto constitution during the intervening war years.

As its name implies, the first American constitution created a **confederation**, a highly decentralized system in which the national government derives limited authority from the states rather than directly from citizens. Not only do the states select officials of the national government, but they also retain the authority to override that government's decisions.

The Articles transferred the form and functions of the Continental Congress to the new, permanent Congress, in which each state received one vote. Major laws required the endorsement of nine of the thirteen state delegations, whereas more fundamental changes, such as direct taxation, necessitated unanimous agreement to amend the Constitution. National authority was so restricted that the delegates saw little purpose for an executive branch or a judiciary.

<sup>c</sup> Among the items deleted: "He [King George III] has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating them and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither." In *Thomas Jefferson*, ed. Merrill D. Peterson (New York: Library of America, 1984), 21–22.

From time to time administrators might be required, but they could be hired as needed and directly supervised by the new Congress.

In adopting a confederation, the delegates sought to replicate the home rule they had lost in the 1760s. Clearly, after years of free riding under British rule, they were not yet willing to absorb the collective action costs associated with nationhood. Yet they also recognized that in declaring their independence they thrust upon themselves responsibility for supplying essential public goods—most important, defense and commercial markets—that Britain had provided under home rule. The same delegates who had pressed hardest for independence, knowing that it was likely to lead to war, were among those who most vigorously favored a confederation over a more centralized and powerful national government. Undoubtedly, the new nation's leaders still had a great deal to learn about the logic of collective action. But they would learn in time—the hard way. Their suspicion of national authority very nearly cost the fledgling nation its independence.

### The Confederation at War

Faced with a war raging for over a year, the states, unwilling to give the national government sufficient authority to conduct the war, became chiefly responsible for recruiting troops and outfitting them for battle. The national military command, which answered to Congress, assumed responsibility for organizing the various state regiments into a single fighting force. In principle, Congress was assigned the role of coordinator. It would identify military requirements, assess the states, and channel their (voluntary) contributions to the army. Congress also was empowered to borrow money through bonds, but its lack of taxation authority made bonds a risky and expensive venture for the government, which had to offer high interest rates to attract investors.

The public's deep suspicion of government also prevented national officeholders from creating the administrative structures suitable for the new government's wartime responsibilities. John Adams even wanted to prevent Washington from appointing his own staff officers for fear that "there be too much Connection between them." Instead, he argued, Congress should select all officers so that these "officers are checks upon the General." Adams's appeal to the "proper Rule and Principle" stimulated serious debate, but he did not prevail in this instance. Adams was, however, more successful in other attempts to dilute executive powers.

The administrative vacuum sucked congressional committees into the daily affairs of requisitioning an army. These legislators struggled mightily, even heroically, to do their duty, but most were unskilled in administration and frequently unable to make timely decisions. In fact, the members of one committee expressed such a variety of views on the number of uniforms to be ordered that they were unable to come to a decision. The desperate plight of General Washington's army as the war continued attests to the naiveté and ineffectiveness of the confederation's structure. Thus the collective action problems described in Chapter 1 were evident in America's war effort: contagious levels of free riding and the reluctance of some states to contribute their fair share for fear that the other states would hold back (a classic prisoner's dilemma). Moreover, the undeveloped national administration provided fertile soil for equally debilitating free riding in the form of corruption.

Without the authority to play a more central role in administering the war, Congress responded to the quickly deteriorating military situation by decentralizing authority even further. Among other things, it passed resolutions instructing the states to supply their troops directly. Perhaps, some members reasoned, the states would be more forthcoming with support for their own sons in uniform. This scheme had the merit of converting a public good—military supplies that all state regiments could consume regardless of their state’s contribution—into a more or less private good that linked the welfare of each state’s troops to its legislature’s effort. But the actual practice of thirteen states locating and supplying intermingled regiments scattered up and down the Atlantic seaboard presented a logistical nightmare. On hearing of it, General Washington caustically remarked that members of Congress “think it is but to say, ‘Presto begone,’ and everything is done.” At the same time pressure mounted on various fronts, including within Congress itself, for Congress to assume greater authority to conduct the war.<sup>d</sup> Understandably, the military commanders were the most outspoken in lobbying Congress and state governors for a “new plan of civil constitution.”<sup>4</sup> General Washington advised Congress that an “entire new plan” providing it with the authority “adequate to all of the purposes of the war” must be instituted immediately. Washington’s aide Alexander Hamilton, later one of the architects of the Constitution, showered members of Congress with correspondence urging them to grasp the emergency authority he claimed was inherent in the Articles. Without the “complete sovereignty” that could come only with an independent source of revenue, he argued, Congress would have neither the resources nor the credibility necessary to conduct the war. And, as the states’ dismal performance had proved, if Congress did not take control, no one else could.<sup>e</sup>

The addition of the second major group—state officials—to the chorus for reform reveals the pervasiveness of frustration with the confederation. Although the confederation had sought to empower these officials above all others, many found themselves trapped in a classic prisoner’s dilemma. They were prepared to sacrifice for the war, but only if they could be confident that the other states would also do their part. Moreover, many of their colleagues who had been outspoken champions of volunteerism were defeated in the 1780 elections by challengers calling for a strengthened national authority that could enforce agreements.

By the summer of 1780 some states were taking direct action. In August representatives of several New England states met and passed a resolution calling for investing Congress with “powers competent for the government.” Several months later five northern states met at what is now known as the Hartford Convention to urge Congress to grant itself the power to tax. In a remarkable resolution the convention called for Congress to delegate to General Washington the authority “to induce . . . punctual compliance” from states that ignored their obligations to supply the army. The delegates realized that states would only cooperate (and end their prisoner’s dilemma) under the threat of coercion.

<sup>d</sup>Ten years later these advocates of congressional authority would form the core group of nationalists, led by James Madison and Alexander Hamilton, pressing the nation for a new constitution.

<sup>e</sup>Hamilton also argued that Congress must delegate administration to “great officers of State—A secretary for foreign affairs—A President of War—A President of Marine—A Financier.” In effect, he was calling for an autonomous national government with a legislature at its center and a separate executive branch.



Congress responded as best it could, but it labored under a constitution designed to frustrate national action. In 1781 Rhode Island, with less than 2 percent of the nation's population, vetoed a bill giving Congress the authority to levy taxes. Various administrative reforms were enacted but had to be watered down to win unanimous endorsement. Congress could not agree on how much independent authority to delegate to the executive offices it created. As a result, the offices had no authority, and their occupants served at the beck and call of the legislature's committees.

The tide turned after France, England's long-standing adversary, agreed to lend the Americans hard currency. By 1782 General Washington could write for the first time since the beginning of the war that his army was well fed, clothed, and armed. A reinvigorated American army and France's continued participation in the war presented Britain with the prospect of a far longer conflict. (France formally recognized American independence and agreed to support the United States unilaterally in 1778.) In October 1781 British troops, under General Charles Cornwallis, suffered defeat at Yorktown, Virginia, and Britain sued for peace. Thus the United States had somehow survived a war with an occupying army. In the jubilation of victory, however, momentum for political reform was lost.

### The Confederation's Troubled Peace

Shortly after signing the peace treaty with Britain, the nation lunged toward new perils—indeed, to the point that many Americans and even more Europeans wondered whether the hard-won independence might still be lost in national disintegration. By 1787 American leaders were openly speculating about the prospect of Britain reasserting its authority over the barely united and internally divided states. “America is a nation without a national government,” one critic observed, “and it is not a pretty sight.”

### The War-Torn Economy

After six years of war, the nation's debt was staggering. Congress owed Americans about \$25 million and foreign governments another \$10 million. The most urgent concern was the back pay owed the army. In the spring of 1783 General Washington learned of a conspiracy forming among disgruntled officers to march on Congress. Greatly alarmed, he wrote his former aide Alexander Hamilton, now a member of Congress, that the army should be paid and “disbanded without delay.” The army is “a dangerous instrument to play with,” he warned ominously. Prudently, Congress followed Washington's advice.

Creditors who had supplied the troops formed another long line. But Congress was more successful in ignoring these unarmed claimants, some of whom eventually received partial payment from the states. Abroad, debts to Britain negotiated in the peace settlement and loans from European governments and private interests all had to be repaid before normal commercial relations with these countries could resume. In the face of so much debt, the national currency plummeted to approximately one-tenth of its prewar value.

The complexities of governing by confederation compounded the problem. Congress held the debt, but the states controlled the purse strings. As it had during the war, Congress prescribed annual state contributions to reduce the debt over twenty-five years. But no one

expressed confidence that the states, having proved so unreliable in war, would step forward in peace to accept fiscal responsibility for the nation. With no enforcement mechanism in place, the states again individually confronted a classic prisoner's dilemma: no state would contribute its share of the revenue so long as it suspected one or more of the other states might not meet its obligations. Congress faced two tough choices. It could try to penalize those states that reneged, or it could try to finance the debt on its own. The latter proved more feasible. Thus in the same bill that mapped long-term debt reduction Congress proposed a constitutional amendment giving the national government a source of direct revenue in the form of import duties. As in the past, however, the Articles' unanimous consent rule for amendments frustrated action. Unwilling to share the revenue from its already active port city of New York, the New York legislature killed this proposal.

### Trade Barriers at Home and Abroad

The nation's shaky finances were not helped by its trade problems, which also stemmed from the confederation's explicit reservation of all matters of commerce to the states. For example, Congress lacked the authority to negotiate credible trade agreements with other nations. European governments found this arrangement, in which trade agreements required the endorsement of each state's legislature, unwieldy. The national government also proved incapable of responding to discriminatory trade sanctions and other actions abroad. When the British and later the French closed their West Indies possessions to U.S. exports, the action threatened the fragile, war-torn economy that depended heavily on exports.

Economic relations among the states were nearly as unsatisfactory. States with international ports charged exporters from other states stiff user fees. New York victimized New Jersey; Virginia and South Carolina both extracted a toll from North Carolina. And each state minted its own currency. Some states, responding to political pressures from indebted farmers, inflated their currencies. Exchange rates fluctuated widely across states, rendering interstate commerce a speculative financial exercise.

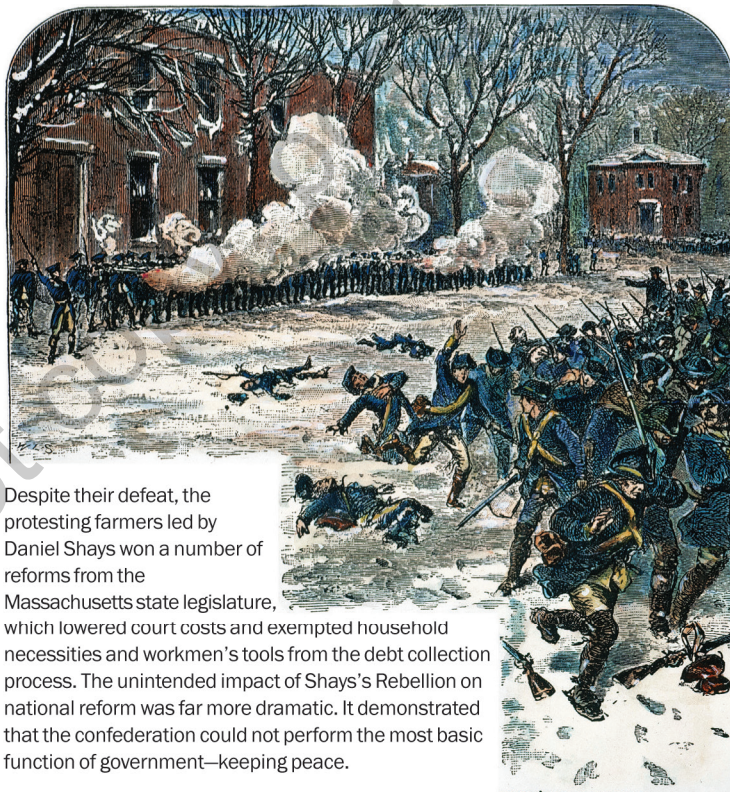
To no one's surprise, many sectors of the economy clamored loudly for reform. The nation's creditors wanted a government able to pay its debts. Importers and the mercantile class desperately needed a sound currency and an end to capricious state policies toward other states' goods. The profits of southern tobacco and indigo growers depended wholly on open export markets, which only a national government could negotiate effectively. The need for a central authority that could create and manage a common market at home and implement a unified commercial policy abroad spurred diverse economic interests to call for a revision of the Articles of Confederation.

In the summer of 1786 Virginia made the first move, inviting delegates of other states to convene that fall in Annapolis, Maryland, to consider ways of strengthening the national government's role in commerce. Eight states named delegates, but when those from only five states showed up, the Annapolis convention adjourned after passing a resolution calling for another convention in Philadelphia nine months later. Thus the Annapolis convention earned a place in history by setting the stage for the Constitutional Convention in May 1787. Although the delegates had no reason to believe the next meeting would generate any better turnout, events

during the intervening months, including **Shays's Rebellion**, galvanized interest and mobilized the states behind constitutional reform.

### Popular Discontent

In the economic depression that followed the Revolution, many small farmers lost their land and other assets. Markets were disrupted, credit became scarce, and personal debt mounted. The financial straits of small farmers spawned occasional demonstrations, but none so threatening as the one that erupted in the fall of 1786 in western Massachusetts, where taxes were especially onerous and the local courts unforgiving. Many farmers lost their land and possessions at the auction block, and some were even being hauled off to debtors' prison. The protest movement began with town meetings and petitions to the state legislature to suspend taxes and foreclosures. When their appeals failed to win much sympathy, these disaffected citizens found more aggressive ways to remonstrate their grievances. Under the leadership of Daniel Shays, a former captain in the Continental Army and a bankrupt farmer, an armed group composed mostly of farmers marched on the Massachusetts Supreme Court session in Springfield to demand that state judges stop prosecuting debtors. Shays's band was met by the state militia, but the confrontation ended peacefully after the magistrates adjourned the court.



Despite their defeat, the protesting farmers led by Daniel Shays won a number of reforms from the Massachusetts state legislature, which lowered court costs and exempted household necessities and workmen's tools from the debt collection process. The unintended impact of Shays's Rebellion on national reform was far more dramatic. It demonstrated that the confederation could not perform the most basic function of government—keeping peace.

SHAYS'S FORCES IN MASSACHUSETTS.

Sarin Images/The Granger Collection, NYC—All rights reserved.

In late January 1787, Massachusetts erupted once more, this time with enough violence to convince the states to convene in Philadelphia. Having learned that Shays planned an assault on a government arsenal in Springfield, delegates from Massachusetts appealed to the national government to send funds and troops. Once again unable to muster compliance among the states, Congress could offer neither troops nor money. A similar appeal to neighboring states proved no more productive. Finally, the state organized a militia (in part with private donations) that intercepted and repulsed Shays's "army" of about a thousand farmers outside the arsenal. Over the next several weeks some of Shays's men were captured, others dispersed, and the rebellion ended.

Had it been an isolated incident, even this event might not have persuaded state leaders of the need for a stronger national government. But Shays's Rebellion coincided with a wave of popular uprisings sweeping across the country. The same winter, two hundred armed farmers in Pennsylvania had tried to reclaim neighbors' possessions that had been seized by tax collectors. On the same day as Shays's defeat, these farmers rescued a neighbor's cattle from a tax sale. Virginia protesters, following the example of the insurgents in Massachusetts, burned down public buildings. Their favorite targets were jails and courthouses where tax and debt records were kept.

State legislatures, either intimidated by threats of force or genuinely sympathetic with farmers' demands, started to cave in under the slightest pressure from these constituencies. At times, these bodies' knee-jerk responses caused them to behave in ways more in keeping with revolutionary tribunals than with deliberative republican legislatures respectful of property rights. Throughout the country they summarily overturned unpopular court decisions, altered property assessments, and issued quickly devalued paper money, which they then forced creditors to accept as full payment of farmers' debts. One scholar offered this assessment: "The economic and social instability engendered by the Revolution was finding political expression in the state legislatures at the very time they were larger, more representative, and more powerful than ever before in American history."<sup>5</sup> Observing all this, the troubled James Madison of Virginia wrote his friend Thomas Jefferson in Paris, where Jefferson was serving as the states' ambassador: "In our Governments the real power lies in the majority, and the invasion of private rights . . . chiefly [arises] . . . not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents."<sup>6</sup> Madison's discomfort with arbitrary majority action guided his efforts and those of like-minded delegates throughout the Constitutional Convention.

To many observers, Shays's Rebellion represented a wildfire threatening to sweep the country into anarchy.<sup>7</sup> No matter how persuasive Hamilton, the beloved Washington, or any of the other **nationalists** were in promoting the cause of constitutional reform, it was Daniel Shays who offered the most compelling reason for states to send delegates to the Philadelphia Convention. Ultimately, the states took the first steps toward true unification not in response to their collective dilemma, but rather out of a more fundamental concern with self-preservation. When they assembled in Philadelphia the next spring, delegates from all states except Rhode Island showed up.

## DRAFTING A NEW CONSTITUTION

In their deliberations the fifty-five youngish, well-educated white men who gathered in Philadelphia in 1787 drew on their shared experience of war and its aftermath, but they did not do so reflexively or out of narrowly construed self-interest. They also were highly conversant in the ideas and theories swirling “in the air” during the Enlightenment, as the dominant intellectual current of the eighteenth century was known. Influenced by recent advances in science, scholars—and even America’s politicians—sought through careful reasoning to discern the “natural laws” that governed economics, politics, and morality. The impact of these ideas was a matter not merely of their novelty and intellectual appeal, but also of how they illuminated Americans’ experiences.

Thus the Constitution that eventually arose out of the Convention was grounded in theories of politics, economics, and even science that were attracting attention at the time throughout Europe. The delegates cited dozens of contemporary and ancient philosophers during floor deliberations, often quoting them in their original language of Latin or French. Of these thinkers, several deserve to be singled out because their ideas are clearly discernible in the Constitution.

### Philosophical Influences

Heading any list of influential Enlightenment thinkers is the English philosopher John Locke (1632–1704), whose brilliant writings on political theory and design of government read in some places as if the Framers were his sole audience. In 1690 Locke vigorously defended the still-novel idea of **popular sovereignty**—that is, citizens’ delegation of authority to their agents in government, with the ability to rescind that authority.<sup>8</sup> This argument clearly influenced Jefferson’s words in the Declaration of Independence. Moreover, Locke stressed individual rights and the limited scope of government authority. If Locke’s ideas strike the modern student as unexceptional, it is because they are so thoroughly embedded in the U.S. Constitution and governmental system that they are taken for granted.

During the same era another Englishman, Sir Isaac Newton (1642–1727), established the foundations of modern mechanics and physics. His discovery of the laws of physical relations (such as gravity) inspired the Framers to search for comparable laws governing social relations. Evidence of Newton’s influence can be seen in the Framers’ descriptions of their design proposals to one another and later to the nation. Concepts such as “force,” “balance,” and “fulcrum” and phrases such as “laws of politics” and “check power with power” that seemed borrowed from a physics textbook were bandied about with great familiarity.

Perhaps more than anyone else, the French philosopher Charles, Baron de Montesquieu (1689–1755), supplied the Framers with the nuts and bolts of a design of government, particularly his classification of governmental functions and forms as legislative, executive, and judicial. Like Locke, Montesquieu championed limited government—limited not only in the nature of its authority but also in the size of the political community it encompassed. Thus during and after the Convention opponents of reform invoked Montesquieu’s case for the

superiority of small republics as a powerful counterargument to those who advocated empowering the national government.

Finally, the Scottish philosopher David Hume (1711–1776) treated politics as a competition among contending interests, in much the same way that his fellow countryman Adam Smith described competition in the marketplace of an emerging capitalist economy. An ocean away, James Madison adapted Hume’s arguments to his own purposes, much as Jefferson did Locke’s.

America’s founding leaders, though politicians, often behaved as if they were philosophers, carefully studying and even writing treatises on government. The most important is James Madison’s three-thousand-word essay “Vices of the Political System of the U. States,” which he drafted in the spring of 1787 after extensive research on ancient and modern confederations. (Madison had Jefferson scour Paris bookstores for source materials.) Madison circulated copies of his manuscript among fellow Virginians who would be attending the Philadelphia Convention to prepare them for the reform proposal he was writing. Madison’s sophisticated understanding of politics is apparent in a passage attributing the confederation’s failure not to a moral breakdown of the citizenry but to the classic prisoner’s dilemma embedded in faulty institutions: “A distrust of the voluntary compliance of each other may prevent the compliance of any, although . . . [cooperation is] the latent disposition of all.”

### Getting Down to Business

Most of the delegates representing their states in Philadelphia probably were unaware of the grand scope of the enterprise on which they were about to embark. Some undoubtedly assumed that the Convention would simply return to the Annapolis agenda that sought to resolve commercial disputes at home and coordinate the states’ commercial policies abroad. Others anticipated minor reforms of the Articles and were prepared to take the positions dictated by their state legislatures. But at least a few, most notably James Madison, were planning—indeed, plotting with others of like mind—to scrap the Articles of Confederation altogether and start over.

Sensing his fellow Virginian’s hidden agenda, war hero Patrick Henry announced he “smelt a rat” and refused to join the delegation to Philadelphia. The Delaware legislature was similarly suspicious and instructed its delegates to oppose any scheme that undermined the equality of the states. Another small state, the ever-independent Rhode Island, boycotted Philadelphia altogether.

The Convention opened on a rainy Friday, May 25, 1787. By near-universal acclamation, the delegates elected General Washington to preside over the deliberations, and the Convention began on a harmonious note. Madison sat at the front, where he could easily participate in floor debates and record the arguments of his colleagues.<sup>f</sup> The Convention agreed to keep the proceedings secret to allow a frank exchange of views and to facilitate compromise. This

<sup>f</sup>Unable to fathom the purpose of certain provisions of the ancient constitutions he had examined in his preparation for the Convention, Madison was determined not to leave future generations in the dark about the rationale of this new constitution. Thus he carefully recorded the business of the Convention. *Notes on the Federal Convention* was discovered among Madison’s papers after his death in 1837. The federal government paid his widow, Dolley, \$30,000 for the papers and published them three years later. This discussion closely follows Madison’s *Notes*.

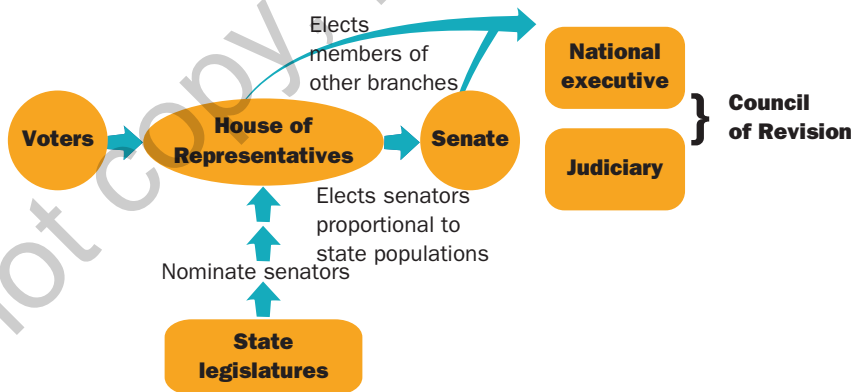
decision also meant keeping the window shutters closed during one of the hottest summers in Philadelphia's history.

### The Virginia and New Jersey Plans

On the first day of substantive business Madison and his nationalist colleagues sprang their surprise. Edmund Randolph, also from Virginia, introduced Madison's blueprint for a new constitution. In this revised constitution Madison favored those institutional design features more closely resembling parliamentary systems than those of the future American republic. In the Virginia Plan, as it came to be known, Madison appears to have been more concerned with fashioning an active national government, even if it imposed high conformity costs on the states. The **Virginia Plan** dominated floor debate well into July. Although few of its provisions survived intact in the final draft of the Constitution, the Virginia Plan succeeded in shifting the deliberations from patching up the confederation to considering anew the requirements of a national union.

The centerpiece of the Virginia Plan was a bicameral national legislature. Members of the lower chamber would be apportioned among the states by population and directly elected by the citizenry. The lower chamber would, in turn, elect the members of the upper chamber from lists of nominees supplied by the state legislatures. It also would elect the officers of the proposed executive and judicial branches (represented in Figure 2.1). Madison's intent was clear: only representatives, whose direct election by the people gave them special legitimacy in formulating national policy, would control the selection of the other officers of government.

**FIGURE 2.1** ■ Organization of the National Government under the Virginia Plan



To solve the nation's collective action problems, the Virginia Plan also gave the national government enforcement authority. It could make whatever laws it deemed appropriate and veto any state laws it regarded as unfit. If a state failed to fulfill its legal obligations, the national government could summon military force against it. This provision proved to be a tactical mistake because it inflamed opposition. In the meantime, the nationalists realized belatedly that

military force would never be needed because the national government could directly implement its own policies and would no longer depend on the cooperation of the states.

With the states reduced to the status of junior partners, the national legislature would assume a standing comparable with that of the British Parliament. Madison did provide one check on this legislative dynamo: a Council of Revision, composed of the executive and certain judges, which could veto legislation. Its members, however, would be elected by the legislature. Thus skeptical delegates reasonably questioned how effective such a check could be. In any event, Madison proposed allowing Congress to override a council veto.

After Madison achieved early success in some preliminary floor votes, opposition, mainly from two sources, to his radical reforms solidified. Delegates representing the less populous states were understandably upset. They could easily calculate that they (and their citizens) would have far less representation under the Virginia Plan than they presently enjoyed with equal state representation and the one-state veto rule. Another bloc (mostly from small states as well) wanted stronger safeguards of state sovereignty. For these **states' rights** delegates, continued state participation in the selection of national officeholders was as important an issue as how legislative seats were to be apportioned.

Both groups coalesced around an alternative proposed by New Jersey delegate William Paterson, known as the **New Jersey Plan**. This late, hastily drafted response to the Virginia Plan was not as thoroughly thought through as Madison's proposal. It satisfied the requirements of its states' rights supporters, however, by perpetuating the composition and selection of Congress as it functioned under the Articles of Confederation and continuing to give each state one vote. But the New Jersey Plan broke with the Articles by giving Congress the authority to force the states to comply with its tax requisitions. This plan also allowed a simple majority vote to enact national policy rather than the supermajority required in the Articles. The New Jersey Plan thus eliminated the most objectionable features of the confederation. But its retention of a seriously malapportioned Congress representing the states rather than the citizenry did not come close to satisfying the demands of the nationalists.

Debate on the composition of Congress raged for weeks, with each side steadfastly and heatedly refusing to budge.<sup>8</sup> Stalemate loomed. As the meetings neared a Fourth of July recess, the delegates agreed to send the question of Congress—its selection and composition—to a committee with instructions to report out a recommendation after the break. Madison was not named to the committee.

## FEATURES OF THE CONSTITUTION

### The Great Compromise

The committee's solution was a Solomon-like compromise that split control of the legislature's two chambers between the large (House of Representatives) and small (Senate) states. The upper chamber,

<sup>8</sup> Madison's allies did make one significant concession, accepting an amendment that gave the states sole authority to select the members of the upper house. Thus the Senate began to assume its ultimate form. But the delegates from small states pressed for more: equal state representation in both chambers.



or Senate, would retain many of the features of Congress under the Articles of Confederation: each state legislature would send two senators to serve six-year terms. Madison's population-based, elective legislature became the House of Representatives. To sweeten the deal for the nationalists, who had rejected a similar compromise earlier in floor deliberations, the committee reserved to the House alone the authority to originate revenue legislation (represented in Figure 2.2).

**FIGURE 2.2** ■ Virginia Plan, New Jersey Plan, and Great Compromise

Virginia Plan	New Jersey Plan	Great Compromise
<ul style="list-style-type: none"> <li>* Two-chamber legislature; representation based on state population</li> <li>* Lower chamber of legislature elected by the citizenry; upper chamber, executive, and courts elected by the lower house</li> <li>* Legislature can make any law and veto any state legislation</li> <li>* Council of Revision (composed of executive and court) can veto legislation, but legislature can override by majority vote</li> </ul>	<ul style="list-style-type: none"> <li>* Single-house chamber; equal representation for each state regardless of population</li> <li>* Legislature has same power as under Articles, with added authority to levy taxes and regulate commerce; can exercise supremacy clause over state legislation</li> <li>* Plural executive can be removed by legislature (on petition of a majority of states); courts appointed by executive</li> <li>* Supreme Court hears appeals in limited number of cases</li> </ul>	<ul style="list-style-type: none"> <li>* Two-chamber legislature, with lower chamber (House of Representatives) representation based on population and upper chamber (Senate) representation equal for every state</li> <li>* Authority to levy taxes reserved to the lower chamber</li> </ul>

The unanimous agreement rule that had hobbled the Confederation Congress was gone, replaced by a rule that wholly ignored states as voting entities and instead empowered a majority of each chamber's membership to pass legislation. Moreover, the delegates agreed to a broad list of enumerated or expressed powers, contained in Article I, Section 8, of the Constitution, that extended the authority of the national legislature far beyond that available to Congress under the confederation. These powers included the authority to declare war, maintain an army and a navy, and borrow money. Another item on the list of new powers stood out: the authority "to regulate Commerce with foreign Nations, and among the several States." This **commerce clause** greatly expanded the new Congress's—and, in turn, the national government's—sphere of action. And another clause in Section 8 further compounded its impact. The Framers closed the long list of explicit powers with the following general provision: Congress shall enjoy the authority "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." This critical provision, called the **necessary and proper clause**, left the door open for a major expansion of Congress's legislative power and the nationalization of public policy during the twentieth century.<sup>h</sup>

<sup>h</sup> Chapter 3, "Federalism," traces the nationalization of public policy via the necessary and proper clause. In addition to listing what Congress can do, the Constitution lists what it—and the states—cannot do. Article I, Section 9, restricts Congress from granting titles of nobility, spending unappropriated funds, suspending the writ of habeas corpus, passing ex post facto laws, levying income taxes (the Sixteenth Amendment ratified in 1913 rescinded this provision), and taxing state exports. Section 10 imposes restrictions on states, prohibiting them from conducting foreign policy (through entering into treaties or alliances or conducting war), printing money, passing laws undermining contracts, and imposing tariffs or duties on trade.

Both defenders and critics of an activist federal government agree that all national policies affect interstate commerce in some way. Together these clauses have provided a rationale for enacting far-reaching national legislation, including federal laws against interstate kidnapping and bank robbery; regulations on agricultural production (covering even the growth of feed that never leaves the farm where it was grown); bans on racial and other discrimination in restaurants, hotels, and public transportation; laws against possession of guns near public schools; and thousands of other wide-ranging national policies.

The committee's proposal was adopted by a vote of 5–4, with the other states abstaining or absent. Opposition came uniformly from the nationalists, who viewed the compromise as one sided. Through the Senate a majority of the states could still prevail over national policy. But the nationalists also recognized that this was the best deal they could get. Because the preferences of the states' rights delegates were more closely aligned with those of the status quo, they could more credibly present the nationalist side with a take-it-or-leave-it proposition.

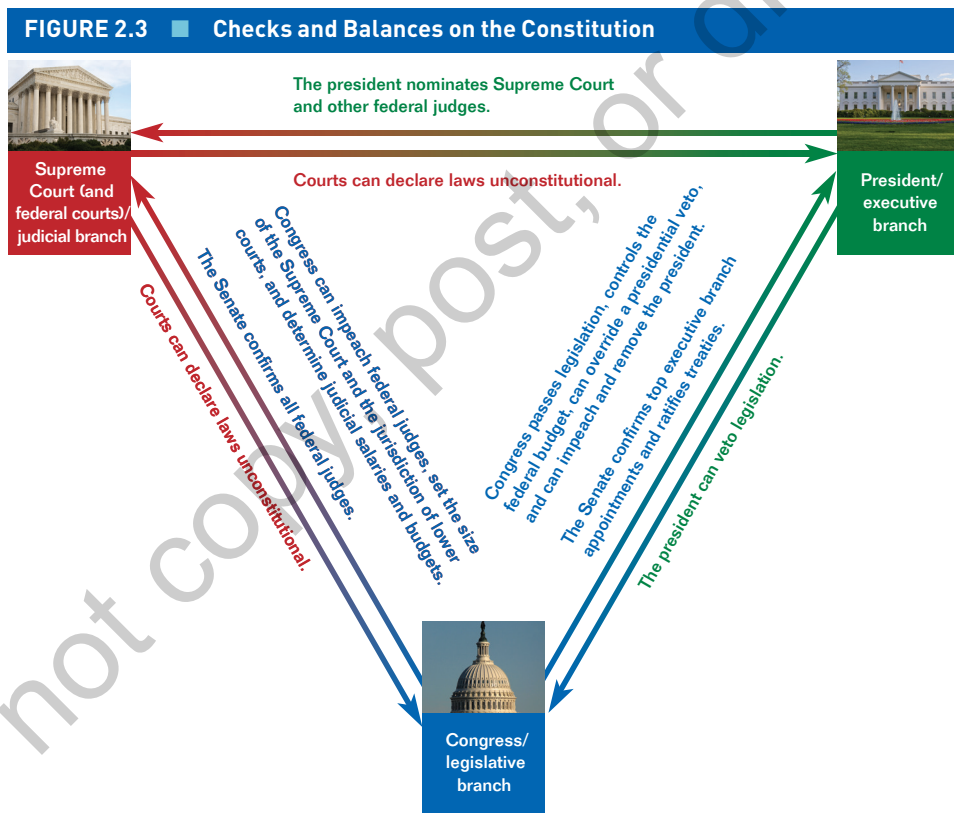
Now, more than two centuries later, the political logic of dividing representation in Congress between the citizens and the states no longer matches reality. The supremacy of the national government over the states was decided by the Civil War. Senators have been elected directly by the voters since adoption of the Seventeenth Amendment in 1913. Despite the new reality, the Senate—the institution that embodies the initial logic of states' rights—persists. Indeed, as noted in Chapter 1, once in place an institution tends to survive long after the circumstances that fashioned it in a particular form have changed beyond all recognition. Although it is difficult today to justify a system in which, for example, citizens of Wyoming count for sixty-five times as much as citizens of California in one chamber of the national legislature, Americans are stuck with it. Yet, although still badly malapportioned, the modern Senate has become as attuned as the House of Representatives to changes in popular sentiments (covered in Chapter 6, “Congress”).

Because the compromise plan substantially strengthened the national government's capacity for action, most nationalists except Madison reconciled themselves to it—at least initially. The man who during his lifetime was called “the father of the Constitution” maintained that ultimately the nationalists would prevail by letting the country stew a while longer under the Articles. Eventually he was talked out of that idea, but he remained profoundly disillusioned. Then, perhaps literally overnight, Madison scrapped the rest of the Virginia Plan and made what amounted to a 180-degree turn in his views on the proper relations among government institutions. A new, more strategic politician had emerged. Suddenly Madison expressed enthusiasm for a genuine separation of powers between the branches, with each side exercising **checks and balances** over the others. The reasoning behind his hurried reassessment might have gone something like this: if the state legislatures could corrupt the new Congress through their hold on the Senate, they also could corrupt the entire national government through Congress's power to select the officers of the other branches of government. The solution: insulate the executive and judicial branches and enlist them in containing any efforts by the states through the Senate to subvert national policy. Thus in early July, with the summer half over and the proceedings

gathering momentum, Madison turned his attention to fashioning an independent executive and judiciary.

## Checks and Balances

Checks and balances may not have been a prominent feature of Madison's initial plan for the new constitution, but once the Senate appeared firmly under control of the states, he became preoccupied with installing authority within each branch that would allow it to prevent one of the other branches from adopting unwise policies. With checks and balances the three branches would *share* power. The president could nominate a judge (a kind of check on the judiciary), but the nominee could not be appointed unless confirmed by the Senate (a kind of check on both the president and judiciary). Figure 2.3 shows the most important checks and balances in the Constitution, but not all!



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## Designing the Executive Branch

In May 2020 Donald Trump announced his intention to reopen large segments of the U.S. economy that the states had shut down with quarantines in response to the COVID-19 pandemic. When a reporter questioned his authority to do so, the president responded with total disregard for and perhaps unawareness of the intricate network of checks and balances: “The authority of the president of the United States having to do with the subject we’re talking about, the authority is total, and that’s the way it’s got to be. . . . It’s total. The governors know that. . . . They can’t do anything without the approval of the president of the United States. . . . I have the ultimate authority.”<sup>9</sup>

Of the Framers, Alexander Hamilton would probably have been sympathetic with the tenor if not the details of Trump’s sentiment. Hamilton had expressed the greatest enthusiasm for a strengthened, independent executive. In fact, he envisioned a president elected for life. These sentiments led his colleagues to ignore his views as they turned their attention to the presidency. His eloquent speeches were “praised by everybody . . . [but] supported by none,” reported one candid delegate.

The delegates’ lack of enthusiasm for an active, authoritative presidency is understandable. They had just finished dividing legislative authority into two coequal chambers with representatives and senators to be elected for different terms and from different constituencies. With each chamber able to block intemperate policies arising from the other, the Framers could more safely invest in them broad authority to make policy. Once the delegates dismissed the idea of a plural executive as impractical, the presidency no longer contained the internal checks that would have it control its excessive impulses.

This posed a serious dilemma for the Convention. Even a casual survey of world history would turn up a panoply of absolute monarchs and other tyrants. Such a list supplied ample examples of the techniques arbitrary executives used to exploit the citizenry and preserve their power. Indeed, all of the delegates had lived under an arbitrary executive’s thumb. They despised King George III and his agents, the vilified colonial governors, who chronically were at odds with the colonial legislature over who had what authority. After the Revolution the new states had overreacted by creating weak governors. Based on his brief experience as Virginia’s wartime governor, Jefferson dismissed the office as a “cipher,” a nonentity. In the end the only acceptable model of the new American president was, in the words of one historian, “sitting there in front of them . . . dignified, silent, universally admired and respected . . . impartial, honored for his selfless devotion to the common good, not intervening in, but presiding over, their councils—a presider, a *president*. The executive was to be—George Washington.”<sup>10</sup> The presence of a real-life example of an ideal executive presiding over the Convention kept in view the kind of leadership the delegates sought to institutionalize, yet it does not appear to have made their task any easier. In the end, the delegates largely succeeded in fashioning an independent executive branch that might be incapable of abusing authority and might actually moderate excesses by an overreaching legislature. To achieve this, they designed several features. First, they limited the scope of presidential responsibilities and particularly the office’s command authority. (The presidency of the twenty-first century might appear to belie their success. In Chapter 7 we survey the evolution of the presidency and reconcile the modern with the early office.) Article

II states, almost as an afterthought, that the president “shall take Care that the Laws be faithfully executed.” Modern presidents sometimes assert that the “take care” clause allows them to undertake whatever actions the nation’s well-being requires and are not expressly forbidden by the Constitution or public law. Yet, unlike Congress’s expansive necessary and proper clause that bolsters their discretion in performing a long list of responsibilities, this mandate is not attached to any specific duty. Specifically, this new executive will appoint officers to fill vacancies in the executive department, receive and appoint ambassadors, negotiate treaties, serve as commander in chief of the army and navy, and periodically report to Congress on the state of the nation. The second design feature attached a legislative check, or veto, to each presidential duty. The Senate would confirm appointments and ratify any treaties (in this instance with a two-thirds vote) before they could take effect. Only Congress could declare war.

The third significant design feature was the veto, a negative action that would allow the executive to perform a “checking” function on the legislature. Unlike some constitutional executives, presidents cannot make policy or appropriate funds for programs, except as allowed in public laws. By requiring a **supermajority** vote of two-thirds of the members of each house to override a presidential veto, the Framers carved out an important role for the modern president in domestic legislation.

Over the next two centuries, the presidency became a much more consequential office, both in its duties and in its authority. But at least with respect to domestic policy, it has done so within a constitutional framework that has not changed. Most of the expansion has occurred through statutory provisions delegating policy responsibilities to the White House. If the Framers observed the president’s role in domestic policy today, they might be shocked with what they found, but they would quickly recognize it as an extension of the office they envisioned.

One cannot be so confident that the Framers would come to the same assessment regarding the president’s dominant role in foreign policy and national defense. Beginning with World War II the United States became a leader in international affairs. Whatever advantages its status conferred, it also entailed numerous—well over one hundred—military actions. None began with Congress declaring “war,” although all of the large-scale conflicts—Korea, Vietnam, and both Iraq wars, among others—found Congress passing resolutions backing the president’s actions that initiated the conflict. Some analysts argue that contemporary international affairs and modern military technology have eclipsed the Constitution’s capacity to prescribe appropriate authority and responsibilities available to the executive and legislature in modern wartime. In part the Constitution’s limited and general language regarding foreign affairs has contributed to this uncertainty. During the George W. Bush presidency, administration and congressional views on the constitutional prerogatives for these branches during wartime diverged sharply. In Chapter 7 we consider occasions during which White House officials have asserted that Congress has no role. Invariably the federal courts have had to resolve these constitutional disputes and have groped for answers along with the president and Congress. We take up these issues in detail later. The important point here is that the Constitution contains gaps—at times, chasms—that have Americans more than two hundred years after the document was ratified asking fundamental questions about the appropriate role of Congress and the presidency. Much of the uncertainty occurs with subjects that Article II’s creation of the presidency failed to resolve.



George Washington was an agent of change that eighteenth-century republicans pined for—a military commander who could seize power from arbitrary executives and then surrender it to a popularly elected, republic government.

Peter Horree/Alamy Stock Photo

At the Constitutional Convention, the delegates found that the only workable formula for agreement between the nationalists and states' rights advocates was to give both sides pretty much what they wanted, an approach that yielded the **Great Compromise**, and multiple routes for amending the Constitution. When the drafters turned to devising a procedure for electing

the president, they returned to arduous committee deliberations and floor wrangling to find a compromise. This time Constitutional Convention politics produced arguably the most convoluted rules to be found in the Constitution: the workings of the **Electoral College**.

As a device, the Electoral College tries to mix state, congressional, and popular participation in the election process and in doing so has managed to confuse citizens for more than two hundred years. In two of the past five elections the candidate who won the Electoral College majority failed to win even a plurality of the popular vote. George W. Bush in 2000 and Donald Trump in 2016 did so by having their popular votes fortuitously distributed across the states in such a fashion as to maximize their electoral votes. Each state is awarded as many electors as it has members of the House and Senate. The Constitution left it to the states to decide how electors are selected, but the Framers generally and correctly expected that the states would rely on statewide elections. If any candidate fails to receive an absolute majority (270) of the 538 votes in the Electoral College, the election is thrown into the House of Representatives, which chooses from among the three candidates who received the largest number of electoral votes. In making its selection, the House votes by state delegation; each state gets one vote, and a majority is required to elect a president (refer to Chapter 11 for more on the Electoral College). Until the Twelfth Amendment corrected the most egregious flaws of the Electoral College, votes for the president and the vice president were tallied side by side, resulting in a vice-presidential candidate almost winning the presidency in the election of 1800.

### Designing the Judicial Branch

The Convention spent comparatively little time designing the new federal judiciary, a somewhat surprising development given that the Constitution assigns the Supreme Court final jurisdiction in resolving differences between the state and national levels of government. Armed with that jurisdiction and with the **supremacy clause** (Article VI), which declares that national laws take precedence over state laws when both properly discharge their governments' respective responsibilities, the Supreme Court emerged from the Convention as a major, probably underappreciated, lever for expanding the scope of national policymaking.

States' rights advocates and nationalists did, however, spar over two lesser questions: Who would appoint Supreme Court justices—the president or the Senate? And should a network of lower federal courts be created, or should state courts handle all cases until they reached the Supreme Court, the only federal court? The Convention split the difference over appointments by giving the president appointment powers and the Senate confirmation powers, and they left it to some future Congress to decide whether the national government needed its own lower-level judiciary. The First Congress exercised this option almost immediately, creating a lower federal court system with the Judiciary Act of 1789.

An important issue never quite resolved by the Constitutional Convention was the extent of the Court's authority to overturn federal laws and executive actions as unconstitutional—a concept known as **judicial review**. Although the supremacy clause appears to establish the Court's authority to review state laws, there is no formal language extending this authority to veto federal laws. Yet many of the Framers, including Hamilton, claimed that the Constitution

implicitly provides for judicial review. Later in life Madison protested that he never would have agreed to a provision that allowed an unelected branch of government to have the final say in lawmaking. But in one of the great ironies of American history, Madison was a litigant in an early Supreme Court decision, *Marbury v. Madison* (1803), in which the Court laid claim to the authority to strike down any legislation it deemed unconstitutional.<sup>11</sup> In Chapter 9 we return to this historic case and its profound effects on the development of the judiciary's role in policymaking.

## Amending the Constitution

In their efforts to provide a suitable means for amending the Constitution, the Framers broke new ground. (Amending the Articles of Confederation required the unanimous consent of the states, and the constitution creating the French republic in 1789 contained no amendment procedure whatsoever.) Perhaps the futility of trying to win unanimous consent for changing the Articles persuaded the Framers to find a more reasonable method for amending the Constitution, one that did not require a full convention like the Philadelphia Convention. Yet they did not want to place the amendment option within easy reach of a popular majority. After all, some future majority frustrated by executive and judicial vetoes might try to change the Constitution rather than accommodate its opponents. So, again, the Framers solved the dilemma by imposing heavy transaction costs on changing the Constitution.

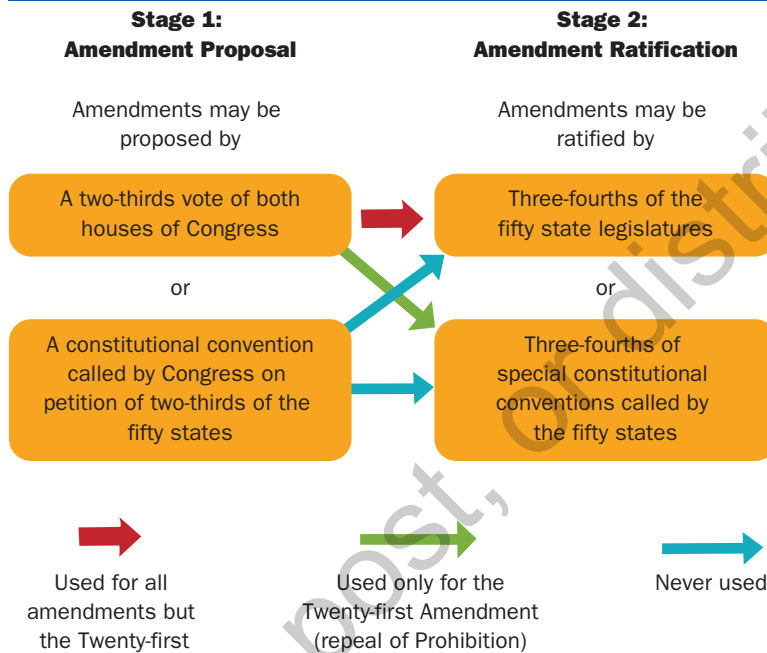
The concept of providing for future amendment of the Constitution proved less controversial than the amendment procedure itself. Intent on preserving their hard-won gains in the face of future amendment proposals, both the nationalists and states' rights advocates approached this matter warily. Delegates from small states insisted on endorsement of amendments by a large number of states, whereas the nationalists argued that the Constitution derived its legitimacy directly from the citizenry and that the citizens alone should approve any change. Unable to muster a majority for either position, the delegates again used the formula of accepting parts of both proposals. As a result, the Constitution allows an amendment to be proposed either by a two-thirds vote of both houses of Congress or by an "application" from two-thirds of the states. Enactment occurs when three-fourths of the states, acting either through their state legislatures or in special conventions, accept the amendment (represented in Figure 2.4).

Since its ratification, the Constitution has been amended twenty-seven times. In every instance, Congress initiated the process, and in all but one case, the state legislatures did the ratifying. (The Constitution and its amendments appear in the appendix.) Six additional amendments—including the Equal Rights Amendment (covered in Chapter 4, "Civil Rights")—were sent to the states but failed to win endorsement from a sufficient number. The paucity of near misses is deceiving, however. Each year, dozens of amendments are proposed in Congress, but they fail to go any further either because they fail to attract the requisite two-thirds support in both chambers or because supporters foresee little chance of success in the states. During the 108th Congress (2003–2004), for example, members proposed amendments restricting marriage to a man and a woman; ensuring "God" is included in the Pledge of Allegiance; and



providing a mechanism for Congress to replenish its membership should more than a quarter of its members be killed, as in a terrorist attack.

**FIGURE 2.4** ■ Process for Amending the Constitution



## SUBSTANTIVE ISSUES

In remapping federal–state responsibilities the Framers largely intended to eliminate the collective action dilemmas that had plagued states’ efforts to cooperate under the Articles of Confederation. The states had to surrender some autonomy to the national government to eliminate the threat of free riding and renegeing on collective agreements.

### Foreign Policy

Trade and foreign policy were at the top of the list of federal–state issues the Framers wanted the Constitution to solve. Shortly after the Revolutionary War, the states had found themselves engaged in cutthroat competition for foreign commerce. The Framers solved this dilemma by placing foreign policy under the administration of the president and giving Congress the explicit legislative authority to regulate commerce. As for common defense and security, the Framers placed those responsibilities squarely on the shoulders of the national government. The

Constitution (Article I, Section 10) forbids any state from entering into a foreign alliance or treaty, maintaining a military during peacetime, or engaging in war unless invaded.

## Interstate Commerce

Relations among the states, a longtime source of friction, also figured prominently in the Framers' deliberations. As a result, Article I, Section 10, prohibits states from discriminating against each other in various ways. They may not enter into agreements without the consent of Congress, tax imports or exports entering local ports, print money not backed by gold or silver, or make laws prejudicial to citizens of other states.

The Framers balanced these concessions with important benefits for the states. The new national government would assume outstanding debts the states had incurred during the war, protect the states from invasion and insurrection, and guarantee that all states would be governed by republican institutions.

All these provisions of the Constitution are less well known than those creating and conferring powers on the several branches of government or the amendments known as the **Bill of Rights**. But the fact that Americans take them for granted reflects their success, not their irrelevance. With these provisions the Framers solved the most serious collective action dilemmas confronting the young nation, including trade. Taken together, the provisions to prevent states from interfering with commerce that crossed their borders established the essentials of a common market among the former colonies. As a result, the Constitution contributed vitally to the nation's economic development during the next century, not only through its directives on interstate commerce but also through the other trade- and business-related provisions in Article I. One such provision prevents the government from passing laws impairing the obligations of private contracts; others mandate that the national government create bankruptcy and patent laws.

## Slavery

Throughout America's history the issue of race has never been far removed from politics. It certainly was present in Philadelphia, despite some delegates' best efforts to prevent a regional disagreement on slavery from thwarting the purpose of the Convention. But how could delegates construct a government based on popular sovereignty and inalienable rights without addressing the fact that one-sixth of Americans were in bondage? They could not. Slavery figured importantly in many delegates' private calculations, especially those from the South. At several junctures, it broke to the surface.

The first effort to grapple with slavery was the most acrimonious and threatening. How should enslaved people be counted in allocating congressional representatives to the states? Madison had persuaded delegates to postpone this issue until they had finalized the design of the new Congress, but the issue soon loomed again. Trying to maximize their representation in the population-based House of Representatives, southern delegates insisted that enslaved people were undeniably people and should be included fully in any population count to determine representation. Northerners resisted this attempted power grab by arguing that because enslaved

people did not enjoy the freedom to act as autonomous citizens, they should not be counted at all. In the end each side accepted a formula initially used to levy taxes under the Articles of Confederation, a plan that assigned states their financial obligations to the national government proportionate to population. Accordingly, the Constitution apportioned each state's seats in the House of Representatives based on population totals in which each enslaved person would count as three-fifths of a citizen.<sup>i</sup>

Later in the Convention some southern delegates insisted on two guarantees for their “peculiar institution” as conditions for remaining at the Convention and endorsing the Constitution in their state's ratification debates. One was the continuation of the slave trade in the future. The delegates from northern states, most of which had outlawed slavery, preferred to leave the issue to some future government. But in the end they conceded by writing into the Constitution a ban on regulation of the slave trade until 1808.<sup>j</sup> (A total ban on importation of enslaved people went into effect on January 1, 1808.) Late in the Convention southerners introduced the Constitution's second slavery protection clause. It required northern states to return runaway enslaved people to their masters. After some delegates first resisted and then softened the language of the clause, the proposal passed.

Why did the delegations from the more numerous northern states cave in to the southerners? The handling of the slavery issue was likely another instance of intense private interests prevailing over more diffuse notions of the public good. Reporting to Jefferson in Paris, Madison wrote that “South Carolina and Georgia were inflexible on the point of enslaved people,” implying that without the slave trade and fugitive provisions they would not have endorsed the Constitution. And because the southerners' preferences were secure under the Articles of Confederation, their threat to defect during the subsequent ratification campaign was credible. After launching anguished, caustic criticisms of southerners' demands during floor debates, the northerners cooled down and reassessed their situation. In the end, they conceded many of their antislavery provisions and adopted a more strategic posture that would allow them to gain something in exchange.

With neither side able to persuade the other to adopt its preferred position and yet with each effectively able to veto ratification, both sides began searching for a mutually acceptable alternative. Their first such attempt had produced the Great Compromise. This time the solution took the form of a **logroll**—a standard bargaining strategy in which two sides swap support for dissimilar policies. In the end, New England accommodated the South by agreeing to two provisions: Article I, Section 9, protecting the importation of enslaved people until at least 1808; and Article IV, Section 2, requiring that northern states return fugitive enslaved people. In return, southern delegates dropped their opposition on an altogether different issue that was dear to

<sup>i</sup>The three-fifths rule had been devised under the Articles to resolve a sectional dispute over apportioning states' tax contributions according to population. At that time the northerners had a stake in recognizing the humanity of enslaved people—their numbers should be fully counted in apportioning tax obligations. Southerners had countered that, because they marketed enslaved people as property, they should be counted as no more than any other property. After extended haggling, the groups agreed to add three-fifths of the number of enslaved people to a state's free population.

<sup>j</sup>The committee that drafted this language proposed that the ban on regulation end in 1800, but a coalition of New Englanders and southerners added eight years to the ban. Only Madison spoke out against extending the deadline. The delegates from Virginia, all of whom had enslaved people at one time or another, voted against extension.

the commercial interests of the northern states. Article I, Section 8, allows Congress to regulate commerce and tax imports with a simple majority.

## Women

Women were scarcely mentioned at the Constitutional Convention. There are several reasons for this. Perhaps overriding any other is that women's political rights had simply not become an issue in the late 1700s. To the degree women's rights were an issue anywhere, it addressed men and women's unequal status in marriage. Divorce was difficult, and in many states, men could confiscate their wife's property. Second, the Framers were much more concerned with establishing proper functioning governmental institutions that had the capacity to act without becoming dictatorial. Individual liberties were clearly a secondary issue. Indicative of this, the Bill of Rights were added to the Constitution as amendments after ratification.



Abigail Adams was an early feminist who urged her husband, John Adams, to consider women's rights in marriage when creating the Constitution.

The Granger Collection, NYC—All rights reserved.

Finally, the actual language of the Constitution is consistently inclusive. Throughout, rights and prerogatives are guaranteed to *persons* and *citizens*, not *men*. Eligibility to serve as a member of Congress, for example, begins with the statement: “No *Person* shall be a Representative.” Elsewhere: “The *Citizens* of each State shall be entitled to all Privileges and Immunities of *Citizens* in the several States.” A few passages of the Constitution use the pronoun *he* (in each instance, however, the masculine pronoun refers back to a gender-free noun), which courts interpreted to include everyone.

Abigail Adams, the wife of John Adams and the mother of John Quincy Adams, has often been celebrated as an early feminist for urging her husband to consider women’s rights when drafting the Constitution. Her numerous letters to her husband and leaders, such as Thomas Jefferson, exhibit a candor and insight that make them compelling to modern readers as well. To her husband, who was away attending the Continental Congress, she wrote, “In the new code of laws which I suppose it will be necessary for you to make, I desire you would remember the ladies, and be more generous to them than your ancestors. Do not put such unlimited power in the hands of husbands. Remember, all men would be tyrants if they could.” This passage often has been celebrated as one of the first expressions of women’s political rights in America. But, in fact, Adams was addressing various civil laws that allowed husbands to confiscate their wives’ property and made divorce all but impossible. Lack of a woman’s rights in marriage—not suffrage—was the grievance of these early feminists. Suffrage would not be seriously addressed for another half century, not until the first women’s rights gathering in 1848 in Seneca Falls, New York. (We review the history of women’s civil rights in Chapter 4.)

## THE FIGHT FOR RATIFICATION

The seventh and final article of the Constitution spells out an important procedure endorsed by delegates in the final days of the Convention: “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.” Everyone knew that this deceptively straightforward provision was critical for the success of the enterprise. The delegates improvised by adapting the nine-state rule used by the Articles for passing normal legislation, even though the Articles did not provide for amendment. And the ratification provision withdrew ratification authority from the state legislatures, which might have misgivings about surrendering autonomy, and gave it instead to elective special conventions. In sum, the delegates succeeded in a bit of legalistic legerdemain—appearing to conform to the requirements of the existing Constitution while breaking radically from it.

### The Federalist and Antifederalist Debate

At the close of the Convention, only three delegates refused to sign the Constitution. This consensus, however, is misleading; others who probably would have objected left early, and many prominent political leaders such as Virginians Patrick Henry and Richard Henry Lee had refused even to participate.

Over the next year every state but Rhode Island (it held out until 1790) elected delegates to state conventions that proceeded to dissect the Constitution and ponder its individual provisions. This was truly a time of national debate over the future of the country. As one observer noted, “Almost every American pen . . . [and] peasants and their wives in every part of the land” began “to dispute on politics and positively to determine upon our liberties.”<sup>12</sup> On a lighter note, the *Boston Daily Advertiser*, responding to General Washington’s call for public debate, admonished its readers: “Come on brother scribblers, ’tis idle to lag! The Convention has let the cat out of the bag.”<sup>13</sup> Delegates to the state conventions concentrated, predictably, on the concerns of their states and communities. Southern states carefully inspected each article for a northern avenue of attack on their “peculiar institution” of slavery. Finding none, all except North Carolina lined up behind the Constitution.

Constituencies and their delegates similarly aligned themselves for or against the Constitution according to its perceived impact on their pocketbooks. Small farmers, struck hard by declining markets and high property taxes after the war, had succeeded in gaining sympathetic majorities in many of the state legislatures and therefore looked suspiciously on the proposed national government’s new role in public finance and commerce. Under pressure from small farmers, many state legislatures had printed cheap paper money (making it easier for the farmers to pay off their debts), overturned court decisions unfavorable to debt-laden farmers, and provided some with direct subsidies and relief. Thus these constituencies were reluctant to see their state legislatures subordinated to some future national policy over currency and bankruptcy.

In the public campaign for ratification these issues tended to be reduced to the rhetoric of nationalism, voiced by the **Federalists**, versus the rhetoric of states’ rights, voiced by the **Antifederalists**. The divisiveness characterizing the Philadelphia Convention thus continued. But the labels given the two sides were confusing. Although they consistently distinguished the Constitution’s supporters and opponents, the labels confused the positions of these camps on the issue of federalism. *Federalism*, a topic so central to understanding America’s political system that we devote all of the next chapter to it, refers to the distribution of authority between the national and state governments. Many of those who opposed ratification were more protective of state prerogatives, as the term *federalist* implies, than were many of the prominent “Federalists.” Appreciating the depth of state loyalties, Madison and his colleagues early on tactically maneuvered to neutralize this issue by claiming that the Constitution provided a true federal system, making those seeking ratification Federalists. Their success in expropriating this label put their opponents at a disadvantage in the public relations campaign. One disgruntled Antifederalist proposed that the labels be changed so that Madison and his crowd would be called the “Rats” (for proratification) and his side the “Antirats.”

Although in the end the Federalists prevailed and are today revered as the nation’s “Founders,” the Antifederalists included a comparable number and quality of proven patriots. Foremost among them was Patrick Henry, who led his side’s counterattack. With him were fellow Virginians Richard Henry Lee, George Mason, and a young James Monroe, who would become the nation’s fifth president under the Constitution he had opposed. Other famous outspoken opponents included Boston’s Revolutionary War hero Samuel Adams and New York governor George Clinton.



With the New York ratification narrowly divided, proratification forces staged a massive rally. The parade was graced by a “ship of state,” an already well-developed metaphor. At the time, New Yorker Alexander Hamilton was widely regarded as one of the Constitution’s most effective sponsors.

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In their opposition to the Constitution, the Antifederalists raised serious theoretical objections—ones that can still be heard more than two hundred years later. They argued that only local democracy, the kind found in small homogeneous communities, could approach true democracy. The United States, they asserted, already was too large and too diverse to be well ruled by a single set of laws. Turning their sights to the Constitution itself, the Antifederalists argued that a stronger national government must be accompanied by explicit safeguards against tyranny. Specifically, the Constitution needed a bill of rights—a familiar feature of most state constitutions. Some delegates to the Convention proposed a bill of rights, but Madison and others had argued that it was unnecessary because the Constitution did not give the national government any powers that could be construed as invading the citizenry’s rights. This argument, however, worked better at the Convention than it did in the public campaign. The Antifederalists quickly realized they had identified a chink in the Constitution’s armor and began pounding the issue hard. Even Madison’s ally Jefferson wrote him from France insisting that individual rights were too important to be “left to inference.” Suddenly on the defensive, Madison made a strategic capitulation and announced that at the convening of the First Congress under the new Constitution, he would introduce constitutional amendments providing a bill of rights. His strategy worked; the issue receded. In a sense, though, the Antifederalist strategy had worked as well. Madison kept his promise, and by 1791, the Constitution contained the Bill of Rights (listed in Table 2.2).

**TABLE 2.2** ■ The First Ten Amendments to the Constitution: The Bill of Rights

Amendment	Purpose
I	Guarantees freedom of religion, speech, assembly, and press, and the right of people to petition the government for redress of grievances
II	Protects the right of states to maintain militias
III	Restricts quartering of troops in private homes
IV	Protects against “unreasonable searches and seizures”
V	Ensures the right not to be deprived of “life, liberty, or property, without due process of law,” including protections against double jeopardy, self-incrimination, and government seizure of property without just compensation
VI	Guarantees the right to a speedy and public trial by an impartial jury
VII	Ensures the right to a jury trial in cases involving the common law [judge-made law originating in England]
VIII	Protects against excessive bail or cruel and unusual punishment
IX	Provides that people’s rights are not restricted to those specified in Amendments I–VIII
X	Reiterates the Constitution’s principle of federalism by providing that powers not granted to the national government are reserved to the states or to the people

In June 1788 New Hampshire became the ninth and technically decisive state to ratify the Constitution. But Virginia and New York had still not voted, and until these two large, centrally located states became a part of the Union, no one gave the new government much chance of getting off the ground. But by the end of July both states had narrowly ratified the Constitution, and the new Union was a reality.

Despite their efforts, Madison and fellow nationalists won only a partial victory with the launching of the Constitution. The nation still added up to little more than a collection of states, but the mechanisms were put in place to allow the eventual emergence of the national government. For example, by basing the Constitution’s adoption on the consent of the governed rather than endorsement by the states, the nationalists successfully denied state governments any claim that they could ignore national policy. Over the next several decades, although state politicians would from time to time threaten to secede or to “nullify” objectionable federal laws, none of the attempts at **nullification** reached a full-fledged constitutional crisis until the Civil War in 1861. With the Union victory, this threat to the national government ended conclusively. Yet, as we shall see in the next chapter, “Federalism,” until the twentieth century national authority remained limited by modern standards. Nowhere is this more evident than in the domains of civil rights and civil liberties, the subjects of Chapters 4 and 5.



## The Influence of *The Federalist*

Aside from eventually yielding a new constitution, the ratification debates fostered another national resource: eighty-five essays collected under the title *The Federalist*. Published under the shared pseudonym Publius in 1787 and 1788, the essays were written by Alexander Hamilton (who wrote the majority), John Jay (who wrote five), and James Madison (who arguably wrote the best). In one of history's interesting twists of fate, Hamilton initially recruited fellow New Yorker William Duer to join the Publius team.<sup>k</sup>

Because their immediate purpose was to influence the delegates to the New York convention, where ratification was in trouble, the *Federalist* essays first appeared in New York City newspapers. At one point Hamilton and Madison were cranking out four essays a week, prompting the Antifederalists to complain that by the time they had rebutted one argument in print, several others had appeared. Reprinted widely, the essays provided rhetorical ammunition to those supporting ratification.<sup>l</sup>

Whatever their role in the Constitution's ratification, *The Federalist Papers*, as they are also called, have profoundly affected the way Americans then and now have understood their government. A few years after their publication, Thomas Jefferson, describing the curriculum of the University of Virginia to its board of overseers, declared *The Federalist* to be indispensable reading for all undergraduates. It is "agreed by all," he explained, that these essays convey "the genuine meaning" of the Constitution.

## THE THEORY UNDERLYING THE CONSTITUTION

Two of Madison's essays, *Federalist* No. 10 and *Federalist* No. 51, offer special insights into the theory underlying the Constitution. (The full text of these essays is available in the appendix.) In different ways, each essay tackles the fundamental problem of self-governance, which Madison poses in a famous passage from *Federalist* No. 51:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

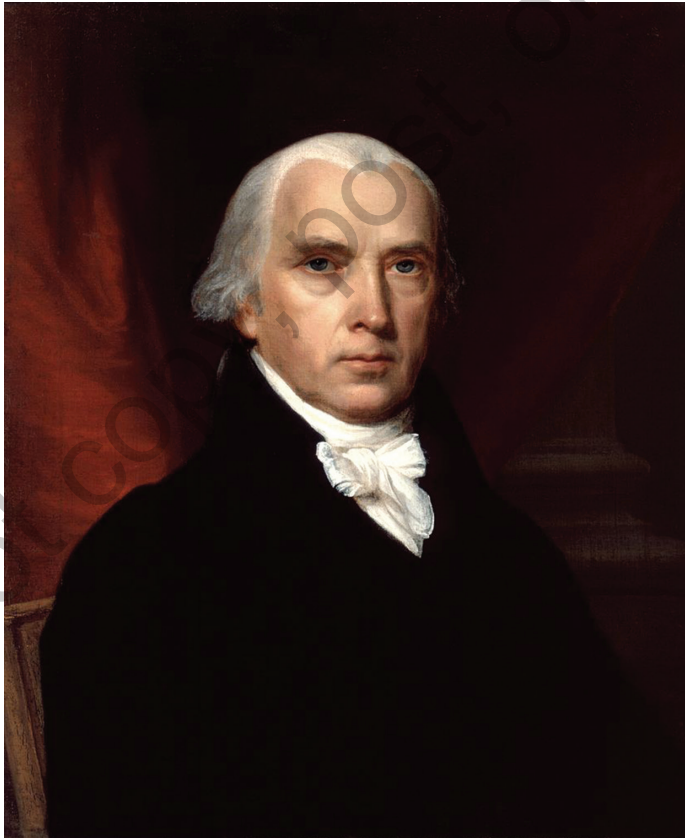
<sup>k</sup> Duer's submissions were judged inadequate, however, and Hamilton turned to Madison. Duer, a professor at Columbia University, later found his appropriate medium in a highly successful American government textbook in which he introduced students to the already famous *Federalist* essays, to which he almost contributed. Writing perhaps the first textbook on American government in 1833, William Alexander Duer penned a heartfelt dedication to James Madison, which is reproduced as the front piece, just after *Logic's* title page.

<sup>l</sup> Although they became famous, the *Federalist* essays, according to most historians, had a negligible impact on the outcome of the ratification process. Perhaps too many hard economic interests were in play for abstract arguments about the general welfare to do more than justify and dress up positions grounded firmly in self-interests. The New York convention shifted toward ratification only after New York City threatened to secede from the state if the vote went against ratification.

The last goal is tricky. *Federalist* No. 10 tackles the problem by both exploring the likelihood that tyranny by the majority would arise within a democracy and identifying a solution. It is a powerful, cogent argument grounded in logic. *Federalist* No. 51 deals with the problem of keeping government officeholders honest and under control. The solution lies in pitting ambitious politicians against one another through the Constitution's separation of powers and checks and balances. This way, politicians can counteract one another's temptation to engage in mischief. Whatever their differences, these two essays can be read as following parallel paths—one at the societal level, the other at the governmental level—toward the same destination of a self-regulating polity free from tyranny.

### **Federalist No. 10**

Madison's first and most celebrated essay appeared in the November 24, 1787, issue of the New York *Daily Advertiser*. *Federalist* No. 10 responds to the strongest argument the Antifederalists could muster—that a “large Republic” cannot long survive. This essay borrows from the writings of David Hume, but over the course of a decade of legislative debate and correspondence,



When James Madison was introduced with the accolade “father of the Constitution,” he frequently demurred, probably less from modesty than from disagreement with many of its provisions.

White House Historical Association

Madison had honed his argument to fit the American case.<sup>14</sup> Indeed, Madison had made the argument before—at the Constitutional Convention when defending the Virginia Plan in a floor debate.

The major task Madison sets out for himself in *Federalist* No. 10 is to devise a republic in which a majority of citizens will be unable to tyrannize the minority. Madison wastes no time identifying the rotten apple. It is **factions**, which he describes as “mortal diseases under which popular governments have everywhere perished.” He defines a faction as “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of *interest*, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community” (emphasis added). Madison’s factions appear to have many of the attributes of modern-day interest groups and even political parties.

Madison then identifies two ways to eliminate factions—authoritarianism and conformism—neither of which he finds acceptable. Authoritarianism, a form of government that actively suppresses factions, is a remedy worse than the disease. In a famous passage of *Federalist* No. 10, Madison offers an analogy: “Liberty is to faction what air is to fire, an aliment without which it instantly expires.”

Conformism, the second solution, is, as Madison notes, “as impracticable as the first would be unwise.” People cannot somehow be made to have the same goals, for “the latent causes of faction are . . . sown in the nature of man.” Thus two individuals who are precisely alike in wealth, education, and other characteristics will nonetheless have different views on many issues. Even the “most frivolous and fanciful distinction” can “kindle their unfriendly passions,” Madison observes, but most of the important political cleavages that divide a citizenry are predictably rooted in their life circumstances. In another famous passage, the author anticipates by nearly a century Karl Marx’s class-based analysis of politics under capitalism:

But the most common and durable source of faction has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. . . . A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views.<sup>m</sup>

If the causes of faction cannot be removed without snuffing out liberty, then one must control their effects. Madison identifies two kinds of factions—those composed of a minority of the citizenry and those composed of a majority—that must be controlled in different ways. During the late eighteenth century, the ubiquitous problem of factional tyranny occurred at the hands of the monarchy and aristocracy, a “minority” faction, for which democracy provides the remedy. A minority faction “may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution.”

<sup>m</sup> In an earlier version of this passage, delivered at the Convention in defense of the Virginia Plan, Madison had added that those who enslaved others and those who did not have distinct and antithetical interests. He may well have omitted this reference to slavery here because it had proved controversial with southern delegates. After all, this is a public argument intended to persuade readers to support adoption of the Constitution.

Democracy, however, introduces its own special brand of factional tyranny—that emanating from a self-interested majority. In Madison’s era many people—especially those opposed to reform—ranted that majority rule equaled mob rule. Thus supporters of the new constitutional plan had to explain how a society could give government authority to a majority without fear that it would trample on minority rights. Madison explained: “To secure the public good and private rights against the danger of . . . a [majority] faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.”

Parting ways with some of the leading political philosophers of his era, Madison dismisses direct democracy as the solution:

There is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.

So much for town meetings.

Madison contends that the republican form of government, in which elected representatives are delegated responsibility for making governmental decisions, addresses the tyranny of the majority problem in two ways. First, representation dilutes the factious spirit. Madison does not trust politicians to be more virtuous than their constituents, but he recognizes that, to get elected, they will tend to moderate their views to appeal to a diverse constituency. Here, Madison subtly introduces his *size principle*, on which the rest of the argument hinges: up to a point, the larger and more diverse the constituency, the more diluted is the influence of any particular faction on the preferences of the representative.

A legislature composed of representatives elected from districts containing diverse interests is unlikely to form a majority coalition of factions that so dominates the institution that it can deny rights to minority factions. This line of reasoning allows Madison to introduce a second distinct virtue of a republic. Unlike a direct democracy, it can advantageously encompass a large population and a large territory. As Madison argues,

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.

In other words, their differences will pose a benign collective action problem. Any attempted collusion would confront such steep transaction costs that any efforts to engage in mischief would inevitably be frustrated.

What has Madison accomplished here? He has turned the Antifederalists’ “small is beautiful” mantra on its head by pointing out that an encompassing national government would be less susceptible to the influence of factions than would state governments: “A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper

or wicked project, would be less apt to pervade the whole body of the Union than a particular member of it.” A geographically large republic would encompass dispersed, diverse populations, thereby imposing serious transaction costs on their representatives in maintaining a majority coalition and minimizing the prospect of majority tyranny. Madison concludes: “In the extent and proper structure of the Union, therefore, we behold a republican remedy for the disease most incident to republican government.”

Until the twentieth century, *Federalist* No. 10 attracted less attention than did some of its companion essays. Yet as the nation has grown in size and diversity, the essay won new prominence for the prescience with which Madison explained how such growth strengthens the republic. This Madisonian view of democracy often is referred to as **pluralism**. It welcomes society’s numerous diverse interests and generally endorses the idea that those competing interests most affected by a public policy will have the greatest say in what the policy will be.

### **Federalist No. 51**

By giving free expression to all of society’s diversity, *Federalist* No. 10 offers an essentially organic solution to the danger of majority tyranny. *Federalist* No. 51, by contrast, takes a more mechanistic approach of separating government officers into different branches and giving them the authority to interfere with each other’s actions. The authority of each branch must “be made commensurate to the danger of attack,” Madison asserts. As for incentive: “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.” In other words, the Framers’ efforts will have failed if future generations of politicians do not jealously defend the integrity of their offices.

Because popular election is the supreme basis for legitimacy and independence in a democracy, no constitutional contrivances can place appointive offices on an equal footing with elective offices. Madison explains:

In republican government, the legislative authority necessarily predominates. The remedy for this inconvenience is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.

Bicameralism is intended to weaken the legislature’s capacity to act too quickly and impulsively, but even so it may not prevent the legislature from encroaching on the other branches. Madison offers the president’s veto as a strong countervailing force and speculates that, by refusing to override the president’s veto, the Senate might team up with the executive to keep the popularly elected House of Representatives in check. Madison even finds virtue in the considerable prerogatives reserved to the states: “In a compound republic of America, the power surrendered by the people is first divided between two distinct governments. . . . Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”

Could this be the same James Madison who wanted to abandon the Convention rather than agree to a Senate elected by the state legislatures, the same man who had wanted Congress to

have an absolute veto over state actions? Madison's Virginia Plan had vested ultimate authority in a popularly elected national legislature, and this model of a legislature became the House of Representatives. So why is he commending a Constitution that severely constrains this institution's influence over policy?

Madison probably was playing to his audience.<sup>15</sup> *Federalist* No. 51 seeks to reassure those fence-sitters listening to Antifederalist propaganda that the Constitution would take a giant step down the short path to tyranny. After all, the Antifederalists were presenting the specter of a powerful and remote national government and, within it, the possible emergence of a junta composed of unelected senators and an indirectly elected president bent on usurping the authority of the states, undermining the one popularly elected branch of government (the House of Representatives), and ultimately subjugating the citizenry. Madison is countering with a portrait of a weak, fragmented system that appears virtually incapable of purposive action, much less of hatching plots. He must have grimaced as he (anonymously) drafted the passage extolling the Constitution's checks on his House of Representatives.

In summary, *Federalist* No. 10 conveys the theory of pluralism that guided the Constitution's chief architect; *Federalist* No. 51 explores how and why the governmental system that emerged from the political process in Philadelphia might actually work. Since these essays were written, Madison's insight into the operation of the Constitution has been largely borne out.

Both the pluralism of competing interests and separated institutions have been judged less favorably by many modern students of American politics. With authority so fragmented, they argue, government cannot function effectively. And by adding a layer of institutional fragmentation on top of pluralism, the Framers simply overdid it. The result is an inherently conservative political process in which legitimate majorities are frequently frustrated by some minority faction that happens to control a critical lever of government. Furthermore, if the logic of *Federalist* No. 10 is correct, Americans do not need all of this constitutional architecture of checks and balances to get the job done. Critics also point to the many other stable democracies throughout the world that function well with institutions designed to allow majorities to govern effectively. Would Madison have privately agreed with this critique? Probably so—after all, his Virginia Plan incorporated those checks and balances necessary to foster the healthy competition of factions and no more.

## DESIGNING INSTITUTIONS FOR COLLECTIVE ACTION: THE FRAMERS' TOOL KIT

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The careful attention that Madison gave to the design of Congress and the presidency in order to channel politics into a productive course preoccupied everyone at the Constitutional Convention. What constitutional arrangements will allow future generations to stand the best chance of solving their collective problems with the least conformity costs or risk of falling into tyranny? Clearly, the majority of delegates recognized the need for institutions that could act more decisively, but they equally feared establishing one that might someday intrude too far into their private lives. This latter concern explains why so many delegates who subsequently

attended their states' ratification conventions favored adding a bill of rights to limit the ability of national majorities to demand religious and political conformity.

In devising the several branches of the national government and its relations with the states, the Framers relied on design principles that instituted varying trade-offs between the transaction and conformity costs introduced in the last chapter to fit the purposes of the institutions they were creating. And they sought balance—keeping the branches in “their proper orbits”—so that none would gradually gain a permanent advantage over the others.

By intent, the Constitution provides only a general framework for government. As its institutions have evolved over the past two centuries, the same design principles have shaped their subsequent development. Consequently, the principles summarized in Table 2.3 are just as useful for dissecting the internal organization of the modern House of Representatives as they are for studying the Framers' plan. The Framers' tool kit informs our analyses throughout the text—especially those chapters that delve into the logic of the governmental system.<sup>n</sup>

**TABLE 2.3 ■ The Framers' Tool Kit**

Design Principle	Defining Feature	Example
Command	Authority to dictate others' actions	President's commander-in-chief authority
Veto	Authority to block a proposal or stop an action	President's veto; Senate confirmation of the president's appointments; judicial review
Agenda control	Authority to place proposals before others for their decision, as well as preventing proposals from being considered	Congress presenting enrolled bill to president; congressional committees' recommendations to the full chamber
Voting rules	Rules prescribing who votes and the minimum number of votes required to accept a proposal or elect a candidate	Supreme Court decisions; Electoral College; selection of the Speaker of the House of Representatives
Delegation	Authority to assign an agent responsible to act on your behalf	Representation; bureaucracy

### Command

This refers to the authority of one actor to prescribe the actions of another. Unlike the other design concepts presented here, **command** is unilateral. It cuts through both coordination

<sup>n</sup> We do not present this list of design principles as exhaustive. One can think of other principles—such as the principles in the Bill of Rights prohibiting certain classes of government actions—but we do find that the tool kit's principles are indispensable for understanding how America's political institutions work the way they do.

and prisoner's dilemma problems by allowing one of the actors to impose a solution or policy. Command certainly achieves efficiencies in reducing transaction costs, but it does so by imposing potentially huge conformity costs on those who prefer some other policy or course of action. For decades, Cuba's Fidel Castro banned whole genres of music from the radio. Whatever its conformity cost, Hobbes endorsed command authority (conferred by God, or so they liked to argue!) as preventing society from deteriorating into anarchy.<sup>o</sup>

The Framers, and republican theorists before them, sought other institutional arrangements that would enable efficiency yet minimize the conformity costs imposed by command. Consequently, "command" was rarely used in designing the Constitution. The only provision (Article II, Section 2) that comes close makes the president "the *commander* in chief of the army and navy." The military, then and now, is the one component of government designed to place a premium on action over deliberation. Hence, the authority to issue commands flows down the military branches' "command structure." Any squad member under enemy fire can appreciate the value of not having others in the unit calculating whether to cover for their buddies or to engage in free riding.

A situation resembling command authority sometimes occurs during crises when the public looks to leaders—the president, governors, and other executives—for guidance. Earlier we introduced focal coordination as a solution to the class of coordination problems in which success depends on cooperation but the participants do not know what others are doing so that they can join in. In this situation, people need a trusted leader to coordinate their efforts. This situation arose dramatically during the early days of the pandemic in 2020. People were getting sick, and health organizations were estimating that millions might die from COVID-19. What to do—or, more precisely, what not to do—to protect oneself and one's family? When people looked to the White House for leadership, they instead got denials ("it will suddenly disappear"), excuses ("the Obama administration did not prepare us for this"), and questionable medical advice—the worst being to take a shot of chlorine! Instead they looked to their states' governors, who instituted a quarantine, shut down schools and businesses, and told them what to do to remain safe.

Understandably, people appreciated their efforts more than those of President Trump. In Figure 2.5 we can compare the approval ratings by survey respondents to the president's and their state governor's handling of the pandemic. In every state the public rated their governor better than the White House.

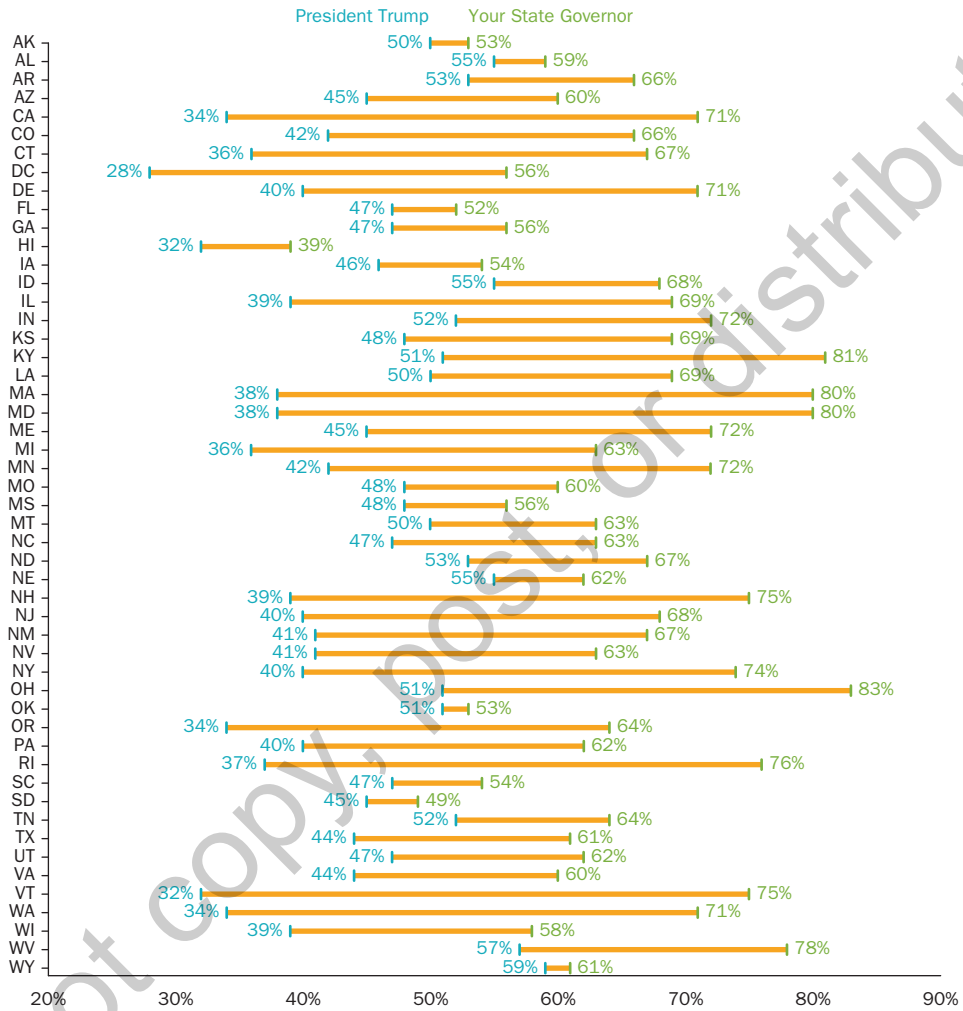
During this era of divided party control of government in Washington, presidents have increasingly relied on *executive orders* to change or implement a policy. Historically, executive orders were authorized by Congress. In the late nineteenth century presidents were given the authority to unilaterally expand the types of federal jobs (e.g., letter carriers) that would fall under the newly created civil service system. The president issued an executive order according to the law's provisions; it would stay in place unless it was rescinded by an act of Congress or, in some eligible cases, revoked by a subsequent president. In recent times presidents have invoked

<sup>o</sup>Moreover, Hobbes argued that in monarchies, the inherited right to rule was not just necessary but also salutary; monarchs had a long-term stake in their subjects' prosperity in order to maximize their own power and prosperity.



**FIGURE 2.5** ■ **President Trump’s Approval Rating Compared to Governors**

Do you approve or disapprove of the way President Trump/your state governor is handling the coronavirus (COVID-19) outbreak? [Net: Approve]



National sample, N = 22,921. Time period = April 16–26, 2020.

Source: “The State of the Nation: A 50-State COVID-19 Survey,” <https://covidstates.org/>

an implicit, and consequently somewhat vague, authority that comes with their constitutional status as the nation’s chief executive. Although executive orders give presidents the opportunity to act unilaterally, they do not fully qualify as “commands” because the judiciary can rescind the order when it decides that a president’s action exceeded the office’s implicit executive authority. This is precisely what happened with President Barack Obama’s order temporarily blocking

deportation of undocumented parents of children who are American citizens and additionally giving them work permits. The president may be the supreme commander, but the Framers made sure any pretense of command authority ends there. Vivid evidence of their success appears in outgoing president Harry Truman's prediction about his successor, army general Dwight Eisenhower: "He'll sit here, and he'll say, 'Do this! Do that!' And nothing will happen. Poor Ike—it won't be a bit like the Army. He'll find it very frustrating."<sup>p</sup>

## Veto

The veto embodies the right of an official or institution to say no to a proposal from another official or institution. Like command, the veto is unilateral, allowing its possessors to impose their views regardless of the preferences of others. Yet it is far less potent than command because of one critical difference: it is a "negative," or blocking action that preserves the status quo.<sup>q</sup> The veto confers little direct advantage in shifting government policy, but in Chapter 7 we find that a president's threat to use it may induce Congress to address the president's objections as it prepares legislation. Moreover, the blocking effects of the veto can be limited by providing those subject to a veto the means of circumventing it. After weighing the pros and cons of giving the president an absolute veto, the Framers backed off and added an override provision. With a two-thirds vote in each chamber, the House of Representatives and Senate can enact a vetoed bill without the president's endorsement. A policy that withstands the huge transaction costs entailed in mustering supermajorities in both chambers has demonstrated its merits and deserves enactment despite the president.<sup>r</sup>

The president's veto is the only explicit use of this instrument in the Constitution, but the Constitution implicitly creates other important veto relationships. Both the House of Representatives and the Senate must agree to identical legislation before it can proceed to the president's desk for signature (or veto). In effect, then, each legislative chamber holds a veto over the legislation emanating from the other chamber. Yet another unnamed veto resides with the Supreme Court. Shortly after the new government was launched, the Supreme Court claimed the power of *judicial review*, asserting its authority to overturn public laws and executive actions it deemed unconstitutional. (We discuss fully this important "discovered" authority in Chapter 9.) The greater the number of veto holders, the higher the transaction costs in making new policy. Consequently, with its numerous veto holders, the American political system deserves its reputation as being inherently conservative.

<sup>p</sup> According to most contemporary observers, Eisenhower's experiences in office bore out Truman's prediction. During Ike's sixth year in office, one critic observed, "The President still feels that when he has decided something, that *ought* to be the end of it . . . and when it bounces back undone or done wrong, he tends to react with shocked surprise." Richard E. Neustadt, *Presidential Power and the Modern Presidents* (New York: Wiley, 1960), 10.

<sup>q</sup> In fact, many of the Constitution's Framers referred to the veto as a "negative."

<sup>r</sup> All state governors possess some form of veto over legislation; many of these vetoes differ significantly from the president's in allowing the governor to veto parts of bills and flexibility in appropriating expenditures less than those prescribed in the legislation.

## BORN TO COMMAND.



KING ANDREW THE FIRST.

Widely published in opposition Whig newspapers, this cartoon depicts President Andrew Jackson trampling on the Constitution and public works legislation. However imperiously Jackson dealt with the opposition-controlled Congress and the Supreme Court, whose decisions he selectively ignored, the veto in his left hand hardly sufficed to allow him “to rule” the country.

Courtesy of the Library of Congress Prints & Photographs Division

### Agenda Control

This refers to the right of an actor to set choices for others. The choices might concern legislation, proposed regulations, or any other decision presented to a collectivity. Political parties nominate candidates who define the choices available to voters on Election Day. Those who exercise **agenda control** gain both positive and negative influence over collective decisions. On the positive side, an agenda setter can introduce a choice to the collectivity—a senator proposing an amendment to a bill under consideration, for example—which then decides to accept or reject it. Where everyone enjoys this right—when, say, any fellow senator can offer an amendment to any colleague’s proposal—access to the agenda will be of little consequence in explaining collective decisions. Agenda control becomes consequential in settings where some members of the group exercise proposal power and others do not. Congress presents the president with

a bill that the president must sign or veto. This is an example of strong agenda control. For an example of weaker agenda control, many state governors can reduce but not increase spending in an appropriation bill sent to them by the state legislature.

Consider the advantage this right confers. The agenda setter can propose a course of action, leaving other participants the more limited authority to accept or reject. The agenda controller thus *limits* the choices available to the collectivity. Unlike the Senate, where proposal rights are universal, the House has long been governed by rules that empower leaders to set the choices members will vote on. Leaders determine what, if any, amendments will be allowed, and limit the time available for debating alternatives. This procedural authority can have huge consequences. In fact, it probably led to that chamber's impeachment of President Bill Clinton in 1998. In late fall of 1998 the Republican-controlled Judiciary Committee sent to the floor articles of impeachment against President Clinton. Republican floor leaders faced a potential problem. They favored impeaching the president as well, but they were fairly certain that a majority of members did not favor this drastic course. Republicans held only a nine-vote majority overall. Moreover, with Democrats appearing unified in opposing impeachment, four to six Republicans informed their leaders that they preferred a softer punishment—specifically, a resolution censuring President Clinton—to impeachment. Yet the Republican leadership's agenda control held a trump card that guaranteed their ultimate success. With the authority to decide which proposals would be available for the members to vote on, the leadership disallowed censure motions and forced Republican fence-sitters to decide between impeachment and no action. In the end the fence-sitters joined their colleagues, and on a nearly perfect party-line vote, the House of Representatives impeached the president, even though a majority of the membership preferred censure.<sup>16</sup> House members confer so much power on their leaders and knowingly bear heavy conformity costs because in the absence of agenda control the transaction costs would be unmanageable. Without leaders orchestrating the chamber's decisions, the institution would be at the mercy of its 435 members—each, like their colleagues in the smaller Senate, jealously protecting and exercising their right to offer any bill or amendment at any time.

To appreciate how the solution to some issues appears to require agenda control authority, Congress has from time to time passed laws giving presidents **fast-track authority** to negotiate trade agreements to bring to Congress for its approval. To give the president credibility when negotiating with other governments (and with various industries), Congress ties its hands by limiting itself to either approval or disapproval. And if it does neither by a certain deadline, the president's proposal becomes law. Some have proposed that a good way to break gridlock in Washington would be to give presidents this kind of authority across the board.<sup>17</sup>

## Voting Rules

Any government that aspires to democracy must allow diverse interests to be expressed in government policy. When members of a collectivity share decision-making authority, the outcomes are determined by some previously agreed-to **voting rule**. The most prominent option in classical democratic theory is **majority rule**. Normally, this term refers to a **simple majority**, or one-half plus one (Table 2.4 describes voting rules used by the Senate).

**TABLE 2.4** ■ Voting Rules of the U.S. Senate\*

Motion	Voting Rule
Passage of ordinary bills and amendments	Simple majority of members present and voting
Rule 22 (cloture to set time limit on debate)	Three-fifths of the full Senate (normally sixty votes)
Veto override	Two-thirds of members present and voting
Unanimous consent to take up legislation out of turn	Unanimous agreement of members present

\*These rules are fully explained in Chapter 6.

Majority rule embodies the hallowed democratic principle of political equality. Equality requires that each citizen's vote carries the same weight and offers all citizens the same opportunity to participate in the nation's civic life. When all votes count the same, majority rule becomes an obvious principle: when disagreements arise, the more widely shared preference should prevail.

Yet majority rule offers no magic balance between transaction and conformity costs. It is just one possible constitutional rule midway between dictatorship and consensus. Governments controlled by popular majorities are less likely to engage in *tyranny*—that is, impose very high conformity costs—than are dictatorships, but this knowledge did not fully reassure the Constitution's Framers. Worried about tyranny by the majority, they carefully constructed institutions that would temper transient passions of majorities in the new government. Separation of powers with checks and balances, two concepts we examine in detail in the next chapter; different term lengths for members of the House and Senate, the president, and federal judges; and explicit provision for states' rights all make it difficult for majorities to take charge of the new government.

Although majority rule figures prominently in the Constitution, it is explicitly required in only a few instances. Almost all popular vote elections require the winner to receive not a majority, but simply a **plurality** of the votes cast—that is, more votes than received by any of the other candidates. A majority of the Electoral College is required to elect the president, and a quorum—a majority of the membership of the House of Representatives—must be present before the House can conduct business. Much of what the government does requires action by Congress, which, the Framers seemed to assume, would conduct its business by majority vote.

Yet the Constitution permits or tacitly authorizes other voting rules. The Constitution leaves it to the states to specify rules electing members of Congress, and states almost always have preferred the plurality rule (the candidate receiving the most votes, regardless of whether the plurality reaches a majority) in deciding winners. Elsewhere in the Constitution supermajorities of various amounts are required. If the president vetoes a bill passed by both houses of Congress, two-thirds of the House and of the Senate must vote to override the veto, or the bill is defeated. And in another example of steep transaction costs, three-quarters of the states must agree to any amendments to the Constitution.

## Delegation

When individuals or groups authorize others to make and implement decisions for them, **delegation** occurs. Every time Americans go to the polls, they *delegate* to representatives the responsibility for making collective decisions for them. Similarly, members of the House of Representatives elect leaders empowered to orchestrate their chamber's business, thereby reducing coordination and other costs of collective action. The House also delegates the task of drafting legislation to standing committees, which are more manageable subsets of members. As in this instance, decisions are frequently delegated in order to control their transaction costs.

Social scientists who analyze delegation note that a **principal**, one who possesses decision-making authority, may delegate their authority to an **agent**, who then exercises it on behalf of the principal. Every spring, millions of Americans hire agents—say, H&R Block—to fill out their tax forms for them and, they hope, save them some money. Similarly, the president (principal) appoints hundreds of staff members (agents) to monitor and promote the administration's interests within the bureaucracy and on Capitol Hill. We use these terms to identify and illuminate a variety of important political relationships that involve some form of delegation.

Delegation is so pervasive because it addresses common collective action problems. It is indispensable whenever special expertise is required to make and carry out sound decisions. The vast and complex federal bureaucracy requires a full chapter (Chapter 8) to describe and explain—because Congress has pursued so many diverse public policies and delegated their implementation to agencies. A legislature could not possibly administer its policies directly without tying itself in knots. The Continental Congress's failed attempts to directly supply Washington's army during the Revolutionary War, resulting in the chronically inadequate provision of essential supplies to the troops, provided a lesson not lost on the delegates to the Constitutional Convention in Philadelphia two decades later.

Beyond the need for technical expertise, majorities may sometimes find it desirable politically to delegate decisions. For example, the government allocates space on the frequency band to prevent radio or television stations from interfering with each other's signals. In 1934 Congress stopped allocating frequencies itself, leaving decisions instead to the five members of the Federal Communications Commission. Congress had learned early that assigning frequencies was difficult and politically unrewarding, for its decisions were regularly greeted with charges of favoritism, or worse. Congress therefore delegated such decisions to a body of experts while retaining the authority to pass new laws that could override the commission's decisions. Thus Congress retains the ultimate authority to set the nation's technical broadcasting policies when it chooses to exercise it.

Finally, almost all enforcement authority—the key to solving prisoner's dilemmas of all types—involves delegation to a policing agent. It might be the Internal Revenue Service (IRS), the Securities and Exchange Commission, the Equal Employment Opportunity Commission, or any of the hundreds of other federal, state, and local agencies that make sure that individuals abide by their collective agreements.

Delegation solves some problems for a collectivity, but it introduces others. A principal runs the risk that its agents will use their authority to serve their own rather than the principal's interest. The discrepancy between what a principal would ideally like its agents to do and what they actually do is called **agency loss**. Agency losses might arise “accidentally” by incompetence or

the principal's failure to communicate goals clearly. Or losses might reflect the inherent differences between the goals of a principal and its agents. A principal wants its agents to be exceedingly diligent in protecting its interests while asking for little in return. Agents, on the other hand, prefer to be generously compensated for minimal effort. The balance in most principal-agent relationships lies on a continuum between these extremes. Mild examples of agency loss include various forms of shirking, or "slacking off." Our agents in the legislature might attend to their own business rather than to the public's, nod off in committee meetings, or accept Super Bowl tickets or golf vacations from someone who wants a special favor. Citizens warily appreciate the opportunities available to their agents in Washington to "feather their own nest." So voters are quick to respond to information, typically from opponents who covet the job, suggesting that the incumbent is not serving constituents well. Members of Congress who miss more than a few roll-call votes usually do so at their peril.

So how can a principal determine whether its agents are being faithful when it cannot observe or understand their actions? Car owners face a similar problem when an auto mechanic says the strange engine noise will require replacement of an obscure part costing a month's pay. How do owners know whether to trust the mechanic, especially because they know the mechanic's financial interest clashes with theirs? They could get a second opinion, investigate the mechanic's reputation, or learn more about cars and check for themselves, but all these solutions take time and energy. Governments use all of these techniques and others to minimize agency loss. **Whistleblower laws** generously reward members of the bureaucracy who report instances of malfeasance. Governments can create an agent who monitors the performance of other agents. Congress has created about eighty inspectors general offices within the federal bureaucracy to check and report to the president and Congress on agency failures to perform assigned duties faithfully and honestly. Delegation always entails a trade-off between the benefits of having the agent take care of decisions on the principal's behalf and the costs associated with the risks that agents will pursue their own interests.

A virulent form of agency loss occurs when the agent turns its delegated authority against the principal. This possible scenario arises when principals provide agents with the coercive authority to ward off external threats or to discourage free riding. What prevents these agents—the police, the army, the IRS, the FBI, and many others—from exploiting their advantage not only to enrich but also to entrench themselves by preventing challenges to their authority? Certainly many have. World history—indeed, current affairs—is rife with news of military takeovers, secret police, rigged elections, imprisoned opponents, ethnic cleansing, and national treasuries drained into Swiss bank accounts. Institutions created to minimize transaction costs may, as the trade-off indicates, impose unacceptably high conformity costs.

## ASSESSING THE CONSTITUTION'S PERFORMANCE IN TODAY'S AMERICAN POLITICS

America's polarized politics poses several challenges for its constitutional system. One is **gridlock**, the inability of the House of Representatives, the Senate, and the president to agree on new policies. Even when all agree that a government program is broken, all too often there appears

to be little prospect that it will soon be fixed. In large part, of course, gridlock in addressing universally recognized problems simply reflects the fact that Americans and their representatives disagree on a solution. Everyone appears to dislike the nation's current immigration policy, but with solutions ranging from "build a wall" to dismantling the Immigration and Customs Enforcement (ICE), there is little prospect of agreement on any new policy.

But gridlock also results from a more fundamental difficulty in reaching collective decisions in a constitutional system that intentionally disperses government authority. Separation of powers and federalism necessitate broad agreement among officeholders across the different branches in order for new policies to be successfully enacted and subsequently implemented. And by adding a layer of institutional fragmentation on top of pluralism, the Framers simply overdid it. The result is an inherently conservative political process. The president, the House of Representatives, and the Senate all hold a veto over new laws, and if they agree, the federal judiciary typically is invited by the disgruntled loser to weigh in and declare the policy unconstitutional. Those opposed to the policy need only prevail in one of those institutions to veto a new policy. Ironically, the American public has regularly expressed dissatisfaction with decisions in Washington for decades, but when posed with the possibility of reform, they rush to defend separation of powers with its checks and balances. Two surveys administered in 2020 and 2021 found only 5 percent of respondents in both preferring to weaken the Constitution's separation



David Horsey Editorial cartoon/The Seattle Times/TCA



of powers while half thought its checks and balances should be strengthened.<sup>18</sup> Americans may not like gridlock, but they appear to support its root cause, our Constitution.

The Framers intentionally left unstated important aspects about how government should work on a daily basis. As a result we are still working through whether separation of powers and checks and balances allow government officials the discretion to pursue a course of action they claim they have the authority to do. Was Obama’s executive order protecting “Dreamers” from deportation constitutional? (The Supreme Court answered this question in 2020, which we examine fully in Chapter 4.) Can a president to whom the Constitution assigns broad pardon power pardon himself or even be indicted for a crime? (President Trump emphatically argued that he could pardon himself, and his Justice Department claimed, perhaps with a stronger argument, that separation of powers prevents such an indictment while the president remains in office.)

Today, trying to figure out what the Constitution permits and prohibits its government officials from doing occupies much of the waking hours of numerous politicians, judges, and lawyers. Divided party control of government in Washington finds presidents acting unilaterally, testing the boundaries of their authority. Not only will the opposition party in Congress challenge their actions, so too will the thoroughly “red” (aka Republican) and thoroughly “blue” (aka Democratic) states challenge objectionable policies in federal courts. Trump’s separation-of-powers controversies—travel bans into the United States, reallocation of federal defense funds to build the border wall, withholding funds from sanctuary cities, refusing to send his income tax records to Congress, preventing federal officials from giving congressional testimony, and sending uninvited federal officers into cities to quell protests—illustrate the scope of this disagreement. This list could have easily been several times as long. During the president’s four years in office, state attorneys general filed 156 multi-state lawsuits against Trump administration officials.<sup>5</sup>

## SUMMARY

### Key Terms

agency loss (p. 86)

agenda control (p. 83)

agent (p. 86)

Antifederalists (p. 70)

Articles of Confederation (p. 46)

bicameral legislature (p. 44)

Bill of Rights (p. 66)

checks and balances (p. 58)

command (p. 79)

commerce clause (p. 57)

confederation (p. 46)

Declaration of Independence (p. 46)

delegation (p. 86)

Electoral College (p. 63)

<sup>5</sup> According to one count through the summer of 2020, federal courts rebuffed the Trump administration’s assertion of authority in ninety cases and upheld it in twelve. <https://policyintegrity.org/trump-court-roundup>

- faction (p. 75)  
 fast-track authority (p. 84)  
 Federalists (p. 70)  
 Great Compromise (p. 62)  
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 Virginia Plan (p. 55)  
 voting rules (p. 84)  
 whistleblower laws (p. 87)

## SUGGESTED READINGS

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**REVIEW QUESTIONS**

1. What steps were taken to construct a national government before the Articles of Confederation? What resulted from these steps?
2. How were decisions made under the Articles? What sorts of decisions were not made by the confederation? How did this system affect the war effort? How did it affect the conduct of the national and state governments once the war was over?
3. Why is the Electoral College so complicated?
4. How did the Framers balance the powers and independence of the executive and legislative branches?
5. Discuss how the coordination and transaction costs for states changed when the national government moved from the Articles of Confederation to the Constitution.
6. What are principals and agents? When in your life have you been one or the other?
7. What mechanisms for constitutional amendment were included in the Constitution? Why were multiple methods included?

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