

# 2 The Constitution

## LEARNING OBJECTIVES

### WHAT YOU NEED TO KNOW

- Why was a Bill of Rights adopted so soon after the ratification of the Constitution?
- Why did so many authors of the Constitution fear factions?
- Why did the Framers agree on the idea of a separation of powers?

### WHO GOVERNS?

1. What is the difference between a democracy and a republic?
2. What branch of government has the greatest power?

### TO WHAT ENDS?

1. Does the Constitution tell us what goals the government should serve?
2. Whose freedom does the Constitution protect?

**THEN** When the Philadelphia convention was held in Philadelphia in 1787, its members were all white men. They were not chosen by popular election, and a few famous men, such as Patrick Henry of Virginia, refused to attend. One state, Rhode Island, sent no delegates at all. They met in secret and there was no press coverage. The delegates met to remedy the defects of the Articles of Confederation, under which the rebellious colonies had been governed, but instead of fixing the Articles they wrote an entirely new constitution. They then publicized it and said that it would go into effect once it had been ratified, not by state legislatures, but by popular conventions in at least nine states.

**NOW** Suppose you think we should have a new constitutional convention to remedy what you and others think are defects in the present document. As you will see later in this chapter, some critics want the Constitution to create here something like the parliamentary system of government one finds in Great

Britain, while others want one that weakens the federal government by (for example) having a requirement that the budget be balanced or setting a limit on how much money it can raise in taxes each year. Now try to imagine your answers to these questions: How would delegates be picked? How many would there be? Is there any way to limit what the new convention does? Should the meeting be covered by live television, and should the delegates be free to send emails and Twitter messages to outsiders?

The goal of the American Revolution was liberty. It was not the first revolution with that object; it may not have been the last; but it was perhaps the clearest case of a people altering the political order violently, simply in order to protect their liberties. Subsequent revolutions had more complicated, or utterly different, objectives. The French Revolution in 1789 sought not only liberty, but “equality and fraternity.” The Russian Revolution (1917) and the Chinese Revolution (culminating in 1949) chiefly sought equality and were little concerned with liberty as we understand it.



## The Problem of Liberty

What the American colonists sought to protect when they signed the Declaration of Independence in 1776 were the traditional liberties to which they thought they were entitled as British subjects. These liberties included the right to bring their legal cases before truly independent judges rather than ones subordinate to the king; to be free of the burden of having British troops quartered in their homes; to engage in trade without burdensome restrictions; and, of course, to pay no taxes voted by a British Parliament in which they had no direct representation. During the ten years or

more of agitation and argument leading up to the War of Independence, most colonists believed their liberties could be protected while they remained a part of the British Empire.

Slowly but surely opinion shifted. By the time war broke out in 1775, a large number of colonists (though perhaps not a majority) had reached the conclusion that the colonies would have to become independent of Great Britain if their liberties were to be assured. The colonists had many reasons for regarding independence as the only solution, but one is especially important: they no longer

had confidence in the English constitution. This constitution was not a single document but rather a collection of laws, charters, and traditional understandings that proclaimed the liberties of British subjects. Yet these liberties, in the eyes of the colonists, were regularly violated despite their constitutional protection. Clearly, then, the English constitution was an inadequate check on the abuses of political power. The revolutionary leaders sought an explanation of the insufficiency of the constitution and found it in human nature.

## THE COLONIAL MIND

“A lust for domination is more or less natural to all parties,” one colonist wrote.<sup>1</sup> Men will seek power, many colonists believed, because they are ambitious, greedy, and easily corrupted. John Adams denounced the “luxury, effeminacy, and venality” of English politics; Patrick Henry spoke scathingly of the “corrupt House of Commons”; and Alexander Hamilton described England as “an old, wrinkled, withered, worn-out hag.”<sup>2</sup> This was in part flamboyant rhetoric designed to whip up enthusiasm for the conflict, but it was also deeply revealing of the colonial mind. Their belief that English politicians—and by implication, most politicians—tended to be corrupt was the colonists’ explanation of why the English constitution was not an adequate guarantee of the liberty of the citizens. This opinion was to persist and, as we shall see, profoundly affect

the way the Americans went about designing their own governments.

The liberties the colonists fought to protect were, they thought, widely understood. They were based not on the generosity of the king or the language of statutes but on a “higher law” embodying “natural rights” that were ordained by God, discoverable in nature and history, and essential to human progress. These rights, John Dickinson wrote, “are born with us; exist with us; and cannot be taken away from us by any human power.”<sup>3</sup> There was general agreement that the essential rights included life, liberty, and property long before Thomas Jefferson wrote them into the Declaration of Independence. (Jefferson changed “property” to “the pursuit of happiness,” but almost everybody else went on talking about property.)

This emphasis on property did not mean the American Revolution was thought up by the rich and wellborn to protect their interests or that there was a struggle between property owners and the propertyless. In late-18th-century America, most people (except the black slaves) had property of some kind. The overwhelming majority of citizens were self-employed—as farmers or artisans—and rather few people benefited financially by gaining independence from England. Taxes were higher during and after the war than before, trade was disrupted by the conflict, and debts mounted perilously as various expedients were invented to pay for the



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*Signing the Declaration of Independence*, painted by John Trumbull.

struggle. There were, of course, war profiteers and those who tried to manipulate the currency to their own advantage, but most Americans at the time of the war saw the conflict clearly in terms of political rather than economic issues. It was a war of ideology.

Everyone recognizes the glowing language with which Jefferson set out the case for independence in the second paragraph of the Declaration:

*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 instituted among Men, deriving their just powers from the consent of the governed—that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, having its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*

What almost no one recalls, but what are an essential part of the Declaration, are the next 27 paragraphs, in which Jefferson listed, item by item, the specific complaints the colonists had against George III and his ministers. None of these items spoke of social or economic conditions in the colonies; all spoke instead of specific violations of political liberties. The Declaration was in essence a lawyer's brief prefaced by a stirring philosophical claim that the rights being violated were **unalienable**—that is,

based on nature and Providence, and not on the whims or preferences of people. Jefferson, in his original draft, added another complaint—that the king had allowed the slave trade to continue *and* was inciting slaves to revolt against their masters.

Congress, faced with so contradictory a charge, decided to include a muted reference to slave insurrections and omit all reference to the slave trade.

**unalienable** A human right based on nature or God.

## THE REAL REVOLUTION

The Revolution was more than the War of Independence. It began before the war, continued after it, and involved more than driving out the British army by force of arms. The *real* Revolution, as John Adams afterward explained in a letter to a friend, was the “radical change in the principles, opinions, sentiments, and affections of the people.”<sup>24</sup> This radical change had to do with a new vision of

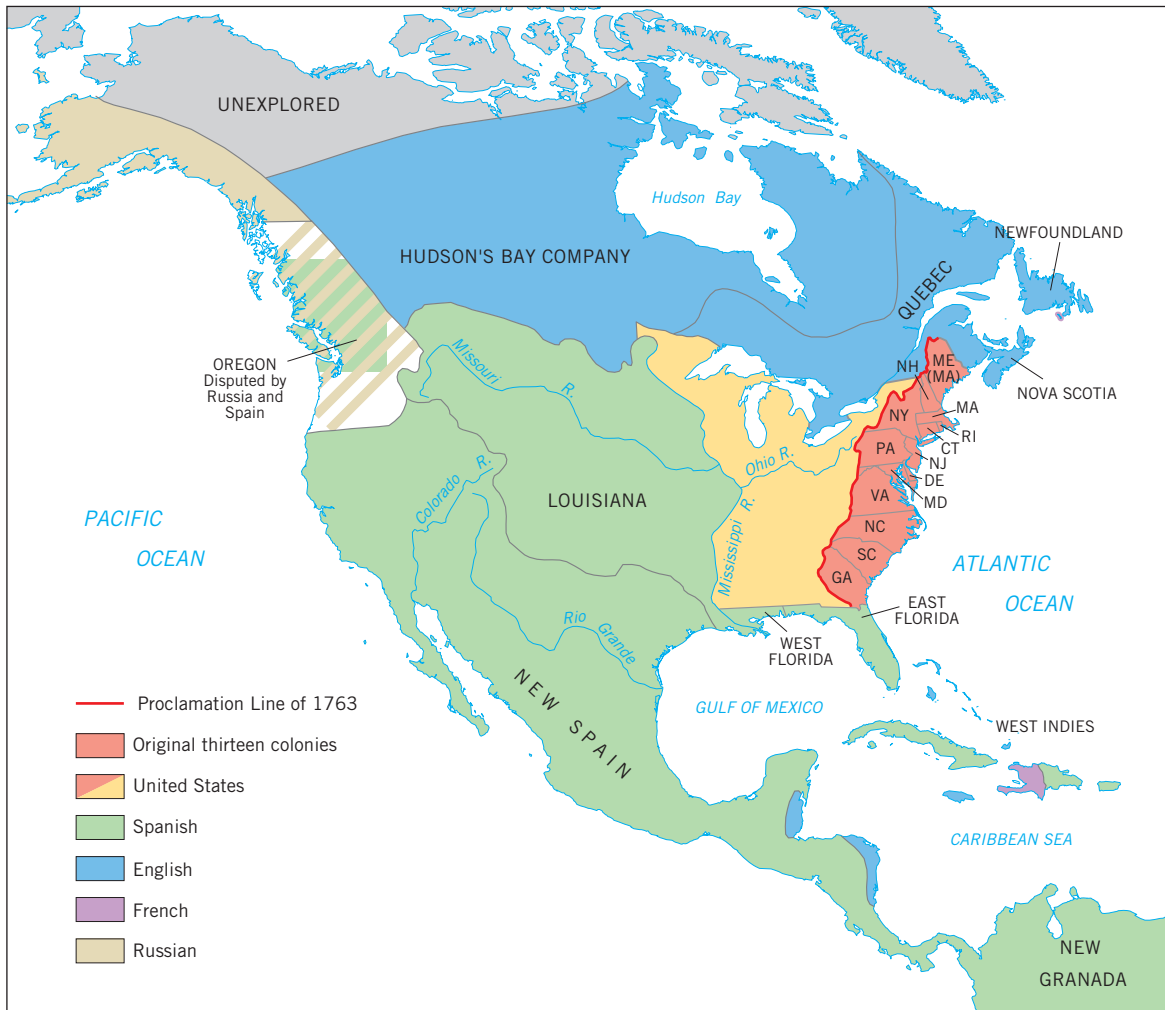
what could make political authority legitimate and personal liberties secure. Government by royal prerogative was rejected; instead, legitimate government would require the consent of the governed. Political power could not be exercised on the basis of tradition but only as a result of a direct grant of power contained in a written constitution. Human liberty existed before government was organized, and government must respect that liberty. The legislative branch of government, in which the people were directly represented, should be superior to the executive branch.

These were indeed revolutionary ideas. No government at the time had been organized on the basis of these principles. And to the colonists such notions were not empty words but rules to be put into immediate practice. In 1776, eight states adopted written constitutions. Within a few years, every former colony had adopted one except Connecticut and Rhode Island, two states that continued to rely on their colonial charters. Most state constitutions had detailed bills of rights defining personal liberties, and most placed the highest political power in the hands of elected representatives.

Written constitutions, representatives, and bills of rights are so familiar to us now that we forget how bold and unprecedented those innovations were in 1776. Indeed, many Americans did not think they would succeed: such arrangements would be either so strong that they would threaten liberty or so weak that they would permit chaos.

The 11 years that elapsed between the Declaration of Independence and the signing of the Constitution in 1787 were years of turmoil, uncertainty, and fear. George Washington had to wage a bitter, protracted war without anything resembling a strong national government to support him. The supply and financing of his army were based on a series of hasty improvisations, most badly administered and few adequately supported by the fiercely independent states. When peace came, many parts of the nation were a shambles. At least a quarter of New York City was in ruins, and many other communities were nearly devastated. Though the British lost the war, they still were powerful on the North American continent, with an army available in Canada (where many Americans loyal to Britain had fled) and a large navy at sea. Spain claimed the Mississippi River valley and occupied what are now Florida and California. Men who had left their farms to fight came back to discover themselves in debt with no money and heavy taxes. The paper money printed to finance the war was now virtually worthless.

**Figure 2.1**  
**North America in 1787**



## WEAKNESSES OF THE CONFEDERATION

The 13 states had formed only a faint semblance of a national government with which to bring order to the nation. The **Articles of Confederation**, which went into effect in 1781, created little more than a “league of friendship” that could not levy taxes or regulate commerce. Each state retained its sovereignty and independence, each state (regardless of size) had one vote in Congress, nine (of 13) votes were required to pass any measure, and the delegates who cast these votes were picked and paid for by the state legislatures. Congress did not have the power to make peace, and thus it was unable to ratify the treaty with England in 1783. It could coin

money, but there was precious little to coin; it could appoint the key army officers, but the army was small and dependent for support on independent state militias; it was allowed to run the post office, then, as now, a thankless task that nobody else wanted. John Hancock, who in 1785 was elected to the meaningless office of “president” under the Articles, never showed up to take the job. Several states claimed the unsettled lands in the West, and they occasionally pressed those claims with guns. Pennsylvania and Virginia went to war near Pittsburgh, and Vermont threatened to become part of Canada. There was no national judicial system to settle these or other claims among the states. To amend the Articles of Confederation, all 13 states had to agree.

Many of the leaders of the Revolution, such as George Washington and Alexander Hamilton, believed a stronger national government was

**Articles of Confederation** A weak constitution that governed America during the Revolutionary War.

money, but there was precious little to coin; it could appoint the key army officers, but the army was small and dependent for support on independent state militias; it was allowed to run the post office, then, as now, a thankless task that nobody else wanted. John Hancock, who in 1785 was elected to the meaningless office of “president” under the Articles, never showed up to take the job. Several states claimed the unsettled lands in the West, and they occasionally pressed those claims with guns. Pennsylvania and Virginia went to war near Pittsburgh, and Vermont threatened to become part of Canada. There was no national judicial system to settle these or other claims among the states. To amend the Articles of Confederation, all 13 states had to agree.



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In 1775, British and American troops exchange fire in Lexington, Massachusetts, the first battle of the War of Independence.

essential. They lamented the disruption of commerce and travel caused by the quarrelsome states and deeply feared the possibility of foreign military intervention, with England or France playing one state off against another. A small group of men, conferring at Washington's home at Mount Vernon in 1785, decided to call a meeting to discuss trade regulation. That meeting, held at Annapolis, Maryland, in September 1786, was not well attended (no delegates arrived from New England), and so another meeting, this one in Philadelphia, was called for the following spring—in May 1787—to consider ways of remedying the defects of the Confederation.

## The Constitutional Convention

The delegates assembled at Philadelphia at the **Constitutional Convention**, for what was advertised (and authorized by Congress) as a meeting to revise the Articles; they adjourned four months later having written a wholly new constitution. When they met, they were keenly aware of the problems of the confederacy but far from agreeing as to what should be done about those problems. The protection of life, liberty, and property was

their objective in 1787 as it had been in 1776, but they had no accepted political theory that would tell them what kind of national government, if any, would serve that goal.

### Constitutional Convention

A meeting in Philadelphia in 1787 that produced a new constitution.

## THE LESSONS OF EXPERIENCE

They had read ancient and modern political history, only to learn that nothing seemed to work. James Madison spent a good part of 1786 studying books sent to him by Thomas Jefferson, then in Paris, in hopes of finding some model for a workable American republic. He took careful notes on various confederacies in ancient Greece and on the more modern confederacy of the United Netherlands. He reviewed the history of Switzerland and Poland and the ups and downs of the Roman republic. He concluded that there was no model; as he later put it in one of the *Federalist* papers, history consists only of beacon lights “which give warning of the course to be shunned, without pointing out that which ought to be pursued.”<sup>5</sup> The problem seemed to be that confederacies were too weak to govern and tended to collapse from internal dissension, while all stronger forms of government were so powerful as to trample the liberties of the citizens.

## STATE CONSTITUTIONS

Madison and the others did not need to consult history, or even the defects of the Articles of Confederation, for illustrations of the problem. These could be found in the government of the American states at the time. Pennsylvania and Massachusetts exemplified two aspects of the problem. The Pennsylvania constitution, adopted in 1776, created the most radically democratic of the new state regimes. All power was given to a one-house (unicameral) legislature, the Assembly, the members of which were elected annually for one-year terms. No legislator could serve more than four years. There was no governor or president, only an Executive Council that had few powers. Thomas Paine, whose pamphlets had helped precipitate the break with England, thought the Pennsylvania constitution was the best in America, and in France philosophers hailed it as the very embodiment of the principle of rule by the people. Though popular in France, it was a good deal less popular in Philadelphia. The Assembly disfranchised the Quakers, persecuted conscientious objectors to the war, ignored the requirement of trial by juries, and manipulated the judiciary.<sup>6</sup> To Madison and his friends, the Pennsylvania constitution demonstrated how a government, though democratic, could be tyrannical as a result of concentrating all powers into one set of hands.

The Massachusetts constitution, adopted in 1780, was a good deal less democratic. There was a clear separation of powers among the various branches of government, the directly elected governor could veto acts of the legislature, and judges served for life. Both voters and elected officials had to be

property owners; the governor, in fact, had to own at least £1,000 worth of property. The principal officeholders had to swear they were Christians.

## SHAYS'S REBELLION

But if the government of Pennsylvania was thought too strong, that of Massachusetts seemed too weak, despite its “conservative” features. In January 1787, a group of ex–Revolutionary War soldiers and officers, plagued by debts and high taxes and fearful of losing their property to creditors and tax collectors, forcibly prevented the courts in western Massachusetts from sitting. This became known as **Shays’s Rebellion**, after one of the officers, Daniel Shays. The governor of Massachusetts asked the Continental Congress to send troops to suppress the rebellion, but it could not raise the money or the manpower. Then he turned to his own state militia, but discovered he did not have one. In desperation, private funds were

### *Shays’s Rebellion*

A 1787 rebellion in which ex–Revolutionary War soldiers attempted to prevent foreclosures of farms as a result of high interest rates and taxes.

collected to hire a volunteer army, which marched on Springfield and, with the firing of a few shots, dispersed the rebels, who fled into neighboring states.

Shays’s Rebellion, occurring between the aborted Annapolis and the coming Philadelphia conventions, had a powerful effect on opinion. Delegates who might have been reluctant to attend the Philadelphia meeting, especially those from New England, were galvanized by the fear that state governments were about to collapse from internal dissension. George Washington wrote a friend despairingly: “For God’s sake, if they [the rebels] have real grievances, redress them; if they have not, employ the force of government against them at once.”<sup>77</sup> Thomas Jefferson, living in Paris, took a more detached view: “A little rebellion now and then is a good thing,” he wrote. “The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.”<sup>78</sup> Though Jefferson’s detachment might be explained by the fact that he was in Paris and not in Springfield, there were others, like Governor George Clinton of New York, who shared the view that no strong central government was required. (Whether Clinton would have agreed about the virtues of spilled blood, especially his, is another matter.)

## THE FRAMERS

The Philadelphia convention attracted 55 delegates, only about 30 of whom participated regularly in the proceedings. One state, Rhode Island, refused to

send anyone. The convention met during a miserably hot Philadelphia summer, with the delegates pledged to keep their deliberations secret. The talkative and party-loving Benjamin Franklin was often accompanied by other delegates to make sure that neither wine nor his delight in telling stories would lead him to divulge delicate secrets.

Those who attended were for the most part young (Hamilton was 30; Madison 36) but experienced. Eight delegates had signed the Declaration of Independence, seven had been governors, 34 were lawyers and reasonably well-to-do, a few were wealthy. They were not “intellectuals,” but men of practical affairs. Thirty-nine had served in the ineffectual Congress of the Confederation; a third were veterans of the Continental Army.

Some names made famous by the Revolution were conspicuously absent. Thomas Jefferson and John Adams were serving as ministers abroad; Samuel Adams was ill; Patrick Henry was chosen to attend but refused, commenting that he “smelled a rat in Philadelphia, tending toward monarchy.”

The key men at the convention were an odd lot. George Washington was a very tall, athletic man who was the best horseman in Virginia and who impressed everyone with his dignity despite decaying teeth and big eyes. James Madison was the very opposite: quite short with a frail body and not much of an orator, but possessed of one of the best minds in the country. Benjamin Franklin, though old and ill, was the most famous American in the world as a scientist and writer and always displayed shrewd judgment, at least when sober. Alexander Hamilton, the illegitimate son of a French woman and a Scottish merchant, had so strong a mind and so powerful a desire that he succeeded in everything he did, from being Washington’s aide during the Revolution to a splendid secretary of the treasury during Washington’s presidency.

The convention produced not a revision of the Articles of Confederation, as it had been authorized to do, but instead a wholly new written constitution creating a true national government unlike any that had existed before. That document is today the world’s oldest written national constitution. Those who wrote it were neither saints nor schemers, and the deliberations were not always lofty or philosophical—much hard bargaining, not a little confusion, and the accidents of personality and time helped shape the final product. The delegates were split on many issues—what powers should be given to a central government, how the states should be represented, what was to be done about slavery, the role of the people—each of which



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Shays's Rebellion in western Massachusetts in 1786–1787 stirred deep fears of anarchy in America. The ruckus was put down by a hastily assembled militia, and the rebels were eventually pardoned.

was resolved by a compromise. The speeches of the delegates (known to us from the detailed notes kept by Madison) did not explicitly draw on political philosophy or quote from the writings of philosophers. Everybody present was quite familiar with the traditional arguments and, on the whole, well read in history. But though the leading political philosophers were only rarely mentioned, the debate was profoundly influenced by philosophical beliefs, some formed by the revolutionary experience and others by the 11-year attempt at self-government.

From the debates leading up to the Revolution, the delegates had drawn a commitment to liberty, which, despite the abuses sometimes committed in its name, they continued to share. Their defense of liberty as a natural right was derived from the writings of the English philosopher John Locke and based on his view that such rights are discoverable by reason. In a “state of nature,” Locke argued, all men cherish and seek to protect their life, liberty, and property. But in a state of nature—that is, a society without a government—the strong can use their liberty to deprive the weak of theirs. The instinct for self-preservation leads people to want a government that will prevent this exploitation. But if the government is not itself to deprive its subjects of their liberty, it must be limited. The chief limitation on it, he said, should derive from the fact that it is created, and governs, by the consent of the governed. People will not agree to be ruled by

a government that threatens their liberty; therefore, the government to which they freely choose to submit themselves will be a limited government designed to protect liberty.

The Pennsylvania experience as well as the history of British government led the Framers to doubt whether popular consent alone would be a sufficient guarantor of liberty. A popular government may prove too weak (as in Massachusetts) to prevent one faction from abusing another, or a popular majority can be tyrannical (as in Pennsylvania). In fact, the tyranny of the majority can be an even graver threat than rule by the few. In the former case, there may be no defenses for the individual—one lone person cannot count on the succor of public opinion or the possibility of popular revolt.

The problem, then, was a delicate one: how to devise a government strong enough to preserve order but not so strong that it would threaten liberty. The answer, the delegates believed, was not “democracy” as it was then understood. To many conservatives in the late 18th century, democracy meant mob rule—it meant, in short, Shays's Rebellion (or, if they had been candid about it, the Boston Tea Party). On the other hand, *aristocracy*—the rule of the few—was no solution, since the few were likely to be self-seeking. Madison, writing later in the *Federalist* papers, put the problem this way:

*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>9</sup>*

Striking this balance could not be done, Madison believed, simply by writing a constitution that set limits on what government could do. The example of British rule over the colonies proved that laws and customs were inadequate checks on political power. As he expressed it, “A mere demarcation on parchment of the constitutional limits [of government] is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”<sup>10</sup>

## The Challenge

The resolution of political issues, great and small, often depends crucially on how the central question is phrased. The delegates came to Philadelphia in general agreement that there were defects in the



Articles of Confederation that ought to be remedied. Had they, after convening, decided to make their business that of listing these defects and debating alternative remedies for them, the document that emerged would in all likelihood have been very different from what in fact was adopted. But immediately after the convention had organized itself and chosen Washington to be its presiding officer, the Virginia delegation, led by Governor Edmund Randolph but relying heavily on the draftsmanship of James Madison, presented to the convention a comprehensive plan for a wholly new national government. The plan quickly became the major item of business at the meeting; it, and little else, was debated for the next two weeks.

## THE VIRGINIA PLAN

When the convention decided to make the **Virginia Plan** its agenda, it had fundamentally altered the nature of its task. The business at hand was not to be the Articles and their defects, but rather how one should go about designing a true national government. The Virginia Plan called for a strong national union organized into three governmental branches—the legislative, executive, and judicial. The legislature was to be composed of two houses, the first elected directly by the people and the second chosen by the first house from among the people

### *Virginia Plan*

Proposal to create a strong national government.

### *New Jersey Plan*

Proposal to create a weak national government.

nominated by state legislatures. The executive was to be chosen by the national legislature, as were members of a national judiciary. The executive and some members of the judiciary were to constitute a “council of revision” that could veto acts of the legislature; that veto, in turn, could be overridden by the legislature. There were other interesting details, but the key features of the Virginia Plan were two: (1) a national legislature would have supreme powers on all matters on which the separate states were not competent to act, as well as the power to veto any and all state laws; and (2) at least one house of the legislature would be elected directly by the people.

## THE NEW JERSEY PLAN

As the debate went on, the representatives of New Jersey and other small states became increasingly worried that the convention was going to write a constitution in which the states would be represented in both houses of Congress on the basis of population. If this happened, the smaller states feared they would always be outvoted by the larger ones, and so, with William Paterson of New Jersey

as their spokesman, they introduced a new plan. The **New Jersey Plan** proposed to amend, not replace, the old Articles of Confederation. It enhanced the power of the national government (though not as much as the Virginia Plan), but it did so in a way that left the states’ representation in Congress unchanged from the Articles—each state would have one vote. Thus not only would the interests of the small states be protected, but Congress itself would remain to a substantial degree the creature of state governments.

If the New Jersey resolutions had been presented first and taken up as the major item of business, it is quite possible they would have become the framework for the document that finally emerged. But they were not. Offered after the convention had been discussing the Virginia Plan for two weeks, the resolutions encountered a reception very different from what they would have received if introduced earlier. The debate had the delegates already thinking in terms of a national government that was more independent of the states, and thus it had accustomed them to proposals that, under other circumstances, might have seemed quite radical. On June 19, the first decisive vote of the convention was taken: seven states preferred the Virginia Plan, three states the New Jersey Plan, and one state was split.

With the tide running in favor of a strong national government, the supporters of the small states had to shift their strategy. They now began to focus their efforts on ensuring that the small states could not be outvoted by the larger ones in Congress. One way was to have the members of the lower house elected by the state legislatures rather than the people, with each state getting the same number of seats rather than seats proportional to its population.

The debate was long and feelings ran high, so much so that Benjamin Franklin, at 81 the oldest delegate



Independence Hall in Philadelphia.

Andre Jenny/Alamy

present, suggested that each day's meeting begin with a prayer. It turned out that the convention could not even agree on this: Hamilton is supposed to have objected that the convention did not need "foreign aid," and others pointed out that the group had no funds with which to hire a minister. And so the argument continued.

## THE COMPROMISE

Finally, a committee was appointed to meet during the Fourth of July holidays to work out a compromise, and the convention adjourned to await its report. Little is known of what went on in that committee's session, though some were later to say that Franklin played a key role in hammering out the plan that finally emerged. That compromise, the most important reached at the convention, and later called the **Great Compromise** (or sometimes the Connecticut Compromise), was submitted to the full convention on July 5 and debated for another week and a half. The debate might have gone on even longer, but suddenly the hot weather moderated, and Monday, July 16,

dawned cool and fresh after a month of misery. On that day, the plan was adopted: five states were in favor, four were opposed, and two did not vote.\* Thus, by the narrowest of margins, the structure of the national legislature was set as follows:

- A House of Representatives consisting initially of 65 members apportioned among the states roughly on the basis of population and elected by the people.
- A Senate consisting of two senators from each state to be chosen by the state legislatures.

The Great Compromise reconciled the interests of small and large states by allowing the former to predominate in the Senate and the latter in the House. This reconciliation was necessary to ensure there would be support for a strong national government from small as well as large states. It represented major concessions on the part of several groups. Madison, for one, was deeply opposed to the idea of having the states equally represented in the Senate. He saw in that a way for the states to hamstring the national government and much preferred

\* The states in favor were Connecticut, Delaware, Maryland, New Jersey, and North Carolina. Those opposed were Georgia, Pennsylvania, South Carolina, and Virginia. Massachusetts was split down the middle; the New York delegates had left the convention. New Hampshire and Rhode Island were absent.

some measure of proportional representation in both houses. Delegates from other states worried that representation on the basis of population in the House of Representatives would enable the large states to dominate legislative affairs. Although the margin by which the compromise was accepted was razor-thin, it held firm. In time, most of the delegates from the dissenting states accepted it.

After the Great Compromise, many more issues had to be resolved, but by now a spirit of accommodation had developed. When one delegate proposed having Congress choose the president, another, James Wilson, proposed that he be elected directly by the people. When neither side of that argument prevailed, a committee invented a plan for an "electoral college" that would choose the president. When some delegates wanted the president chosen for a life term, others proposed a seven-year term, and still others wanted the term limited to three years without eligibility for reelection. The convention settled on a four-year term with no bar to reelection. Some states wanted the Supreme Court picked by the Senate; others wanted it chosen by the president. They finally agreed to let the justices be nominated by the president and then confirmed by the Senate.

Finally, on July 26, the proposals that were already accepted, together with a bundle of unresolved issues, were handed over to the Committee of Detail, consisting of five delegates. This committee included Madison and Gouverneur Morris, who was to be the chief draftsman of the document that finally emerged. The committee hardly contented itself with mere "details," however. It inserted some new proposals and made changes in old ones, drawing for inspiration on existing state constitutions and the members' beliefs as to what the other delegates might accept. On August 6, the report—the first complete draft of the Constitution—was submitted to the convention. There it was debated, item by item, revised, amended, and finally, on September 17, approved by all 12 states in attendance. (Not all *delegates* approved, however; three, including Edmund Randolph, who first submitted the Virginia Plan, refused to sign.)

## The Constitution and Democracy

A debate continues to rage over whether the Constitution created, or was even intended to create, a democratic government. The answer is complex. The Framers did not intend to create a "pure democracy"—one in which the people rule directly.

### Great Compromise

Plan to have a popularly elected House based on state population and a state-selected Senate, with two members for each state.

For one thing, the size of the country and the distances between settlements would have made that physically impossible. But more importantly, the Framers worried that a government in which all citizens directly participate, as in the New England town meeting, would be a government excessively

**republic** A government in which elected representatives make the decisions.

**judicial review**

The power of the courts to declare laws unconstitutional.

**federalism**

Government authority shared by national and local governments.

subject to temporary popular passions and one in which minority rights would be insecure. They intended instead to create a **republic**, by which they meant a government in which a system of representation operates. In designing that system, the Framers chose, not without argument, to have the members of the House of Representatives elected directly by the people. Some delegates did not want to go even that far. Elbridge Gerry of Massachusetts, who refused to sign the Constitution, argued that though “the people do not want [that is, lack] virtue,” they often are the “dupes of pretended patriots.” Roger Sherman of Connecticut agreed. But George

Mason of Virginia and James Wilson of Pennsylvania carried the day when they argued that “no government could long subsist without the confidence of the people,” and this required “drawing the most numerous branch of the legislature directly from the people.” Popular elections for the House were approved: six states were in favor, two opposed.

But though popular rule was to be one element of the new government, it was not to be the only one. State legislatures, not the people, would choose the senators; electors, not the people directly, would choose the president. As we have seen, without these arrangements, there would have been no Constitution at all, for the small states adamantly opposed any proposal that would have given undue power to the large ones. And direct popular election of the president would clearly have made the populous states the dominant ones. In short, the Framers wished to observe the principle of majority rule, but they felt that, on the most important questions, two kinds of majorities were essential—a majority of the voters and a majority of the states.

The power of the Supreme Court to declare an act of Congress unconstitutional—**judicial review**—is also a way of limiting the power of popular majorities. It is not clear whether the Framers intended that there be judicial review, but there is little doubt that in the Framers’ minds the fundamental law, the Constitution, had to be safeguarded

against popular passions. They made the process for amending the Constitution easier than it had been under the Articles but still relatively difficult.

An amendment can be proposed either by a two-thirds vote of both houses of Congress *or* by a national convention called by Congress at the request of two-thirds of the states.\* Once proposed, an amendment must be ratified by three-fourths of the states, either through their legislatures or through special ratifying conventions in each state. Twenty-seven amendments have survived this process, all of them proposed by Congress and all but one (the Twenty-first Amendment) ratified by state legislatures rather than state conventions.

In short, the answer to the question of whether the Constitution brought into being a democratic government is yes, if by *democracy* one means a system of representative government based on popular consent. The degree of that consent has changed since 1787, and the institutions embodying that consent can take different forms. One form, rejected in 1787, gives all political authority to one set of representatives, directly elected by the people. (That is the case, for example, in most parliamentary regimes, such as Great Britain, and in some city governments in the United States.) The other form of democracy is one in which different sets of officials, chosen directly or indirectly by different groups of people, share political power. (That is the case with the United States and a few other nations where the separation of powers is intended to operate.)

## KEY PRINCIPLES

The American version of representative democracy was based on two major principles, the separation of powers and federalism. In America, political power was to be shared by three separate branches of government; in parliamentary democracies, that power was concentrated in a single, supreme legislature. In America, political authority was divided between a national government and several state governments—**federalism**—whereas in most European systems authority was centralized in the national government. Neither of these principles was especially controversial at Philadelphia. The delegates began their work in broad agreement that separated powers and some measure of federalism were necessary, and both the Virginia and New Jersey plans

\* There have been many attempts to get a new constitutional convention. In the 1960s, 33 states, one short of the required number, requested a convention to consider the reapportionment of state legislatures. In the 1980s, efforts were made to call a convention to consider amendments to ban abortions and to require a balanced federal budget.

**enumerated**

**powers** Powers given to the national government alone.

**reserved powers**

Powers given to the state government alone.

**concurrent powers**

Powers shared by the national and state governments.

**checks and**

**balances** Authority shared by three branches of government.

contained a version of each. How much federalism should be written into the Constitution was quite controversial, however.

Under these two principles, governmental powers in this country can be divided into three categories. The powers given to the national government exclusively are the delegated or **enumerated powers**. They include the authority to print money, declare war, make treaties, conduct foreign affairs, and regulate commerce among the states and with foreign nations. Those given exclusively to the states are the **reserved powers** and include the power to issue licenses and to regulate commerce wholly

within a state. Those shared by both the national and the state governments are called **concurrent powers** and include collecting taxes, building roads, borrowing money, and having courts.

## GOVERNMENT AND HUMAN NATURE

The desirability of separating powers and leaving the states equipped with a broad array of rights and responsibilities was not controversial at the Philadelphia convention because the Framers' experiences with British rule and state government under the Articles had shaped their view of human nature. These experiences had taught most of the Framers that people would seek their own advantage in and out of politics; this pursuit of self-interest, unchecked, would lead some people to exploit others. Human nature was good enough to make it possible to have a decent government based

# How Things Work

## Checks and Balances

The Constitution creates a system of *separate* institutions that *share* powers. Because the three branches of government share powers, each can (partially) check the powers of the others. This is the system of **checks and balances**. The major checks possessed by each branch are listed below.

### Congress

1. Can check the president in these ways:
  - a. By refusing to pass a bill the president wants
  - b. By passing a law over the president's veto
  - c. By using the impeachment powers to remove the president from office
  - d. By refusing to approve a presidential appointment (Senate only)
  - e. By refusing to ratify a treaty the president has signed (Senate only)
2. Can check the federal courts in these ways:
  - a. By changing the number and jurisdiction of the lower courts
  - b. By using the impeachment powers to remove a judge from office
  - c. By refusing to approve a person nominated to be a judge (Senate only)

### The President

1. Can check Congress by vetoing a bill it has passed
2. Can check the federal courts by nominating judges

### The Courts

1. Can check Congress by declaring a law unconstitutional
2. Can check the president by declaring actions by him or his subordinates unconstitutional or not authorized by law

In addition to these checks specifically provided for in the Constitution, each branch has informal ways of checking the others. For example, the president can try to withhold information from Congress (on the grounds of "executive privilege"), and Congress can try to get information by mounting an investigation.

The exact meaning of the various checks is explained in Chapter 13 on Congress, Chapter 14 on the presidency, and Chapter 16 on the courts.

on popular consent, but it was not good enough to make it inevitable.

One solution to this problem would be to improve human nature. Ancient political philosophers such as Aristotle believed that the first task of any government was to cultivate virtue among the governed. Many Americans were of the same mind. To them, Americans would first have to become good people before they could have a good government. Samuel Adams, a leader of the Boston Tea Party, said that the new nation must become a “Christian Sparta.” Others spoke of the need to cultivate frugality, industry, temperance, and simplicity.

But to James Madison and the other architects of the Constitution, the deliberate cultivation of vir-

tue would require a government too strong and thus too dangerous to liberty, at least at the national level. Self-interest, freely pursued within reasonable limits, was a more practical and durable solution to the problem of government than any effort to improve the virtue of the citizenry. He wanted, he said, to make republican government possible “even in the absence of political virtue.”

Madison argued that the very self-interest that leads people toward factionalism and tyranny might, if properly harnessed by appropriate constitutional arrangements, provide a source of unity and a guarantee of liberty. This harnessing was to be accomplished by dividing the offices of the new government among many people and giving to the holder of each office the “neces-

sary means and personal motives to resist encroachments of the others.” In this way, “ambition must be made to counteract ambition” so that “the private interest of every individual may be a sentinel over the public rights.”<sup>11</sup>

If men were angels, all this would be unnecessary. But Madison and the other delegates pragmatically insisted on taking human nature pretty much as it was, and therefore they adopted “this policy of supplying, by opposite and rival interests, the defect of better motives.”<sup>12</sup> The **separation of powers** would work, not in spite of the imperfections of human nature, but because of them.

So also with federalism. By dividing power between the states and the national government, one level

of government can serve as a check on the other. This should provide a “double security” to the rights of the people: “The different governments will control each other, at the same time that each will be controlled by itself.”<sup>13</sup> This was especially likely to happen in America, Madison thought, because it was a large country filled with diverse interests—rich and poor, Protestant and Catholic, northerner and southerner, farmer and merchant, creditor and debtor. Each of these interests would constitute a **faction** that would seek its own advantage. One faction might come to dominate government, or a part of government, in one place, and a different and rival faction might dominate it in another. The pulling and hauling among these factions would prevent any single government—say, that of New York—from dominating all of government. The division of powers among several governments would give to virtually every faction an opportunity to gain some—but not full—power.

## The Constitution and Liberty

A more difficult question is whether the Constitution created a system of government that would respect personal liberties. And that in fact is the question that was debated in the states when the document was presented for ratification. The proponents of the Constitution called themselves the **Federalists** (though they might more accurately have been called “nationalists”). The opponents came to be known as the **Antifederalists** (though they might more accurately have been called “states’ righters”).\* To be put into effect, the Constitution had to be approved at ratifying conventions in at least nine states. This was perhaps the most democratic feature of the Constitution: it had to be accepted, not by the existing Congress (still limping along under the Articles of Confederation), nor by the state legislatures, but by special conventions elected by the people.

Though democratic, the process established by the Framers for ratifying the Constitution was technically illegal. The Articles of Confederation, which still governed, could be amended only with the approval of all 13 state legislatures. The Framers

\* To the delegates a truly “federal” system was one, like the New Jersey Plan, that allowed for very strong states and a weak national government. When the New Jersey Plan lost, the delegates who defeated it began using the word *federal* to describe their plan even though it called for a stronger national government. Thus men who began as “Federalists” at the convention ultimately became known as “Antifederalists” during the struggle over ratification.

### *separation of powers*

Constitutional authority is shared by three different branches of government.

**faction** A group with a distinct political interest.

### **Federalists**

Those who favor a stronger national government.

### **Antifederalists**

Those who favor a weaker national government.

wanted to bypass these legislatures because they feared that, for reasons of ideology or out of a desire to retain their powers, the legislators would oppose the Constitution. The Framers wanted ratification with less than the consent of all 13 states because they knew that such unanimity could not be attained. And indeed the conventions in North Carolina and Rhode Island did initially reject the Constitution.

## THE ANTIFEDERALIST VIEW

The great issue before the state conventions was liberty, not democracy. The opponents of the new Constitution, the Antifederalists, had a variety of objections but were in general united by the belief that liberty could be secure only in a small republic in which the rulers were physically close to—and closely checked by—the ruled. Their central objection was stated by a group of Antifederalists at the ratifying convention in an essay published just after they had lost: “a very extensive territory cannot be

governed on the principles of freedom, otherwise than by a confederation of republics.”<sup>14</sup>

These dissenters argued that a strong national government would be distant from the people and would use its powers to annihilate or absorb the functions that properly belonged to the states. Congress would tax heavily, the Supreme Court would overrule state courts, and the president would come to head a large standing army. (Since all these things have occurred, we cannot dismiss the Antifederalists as cranky obstructionists who opposed without justification the plans of the Framers.) These critics argued that the nation needed, at best, a loose confederation of states, with most of the powers of government kept firmly in the hands of state legislatures and state courts.

But if a stronger national government was to be created, the Antifederalists argued, it should be hedged about with many more restrictions than those in the constitution then under consideration. They proposed several such limitations, including narrowing the jurisdiction of the Supreme Court, checking the president’s power by creating a council that would review his actions, leaving military affairs in the hands of the state militias, increasing the size of the House of Representatives so that it would reflect a greater variety of popular interests, and reducing or eliminating the power of Congress to levy taxes. And some of them insisted that a *bill of rights* be added to the Constitution.

James Madison gave his answer to these criticisms in *Federalist* No. 10 and No. 51 (reprinted in the Appendix). It was a bold answer, for it flew squarely in the face of widespread popular sentiment and much philosophical writing. Following the great French political philosopher Montesquieu, many Americans believed liberty was safe only in small societies governed either by direct democracy or by large legislatures with small districts and frequent turnover among members.

Madison argued quite the opposite—that liberty is safest in *large* (or as he put it, “extended”) republics. In a small community, he said, there will be relatively few differences in opinion or interest; people will tend to see the world in much the same way. If anyone dissents or pursues an individual interest, he or she will be confronted by a massive majority and will have few, if any, allies. But in a large republic there will be many opinions and interests; as a result, it will be hard for a tyrannical majority to form or organize, and anyone with an unpopular view will find it easier to acquire allies. If Madison’s argument seems strange or abstract, ask yourself

**Figure 2.2**  
Ratification of the Federal Constitution by State Conventions, 1787–1790



the following question: if I have an unpopular opinion, an exotic lifestyle, or an unconventional interest, will I find greater security living in a small town or a big city?

By favoring a large republic, Madison was not trying to stifle democracy. Rather, he was attempting to show how democratic government really works, and what can make it work better. To rule, different interests must come together and form a **coalition**—that is, an alliance. In *Federalist* No. 51, he argued that the coalitions that formed in a large republic would be more moderate than those that

**coalition** An alliance of factions.

formed in a small one because the bigger the republic, the greater the variety of interests, and thus the more a coalition of the majority would have to accommodate a diversity of interests and opinions if it hoped to succeed. He concluded that in a nation the size of the United States, with its enormous variety of interests, “a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good.” Whether he was right in that prediction is a matter to which we shall return repeatedly.

The implication of Madison’s arguments was daring, for he was suggesting that the national government should be at some distance from the people and insulated from their momentary passions, because the people did not always want to do the right thing. Liberty was threatened as much (or even more) by public passions and popularly based factions as by

strong governments. Now the Antifederalists themselves had no very lofty view of human nature, as is evidenced by the deep suspicion with which they viewed “power-seeking” officeholders. What Madison did was take this view to its logical conclusion, arguing that if people could be corrupted by office, they could also be corrupted by factional self-interest. Thus the government had to be designed to prevent both the politicians and the people from using it for ill-considered or unjust purposes.

To argue in 1787 against the virtues of small democracies was like arguing against motherhood. Moreover, the Federalists’ counterargument involved many steps: representative democracy over direct democracy; a large republic over a small republic; diversity of economic, religious, and other interests over homogeneity of such interests; and barriers, not boosts, to majority group formation and influence. Still, the Federalists prevailed, probably because many citizens were convinced that a reasonably strong national government was essential if the nation were to stand united against foreign enemies, facilitate commerce among the states, guard against domestic insurrections, and keep one faction from oppressing another. The political realities of the moment and the recent bitter experiences with the Articles probably counted for more in ratifying the Constitution than Madison’s arguments. His cause was helped by the fact that, for all their legitimate concerns and their uncanny instinct for what the future might bring, the Antifederalists could offer no agreed-upon alternative to the new

## The *Federalist* Papers

In 1787, to help win ratification of the new Constitution in the New York state convention, Alexander Hamilton decided to publish a series of articles defending and explaining the document in the New York City newspapers. He recruited John Jay and James Madison to help him, and the three of them, under the pen name “Publius,” wrote 85 articles that appeared from late 1787 through 1788. The identity of the authors was kept secret at the time, but we now know that Hamilton wrote 51 of them, Madison 26, and Jay five, and that Hamilton and Madison jointly authored three.

The *Federalist* papers probably played only a small role in securing ratification. Like most legislative battles, this one was not decisively influenced by

philosophical writings. But these essays have had a lasting value as an authoritative and profound explanation of the Constitution. Though written for political purposes, the *Federalist* has become the single most important piece of American political philosophy ever produced. Ironically, Hamilton and Madison were later to become political enemies; even at the Philadelphia convention they had different views of the kind of government that should be created. But in 1787–1788, they were united in the belief that the new constitution was the best that could have been obtained under the circumstances.

Although Hamilton wrote most of the *Federalist* papers, Madison wrote the two most famous articles—Nos. 10

(continued)

and 51, reprinted in the Appendix. After you have finished this chapter, turn to the Appendix and try to read them. On your first reading of the papers, you may find Madison's language difficult to understand and his ideas overly complex. The following pointers will help you decipher his meaning.

In *Federalist* No. 10, Madison begins by stating that “a well constructed Union” can “break and control the violence of faction.” He goes on to define a *faction* as any group of citizens who attempt to advance their ideas or economic interests at the expense of other citizens, or in ways that conflict with “the permanent and aggregate interests of the community” or “public good.” Thus what Madison terms “factions” are what we today call “special interests.”

One way to defeat factions, according to Madison, is to remove whatever causes them to arise in the first place. This can be attempted in two ways. First, government can deprive people of the liberty they need to organize: “Liberty is to faction what air is to fire.” But that is surely a cure “worse than the disease.” Second, measures can be taken to make all citizens share the same ideas, feelings, and economic interests. However, as Madison observes, some people are smarter or more hard-working than others, and this “diversity in the faculties” of citizens is bound to result in different economic interests as some people acquire more property than others. Consequently, protecting property rights, not equalizing property ownership, “is the first object of government.” Even if everyone shared the same basic economic interests, they would still find reasons “to vex and oppress each other” rather than cooperate “for their common good.” Religious differences, loyalties to different leaders, even “frivolous and fanciful distinctions” (not liking how other people dress or their taste in music) can be fertile soil for factions. In Madison's view, people are factious by nature; the “causes of faction” are “sown” into their very being.

Madison thus proposes a second and, he thinks, more practical and desirable way of defeating faction. The way to cure “the mischiefs of faction” is not by removing its causes but by “controlling its effects.” Factions will always exist, so the trick is to establish a form of government that is likely to serve the public good through the even-handed “regulation of these various and interfering interests.” Wise and public-spirited leaders can “adjust these clashing interests and render them all subservient to the public good,” but, he cautions, “enlightened statesmen will not always be at the helm.” (Madison implies that “enlightened statesmen”—such as himself, Washington, and Jefferson—were at the “helm” of government in 1787.)

Madison's proposed cure for the evils of factions is in fact nothing other than a republican form of government. Use the following questions to guide your own analysis of Madison's ideas. Why does Madison think the problem of a “minority” faction is easy to handle? Conversely, why is he so troubled by the potential of a majority faction? How does he distinguish direct democracy from republican government? What is he getting at when he terms elected representatives “proper guardians of the public weal,” and why does he think that “extensive republics” are more likely to produce such representatives than small ones?

When you are finished with *Federalist* No. 10, try your hand at *Federalist* No. 51. You will find that the ideas in the former paper anticipate many of those in the latter. And you will find many points on which you may or may not agree with Madison. For example, do you agree with his assumption that people—even your best friends or college roommates—are factious by nature? Likewise, do you agree with his view that government is “the greatest of all reflections on human nature”?

By attempting to meet the mind of James Madison, you can sharpen your own mind and deepen your understanding of American government.

Constitution. In politics, then as now, you cannot beat something with nothing.

But this does not explain why the Framers failed to add a bill of rights to the Constitution. If they were so preoccupied with liberty, why didn't they take this most obvious step toward protecting liberty, especially since the Antifederalists were demanding it? Some historians have suggested that this omission was evidence that liberty was not as important to the Framers as they claimed. In fact, when one delegate suggested that a bill of rights be drawn up, the state

delegations at the convention unanimously voted the idea down. There were several reasons for this.

First, the Constitution, as written, *did* contain a number of specific guarantees of individual liberty, including the right of trial by jury in criminal cases and the privilege of the writ of habeas corpus. The liberties guaranteed in the Constitution (before the **Bill of Rights** was added) are listed on the following (turn) page.

**Bill of Rights** First ten amendments to the Constitution.



- Writ of **habeas corpus** may not be suspended (except during invasion or rebellion).
- No **bill of attainder** may be passed by Congress or the states.
- No **ex post facto law** may be passed by Congress or the states.
- Right of trial by jury in criminal cases is guaranteed.
- The citizens of each state are entitled to the privileges and immunities of the citizens of every other state.
- No religious test or qualification for holding federal office is imposed.
- No law impairing the obligation of contracts may be passed by the states.

**habeas corpus** An order to produce an arrested person before a judge.

**bill of attainder** A law that declares a person, without a trial, to be guilty of a crime.

**ex post facto law** A law that makes an act criminal although the act was legal when it was committed.

Second, most states in 1787 had bills of rights. When Elbridge Gerry proposed to the convention that a federal bill of rights be drafted, Roger Sherman rose to observe that it was unnecessary because the state bills of rights were sufficient.<sup>15</sup>

But third, and perhaps most important, the Framers thought they were creating a government with specific, limited powers. It could do, they thought, only what the Constitution gave it the power to do, and nowhere in that document was there permission to infringe on freedom of speech or of the press or to impose cruel and unusual punishments. Some delegates prob-

ably feared that if any serious effort were made to list the rights that were guaranteed, later officials might assume that they had the power to do anything not explicitly forbidden.

## NEED FOR A BILL OF RIGHTS

Whatever their reasons, the Framers made at least a tactical and perhaps a fundamental mistake. It quickly became clear that without at least the promise of a bill of rights, the Constitution would not be ratified. Though the small states, pleased by their equal representation in the Senate, quickly ratified (in Delaware, New Jersey, and Georgia, the vote in the conventions was unanimous), the battle in the large states was intense and the outcome uncertain. In Pennsylvania, Federalist supporters dragged boycotting Antifederalists to the legislature in order to

ensure a quorum was present so a convention could be called. There were rumors of other rough tactics.

In Massachusetts, the Constitution was approved by a narrow majority, but only after key leaders promised to obtain a bill of rights. In Virginia, James Madison fought against the fiery Patrick Henry, whose climactic speech against ratification was dramatically punctuated by a noisy thunderstorm outside. The Federalists won by 10 votes. In New York, Alexander Hamilton argued the case for six weeks against the determined opposition of most of the state's key political leaders; he carried the day, but only by three votes, and then only after New York City threatened to secede from the state if it did not ratify. By June 21, 1788, the ninth state—New Hampshire—had ratified, and the Constitution was law.

Many people think that the first Congress moved quickly to adopt a Bill of Rights—that is, the first ten amendments to the Constitution—in order to satisfy demands made in state ratifying conventions that this be done. Unfortunately, that is not quite right. Of the many criticisms made of the proposed Constitution, hardly any referred to civil liberties. Take, for example, the Massachusetts convention. Several critics, including John Hancock, said they would vote to ratify the document if the new members of Congress did all they could to get nine amendments adopted. But these amendments had nothing to do with free speech or a free press. Instead, they involved the size of the House of Representatives, congressional influence on local elections, the power of Congress to impose taxes, and the need for grand juries in criminal cases.<sup>16</sup> Other speakers wanted an amendment that would have House members stand for election every year. Critics in other states made the same arguments.

Despite the bitterness of the ratification struggle, the new government that took office in 1789–1790, headed by President Washington, was greeted enthusiastically. By the spring of 1790, all 13 states had ratified. There remained, however, the task of fulfilling the promise of amending the document. To that end, James Madison introduced into the first session of the First Congress a set of proposals, 12 of which were approved by Congress; 10 of these were ratified by the states and went into effect in 1791. But with only a few exceptions, these bore no relationship to the criticisms made in the state conventions. On what, then did Madison base them? Probably on the Virginia Declaration of Rights, written by George Mason and Madison, and unanimously approved by the Virginia legislature in 1776. These amendments, which no one called a

# How Things Work

## The Bill of Rights

### The First Ten Amendments to the Constitution Grouped by Topic and Purpose

#### Protections Afforded Citizens to Participate in the Political Process

**Amendment 1:** Freedom of religion, speech, press, and assembly; the right to petition the government.

#### Protections Against Arbitrary Police and Court Action

**Amendment 4:** No unreasonable searches or seizures.

**Amendment 5:** Grand jury indictment required to prosecute a person for a serious crime.

No “double jeopardy” (being tried twice for the same offense).

Forcing a person to testify against himself or herself prohibited.

No loss of life, liberty, or property without due process.

**Amendment 6:** Right to speedy, public, impartial trial with defense counsel and right to cross-examine witnesses.

**Amendment 7:** Jury trials in civil suits where value exceeds \$20.

**Amendment 8:** No excessive bail or fines, no cruel and unusual punishments.

#### Protections of States’ Rights and Unnamed Rights of People

**Amendment 9:** Unlisted rights are not necessarily denied.

**Amendment 10:** Powers not delegated to the United States or denied to states are reserved to the states.

#### Other Amendments

**Amendment 2:** Right to bear arms.

**Amendment 3:** Troops may not be quartered in homes in peacetime.

Bill of Rights as late as 1792, did not limit the power of state governments over citizens, only the power of the federal government. Later, the Fourteenth Amendment, as interpreted by the Supreme Court, extended many of the guarantees of the Bill of Rights to cover state governmental action.

## THE CONSTITUTION AND SLAVERY

Though black slaves amounted to one-third of the population of the five southern states, nowhere in the Constitution can one find the word *slave* or *slavery*.

To some, the failure of the Constitution to address the question of slavery was a great betrayal of the promise of the Declaration of Independence that “all men are created equal.” For the Constitution to be silent on the subject of slavery, and thereby to allow that odious practice to continue, was to convert, by implication, the wording of the Declaration to “all white men are created equal.”

It is easy to accuse the signers of the Declaration and the Constitution of hypocrisy. They knew of slavery, many of them owned slaves, and yet they were silent. Indeed, British opponents of the independence movement took special delight in taunting the colonists about their complaints of being “enslaved” to the British Empire while ignoring the slavery in their very midst.

Increasingly, revolutionary leaders during this period spoke to this issue. Thomas Jefferson had tried to get a clause opposing the slave trade put into the Declaration of Independence. James Otis of Boston had attacked slavery and argued that black as well as white men should be free. As revolutionary fervor mounted, so did northern criticism of slavery. The Massachusetts legislature and then the Continental Congress voted to end the slave trade; Delaware prohibited the importation of slaves; Pennsylvania voted to tax it out of existence; and Connecticut and Rhode Island decided that all slaves brought into those states would automatically become free.

Slavery continued unabated in the South, defended by some whites because they thought it right, by others because they found it useful. But even in the South there were opponents, though rarely conspicuous ones. George Mason, a large Virginia slaveholder and a delegate to the convention, warned prophetically that “by an inevitable chain of causes and effects, providence punishes national sins [slavery] by national calamities.”<sup>17</sup>

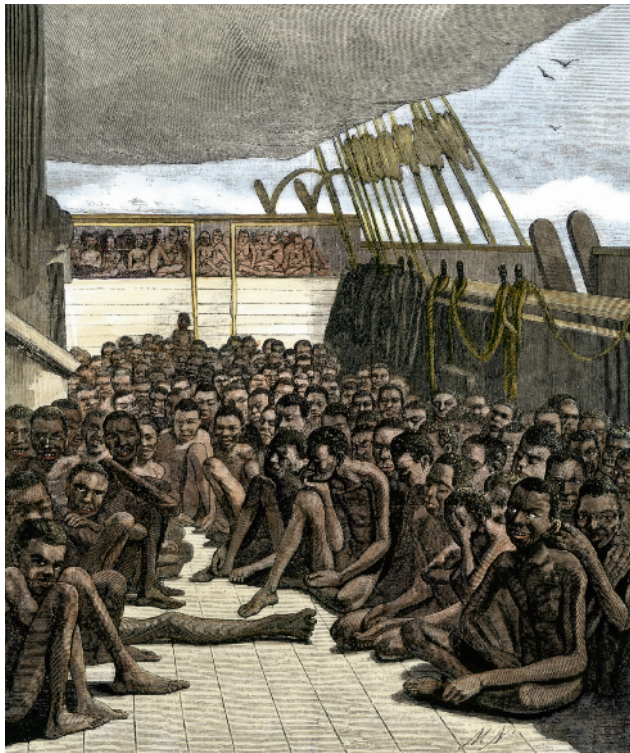
The blunt fact, however, was that any effort to use the Constitution to end slavery would have meant the end of the Constitution. The southern states would never have signed a document that seriously interfered with slavery. Without the southern states, there would have been a continuation of the Articles of Confederation, which would have left each state entirely sovereign and thus entirely free of any prospective challenge to slavery.

Thus the Framers compromised with slavery; political scientist Theodore Lowi calls this their Greatest Compromise.<sup>18</sup> Slavery is dealt with in three places in the Constitution, though never by name. In determining the representation each state was to have in the House, “three-fifths of all other persons” (that is, of slaves) are to be added to “the whole number of free persons.”<sup>19</sup> The South originally wanted slaves to count fully even though, of course, none would

be elected to the House; they settled for counting 60 percent of them. The Great (or Connecticut) Compromise favored smaller states, which were mostly northern, by giving each state two senators; but the three-fifths compromise even more strongly favored the South’s slaveholding states. For example, apportioned according to its free population, the southern states would have had a combined total of 33 House seats rather than the 47 they claimed. The three-fifths compromise is behind the fact that southern-born presidents, House leaders, and Supreme Court justices generally dominated antebellum American national government.<sup>20</sup>

The convention also agreed not to allow the new government by law or even constitutional amendment to prohibit the importation of slaves until 1808.<sup>21</sup> The South thus had 20 years in which it could acquire more slaves from abroad; after that, Congress was free (but not required) to end the importation. Finally, the Constitution guaranteed that if a slave were to escape his or her master and flee to a nonslave state, the slave would be returned by that state to “the party to whom . . . service or labour may be due.”<sup>22</sup>

The unresolved issue of slavery was to prove the most explosive question of all. Allowing slavery to continue was a fateful decision, one that led to the



North Wind Picture Archives/Alamy

**Deck of a slave ship captured in 1860. Thousands of slaves died on such ships.**

## How We Compare

### Does a Constitution Guarantee Freedom?

You may think that the best protection for individual freedom is for a nation to have a written constitution. After all, a constitution is supposed to limit governmental action. But if you look around the world you will see that a constitution is not enough.

Here are three nations that do not have a written constitution and yet personal freedom is well established:

Israel      New Zealand      United Kingdom

And here are three nations with a written constitution where personal freedom is rare:

Iran      North Korea      Russia

What else must nations have in order to ensure personal freedom?

worst social and political catastrophe in the nation's history—the Civil War. The Framers chose to sidestep the issue in order to create a union that, they hoped, would eventually be strong enough to deal with the problem when it could no longer be postponed. The legacy of that choice continues to this day.

## The Motives of the Framers

The Framers were not saints or demigods. They were men with political opinions who also had economic interests and human failings. It would be a mistake to conclude that everything they did in 1787 was motivated by a disinterested commitment to the public good. But it would be an equally great mistake to think that what they did was nothing but an effort to line their pockets by producing a government that would serve their own narrow interests. As in almost all human endeavors, the Framers acted out of a mixture of motives. What is truly astonishing is that economic interests played only a modest role in their deliberations.

### ECONOMIC INTERESTS

Some of the Framers were wealthy; some were not. Some owned slaves; some had none. Some were creditors (having loaned money to the Continental Congress or to private parties); some were deeply in debt. For nearly a century, scholars have argued over just how important these personal interests were in shaping the provisions of the Constitution.

In 1913 Charles Beard, a historian, published a book—*An Economic Interpretation of the Constitution*—arguing that the better-off urban and commercial classes, especially those members who held the IOUs issued by the government to pay for the Revolutionary War, favored the new Constitution because they stood to benefit from it.<sup>23</sup> But in the 1950s, that view was challenged by historians who, after looking carefully at what the Framers owned or owed, concluded that one could not explain the Constitution exclusively or even largely in terms of the economic interests of those who wrote it.<sup>24</sup> Some of the richest delegates, such as Elbridge Gerry of Massachusetts and George Mason of Virginia, refused to sign the document, while many of its key backers—James Madison and James Wilson, for example—were men of modest means or heavy debts.

In the 1980s, a new group of scholars, primarily economists applying more advanced statistical techniques, found evidence that some economic

considerations influenced how the Framers voted on some issues during the Philadelphia convention. Interestingly, however, the economic position of the *states* from which they came had a greater effect on their votes than did their *own* monetary condition.<sup>25</sup>

We have already seen how delegates from small states fought to reduce the power of large states and how those from slaveowning states made certain that the Constitution would contain no provision that would threaten slavery.

But contrary to what Beard asserted, the economic interests of the Framers themselves did not dominate the convention. Some delegates owned a lot of public debt they had purchased for low prices. A strong national government of the sort envisaged by the Constitution was more likely than the weak Continental Congress to pay off this debt at face value, thus making the delegates who owned it much richer. Despite this, the ownership of public debt had no significant effect on how the Framers voted in Philadelphia. Nor did the big land speculators vote their interests. Some, such as George Washington and Robert Morris, favored the Constitution, while others, such as George Mason and William Blount, opposed it.<sup>26</sup>

In sum, the Framers tended to represent their states' interests on important matters. Since they were picked by the states to do so, this is exactly what one would expect. If they had not met in secret, perhaps they would have voted even more often as their constituents wanted.

With the grave and enormous exception of slavery, the Framers usually did not vote their own respective economic interests.

At the popularly elected state ratifying conventions, economic factors played a larger role. Delegates who were merchants, who lived in cities, who owned large amounts of western land, who held government IOUs, and who did not own slaves were more likely to vote to ratify the new Constitution than delegates who were farmers, who did not own public debt, and who did own slaves.<sup>27</sup> There were plenty of exceptions, however. Small farmers dominated the conventions in some states where the vote to ratify was unanimous.

Though interests made a difference, they were not simply elite interests. In most states, the great majority of adult white males could vote for delegates to the ratifying conventions. This means that women and blacks were excluded from the debates, but by the standards of the time—standards that did not change for over a century—the ratification process was remarkably democratic.

## THE CONSTITUTION AND EQUALITY

Ideas counted for as much as interests. At stake were two views of the public good. One, espoused by the Federalists, was that a reasonable balance of liberty, order, and progress required a strong national government. The other, defended by the Antifederalists, was that liberty would not be secure in the hands of a powerful, distant government; freedom required decentralization.

Today that debate has a new focus. The defect of the Constitution, to some contemporary critics, is not

that the government it created is too strong but that it is too weak. In particular, the national government is too weak to resist the pressures of special interests that reflect and perpetuate social inequality.

This criticism reveals how our understanding of the relationship between liberty and equality has changed since the Founding. To Jefferson and Madison, citizens naturally differed in their talents and qualities. What had to be guarded against was the use of governmental power to create unnatural and undesirable inequalities. This might happen, for example, if political power was concentrated in the hands of a few people (who could use that power

## RESEARCH FRONTIERS

### The Founding Debate over Church and State

Over the last decade, diverse scholars have begun to rediscover how competing views about religion and government shaped the debate between the Federalists and the Antifederalists.

In present-day political vernacular, the Antifederalists were the day's religious conservatives. Many Antifederalist leaders condemned the Constitution's no-religious-test provision (Article VI) and denounced the First Amendment because it forbade the Congress from establishing Christianity or any other religion as the national religion.

In stark contrast, most Federalists, even the orthodox Reverend John Witherspoon, agreed with James Madison that the Constitution should permit, and the national government should promote, religious pluralism. In *Federalist* No. 51, Madison argued that "the security for civil rights" consisted in "the multiplicity of interests" just as "that for religious rights" consisted in "the multiplicity of sects."

Scholars have argued about the religious views of the Founders for many years. Some have said they were religious while others have said they were atheists, agnostics, or Deists who believe there is a God but one who does not intervene in human affairs.

We now know that George Washington was not a Deist but rather a fairly typical late 18th-century Anglican. On the other hand, Thomas Jefferson was a Deist. During his two terms as our first president, Washington set many important precedents regarding the relationship between government and religion.

Unlike the Antifederalists, Washington, Witherspoon, Madison, and most other Federalists believed that any religious groups including their own might degenerate into what Madison, in *Federalist* No. 10, famously defined

as "factions" that threaten "the rights of other citizens" and thwart the national interest or common good.

In defeating Antifederalist demands that the Constitution privilege Anglo-Protestants, neither Washington nor most other Federalists advocated a total separation between church and state, but neither did they deny the need for government diligence in checking what Madison, in *Federalist* No. 10, termed "a zeal for different opinions concerning religion."

- Do you think the fact that America today is home to over 300 million citizens representing scores of different Christian and other religious traditions, including tens of millions of citizens who are religiously unaffiliated, vindicates the Federalist vision?
- What might a "neo-Antifederalist" argue regarding church and state in America today?
- Finally, do a little research to find out what each of the three most recent presidents—Bill Clinton, George W. Bush, and Barack Obama—have argued about the relationship between religion and government.

Source: Peter R. Henriques, *Realistic Visionary: A Portrait of George Washington* (University of Virginia Press, 2008); Tara Ross and Joseph C. Smith, Jr., *Under God: George Washington and the Question of Church and State* (Spence, 2008); John J. Dilulio, Jr., *Godly Republic: A Centrist Blueprint for America's Faith-Based Future* (University of California Press, 2007); Peter A. Lillback, *George Washington's Sacred Fire* (Providence Forum Press, 2006); Michael Novak and Jana Novak, *Washington's God: Religion, Liberty, and the Father of Our Country* (Basic Books, 2006).

to give themselves special privileges) or if it was used in ways that allowed some private parties to acquire exclusive charters and monopolies. To prevent the inequality that might result from having too strong a government, its powers must be kept strictly limited.

Today, some people think of inequality quite differently. To them it is the natural social order—the marketplace and the acquisitive talents of people operating in that marketplace—that leads to undesirable inequalities, especially in economic power. The government should be powerful enough to restrain these natural tendencies and produce, by law, a greater degree of equality than society allows when left alone.

To the Framers, liberty and (political) equality were not in conflict; to some people today, these two principles are deeply in conflict. To the Framers, the task was to keep government so limited as to prevent it from creating the worst inequality—political privilege. To some modern observers, the task is to make government strong enough to reduce what they believe is the worst inequality—differences in wealth.

## Constitutional Reform: Modern Views

Almost from the day it was ratified, the Constitution has been the object of debate over ways in which it might be improved. These debates have rarely involved the average citizen, who tends to revere the document even if he or she cannot recall all its details. Because of this deep and broad popular support, scholars and politicians have been wary of attacking the Constitution or suggesting many wholesale changes. But such attacks have occurred. During the 1980s—the decade in which we celebrated the bicentennial of its adoption—we heard a variety of suggestions for improving the Constitution, ranging from particular amendments to wholesale revisions. In general there are today, as in the 18th century, two kinds of critics: those who think the federal government is too weak and those who think it is too strong.

### REDUCING THE SEPARATION OF POWERS

To the first kind of critic, the chief difficulty with the Constitution is the separation of powers. By making every decision the uncertain outcome of the pulling and hauling between the president and Congress, the Constitution precludes the emergence—except

perhaps in times of crisis—of the kind of effective national leadership the country needs. In this view, our nation today faces a number of challenges that require prompt, decisive, and comprehensive action. Our problem is gridlock. Our position of international leadership, the dangerous and unprecedented proliferation of nuclear weapons among the nations of the globe, and the need to find ways of stimulating economic growth while reducing our deficit and conserving our environment—all these situations require the president be able to formulate and carry out policies free of some of the pressures and delays from interest groups and members of Congress tied to local interests.

Not only would this increase in presidential authority make for better policies, these critics argue, it would also help the voters hold the president and his party accountable for their actions. As matters now stand, nobody in government can be held responsible for policies: everybody takes the credit for successes and nobody takes the blame for failures. Typically the president, who tends to be the major source of new programs, cannot get his policies adopted by Congress without long delays and much bargaining, the result of which often is some watered-down compromise that neither the president nor Congress really likes but that each must settle for if anything is to be done at all.

Finally, critics of the separation of powers complain that the government agencies responsible for implementing a program are exposed to undue interference from legislators and special interests. In this view, the president is supposed to be in charge of the bureaucracy but in fact must share this authority with countless members of Congress and congressional committees.

Not all critics of the separation of powers agree with all these points, nor do they all agree on what should be done about the problems. But they all have in common a fear that the separation of powers makes the president too weak and insufficiently accountable. Their proposals for reducing the separation of powers include the following:

- Allow the president to appoint members of Congress to serve in the cabinet (the Constitution forbids members of Congress from holding any federal appointive office while in Congress).
- Allow the president to dissolve Congress and call for a special election (elections now can be held only on the schedule determined by the calendar).
- Allow Congress to require a president who has lost its confidence to face the country in a special election before his term would normally end.

# Were Women Left Out of the Constitution?

**In one sense, yes:** Women were mentioned nowhere in the Constitution when it was written in 1787. Moreover, Article I, which set forth the provisions for electing members of the House of Representatives, granted the vote to those people who were allowed to vote for members of the lower house of the legislature in the states in which they resided. In no state at the time could women participate in those elections. In no state could they vote in any elections or hold any offices. Furthermore, wherever the Constitution uses a pronoun, it uses the masculine form—*he* or *him*.

**In another sense, no:** Wherever the Constitution or the Bill of Rights defines a right that people are to have, it either grants that right to “persons” or “citizens,” not to “men,” or it makes no mention at all of people or gender. For example:

- “The *citizens* of each State shall be entitled to all privileges and immunities of citizens of the several States.”  
[Art. I, sec. 9]
- “No *person* shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.”  
[Art. III, sec. 3]
- “No bill of attainder or ex post facto law shall be passed.”  
[Art. I, sec. 9]
- “The right of the *people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”  
[Amend. IV]
- “No *person* shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury . . . nor shall any *person* be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law.”  
[Amend. V]
- “In all criminal prosecutions the *accused* shall enjoy the right to a speedy and public trial, by an impartial jury.”  
[Amend. VI]

Moreover, when the qualifications for elective office are stated, the word *person*, not *man*, is used.

- “No *person* shall be a Representative who shall not have attained to the age of twenty-five years.”  
[Art. I, sec. 2]
- “No *person* shall be a Senator who shall not have attained to the age of thirty years.”  
[Art. I, sec. 3]
- “No *person* except a natural born citizen . . . shall be eligible to the office of President; neither shall any *person* be eligible to that office who shall not have attained to the age of thirty-five years.”  
[Art. II, sec. 1]

In places, the Constitution and the Bill of Rights used the pronoun *he*, but always in the context of referring back to a *person* or *citizen*. At the time, and until quite recently, the male pronoun was often used in legal documents to refer generically to both men and women.

Thus, though the Constitution did not give women the right to vote until the Nineteenth Amendment was ratified in 1920, it did use language that extended fundamental rights, and access to office, to women and men equally.

Of course, what the Constitution permitted did not necessarily occur. State and local laws denied to women rights that in principle they ought to have enjoyed. Except for a brief period in New Jersey, no women voted in statewide elections until, in 1869, they were given the right to cast ballots in territorial elections in Wyoming.

When women were first elected to Congress, there was no need to change the Constitution; nothing in it restricted officeholding to men.

When women were given the right to vote by constitutional amendment, it was not necessary to amend any existing language in the Constitution, because nothing in the Constitution itself denied women the right to vote; the amendment simply added a new right:

- “The right of citizens of the United States to vote shall not be denied or abridged by the United States or any state on account of sex.”  
[Amend. XIX]

Source: Adapted from Robert Goldwin, “Why Blacks, Women and Jews Are Not Mentioned in the Constitution,” *Commentary* (May 1987): 28–33.

- Require the presidential and congressional candidates to run as a team in each congressional district; thus a presidential candidate who carries a given district could be sure the congressional candidate of his party would also win in that district.
- Have the president serve a single six-year term instead of being eligible for up to two four-year terms; this would presumably free the president to lead without having to worry about reelection.
- Lengthen the terms of members of the House of Representatives from two to four years so that the entire House would stand for reelection at the same time as the president.<sup>28</sup>

Some of these proposals are offered by critics out of a desire to make the American system of government work more like the British parliamentary system, in which, as we shall see in Chapters 13 and 14, the prime minister is the undisputed leader of the majority in the British Parliament. The parliamentary system is the major alternative in the world today to the American separation-of-powers system.

**amendment** A new provision in the Constitution that has been ratified by the states.

Both the diagnosis and the remedies proposed by these critics of the separation of powers have been challenged. Many defenders of our present constitutional system believe that nations, such as Great Britain, with a different, more unified political system have done no better than the United States in dealing with the problems of economic growth, national security, and environmental protection. Moreover, they argue, close congressional scrutiny of presidential proposals has improved these policies more often than it has weakened them. Finally, congressional “interference” in the work of government agencies is a good way of ensuring that the average citizen can fight back against the bureaucracy; without that so-called interference, citizens and interest groups might be helpless before big and powerful agencies.

Each of the specific proposals, defenders of the present constitutional system argue, would either make matters worse or have, at best, uncertain effects. Adding a few members of Congress to the president’s cabinet would not provide much help in getting his program through Congress; there are 535 senators and representatives, and probably only about half a dozen would be in the cabinet. Giving either the president or Congress the power to call

## How Things Work

### Ways of Amending the Constitution

Under Article V, there are two ways to *propose amendments* to the Constitution and two ways to *ratify* them.

#### To Propose an Amendment

1. Two-thirds of both houses of Congress vote to propose an amendment, *or*
2. Two-thirds of the state legislatures ask Congress to call a national convention to propose amendments.

#### To Ratify an Amendment

1. Three-fourths of the state legislatures approve it, *or*
2. Ratifying conventions in three-fourths of the states approve it.

#### Some Key Facts

- Only the first method of proposing an amendment has been used.
- The second method of ratification has been used only once, to ratify the Twenty-first Amendment (repealing Prohibition).
- Congress may limit the time within which a proposed amendment must be ratified. The usual limitation has been seven years.
- Thousands of proposals have been made, but only 33 have obtained the necessary two-thirds vote in Congress.
- Twenty-seven amendments have been ratified.
- The first 10 amendments, ratified on December 15, 1791, are known as the Bill of Rights.



a special election in between the regular elections (every two or four years) would cause needless confusion and great expense; the country would live under the threat of being in a perpetual political campaign with even weaker political parties. Linking the fate of the president and congressional candidates by having them run as a team in each district would reduce the stabilizing and moderating effect of having them elected separately. A Republican presidential candidate who wins in the new system would have a Republican majority in the House; a Democratic candidate winner would have a Democratic majority. We might as a result expect dramatic changes in policy as the political pendulum swung back and forth. Giving presidents a single six-year term would indeed free them from the need to worry about reelection, but it is precisely that worry that keeps presidents reasonably concerned about what the American people want.

## MAKING THE SYSTEM LESS DEMOCRATIC

The second kind of critic of the Constitution thinks the government does too much, not too little. Though the separation of powers at one time may have slowed the growth of government and moderated the policies it adopted, in the last few decades government has grown helter-skelter. The problem, these critics argue, is not that democracy is a bad idea but that democracy can produce bad, or at least unintended, results if the government caters to the special-interest claims of the citizens rather than to their long-term values.

To see how these unintended results might occur, imagine a situation in which every citizen thinks the government grows too big, taxes too heavily, and spends too much. Each citizen wants the government made smaller by reducing the benefits other people get—but not by reducing the benefits he or she gets. In fact, such citizens may even be willing to see their own benefits cut, provided everybody else's are cut as well, and by a like amount.

But the political system attends to individual wants, not general preferences. It gives aid to farmers, contracts to industry, grants to professors, pensions to the elderly, and loans to students. As someone once said, the government is like an adding machine: during elections candidates campaign by promising

**line-item veto** An executive's ability to block a particular provision in a bill passed by the legislature.

to do more for whatever group is dissatisfied with what the incumbents are doing for it. As a result, most elections bring to office men and women committed to doing more for somebody. The grand total of all these additions is more for everybody. Few politicians have an incentive to do less for anybody.

To remedy this state of affairs, these critics suggest various mechanisms, but principally a constitutional amendment that would either set a limit on the amount of money the government could collect in taxes each year or require that each year the government have a balanced budget (that is, not spend more than it takes in in taxes), or both. In some versions of these plans, an extraordinary majority (say, 60 percent) of Congress could override these limits, and the limits would not apply in wartime.

The effect of such amendments, the proponents claim, would be to force Congress and the president to look at the big picture—the grand total of what they are spending—rather than just to operate the adding machine by pushing the “add” button over and over again. If they could spend only so much during a given year, they would have to allocate what they spend among all rival claimants. For example, if more money were to be spent on the poor, less could then be spent on the military, or vice versa.

Some critics of an overly powerful federal government think these amendments will not be passed or may prove unworkable; instead, they favor enhancing the president's power to block spending by giving him a **line-item veto**. Most state governors can veto a particular part of a bill and approve the rest using a line-item veto. The theory is that such a veto would better equip the president to stop unwarranted spending without vetoing the other provisions of a bill. In 1996, President Clinton signed the Line Item Veto Act, passed by the 104th Congress. But despite its name, the new law did not give the president full line-item veto power (only a change in the Constitution could confer that power). Instead the law gave the president authority to selectively eliminate individual items in large appropriations bills, expansions in certain income-transfer programs, and tax breaks (giving the president what budget experts call *enhanced rescission authority*). But it also left Congress free to craft bills in ways that would give the president few opportunities to veto (or *rescind*) favored items. For example, Congress could still force the president to accept or reject an entire appropriations bill simply by tagging on this sentence: “Appropriations provided under this act (or title or

section) shall not be subject to the provisions of the Line Item Veto Act.” In *Clinton et al. v. New York et al.* (1998), the Supreme Court struck down the 1996 law, holding 6 to 3 that the Constitution does not allow the president to cancel specific items in tax and spending legislation. Clinton’s successor, President George W. Bush, championed the line-item veto, but to no avail; and, when asked about the line-item veto in February 2009, President Barack Obama’s press secretary, Robert Gibbs, quipped that the new president would “love to take that for a test drive.”

Finally, some critics of a powerful government feel that the real problem arises not from an excess of “adding-machine” democracy but from the growth in the power of the federal courts, as described in Chapter 16. These critics would like to devise a set of laws or constitutional amendments that would narrow the authority of federal courts.

The opponents of these suggestions argue that constitutional amendments to restrict the level of taxes or to require a balanced budget are unworkable, even assuming—which they do not—that a smaller government is desirable. There is no precise, agreed-upon way to measure how much the government spends or to predict in advance how much it will receive in taxes during the year; thus defining and enforcing a “balanced budget” is no easy matter. Since the government can always borrow money, it might easily evade any spending limits. It has also shown great ingenuity in spending money in ways that never appear as part of the regular budget.

The line-item veto may or may not be a good idea. Unless the Constitution is amended to permit it, future presidents will have to do without it. The states, where some governors have long had the veto, are quite different from the federal government in power and responsibilities. Whether a line-item veto would work as well in Washington, D.C., as it does in many state capitals is something that we may simply never know.

Finally, proposals to curtail judicial power are thinly veiled attacks, the opponents argue, on the ability of the courts to protect essential citizen rights. If Congress and the people do not like the way the Supreme Court has interpreted the Constitution, they can always amend the Constitution to change a specific ruling; there is no need to adopt some across-the-board limitation on court powers.

## WHO IS RIGHT?

Some of the arguments of these two sets of critics of the Constitution may strike you as plausible or even entirely convincing. Whatever you may ultimately decide, decide nothing for now. One cannot make or remake a constitution based entirely on abstract reasoning or unproven factual arguments. Even when the Constitution was first written in 1787, it was not an exercise in abstract philosophy but rather an effort to solve pressing, practical problems in the light of a theory of human nature, the lessons of past experience, and a close consideration of how governments in other countries and at other times had worked.

Just because the Constitution is over 200 years old does not mean it is out-of-date. The crucial questions are these: How well has it worked over the long sweep of American history? How well has it worked compared to the constitutions of other democratic nations?

The only way to answer those questions is to study American government closely—with special attention to its historical evolution and to the practices of other nations. That is what this book is about. Of course, even after close study, people will still disagree about whether our system should be changed. People want different things and evaluate human experience according to different beliefs. But if we first understand how, in fact, the government works and why it has produced the policies it has, we can then argue more intelligently about how best to achieve our wants and give expression to our beliefs.



In an excellent TV series, John Adams and George Washington discuss politics in the 18th century.

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# WHAT WOULD YOU DO?

## MEMORANDUM

**To:** Elizabeth Anthony, Arkansas state senate majority leader

**From:** George Morris, chief of staff

**Subject:** Proposal for a new constitutional convention

In the 1990s, Arkansas and several other states approved term limits for their members of Congress, but the Supreme Court ruled in 1995 that states do not have this authority. Now term-limit advocates are pursuing a broader strategy, calling for states to approve legislation that would require Congress to consider several amendment proposals, including term limits and abolishing the Electoral College to permit the direct popular election of the president. The Arkansas General Assembly passed such a bill last week, and several senators in your party have declared their support.

### Arguments for:

1. Since the Twenty-second Amendment restricts presidents to two terms, members of Congress should face similar limits.
2. Term limits will ensure that national leaders do not become career politicians.
3. The public favors the direct popular election of the president; this constitutional convention would make possible abolishing the Electoral College.

### Arguments against:

1. Limiting members of Congress to two terms would increase the power of lobbyists, congressional staffers, and administrative officials.

### Your decision:

Favor legislation \_\_\_\_\_

Oppose legislation \_\_\_\_\_

## News >>

### Twenty-Eight States Back Proposal for Constitutional Convention

Yesterday Pennsylvania's legislature approved a proposal for a constitutional convention, becoming the twenty-eighth state to do so. The Constitution states that Congress shall hold a convention for proposing amendments at the request of two-thirds of the state legislatures, but it has never happened in U.S. history. Six more states must approve for Congress to take action, and two announced yesterday that they plan to review similar proposals this week.

2. The Electoral College encourages a two-party system; a direct popular vote for the president would require runoff elections if no candidate won a majority.
3. The Constitutional Convention of 1787 was held in secret and involved only a few dozen people; today it would be heavily covered by the press and involve hundreds, perhaps thousands of people. No one knows what changes it might make.

## LEARNING OBJECTIVES

### WHAT YOU NEED TO KNOW

#### ✓ Why was a Bill of Rights adopted so soon after the ratification of the Constitution?

A Bill of Rights was adopted by the First Congress because so many states had asked for amendments in exchange for their votes to ratify the Constitution. But what they got was quite different from what they requested. James Madison, in writing the amendment, used much of the language of the Virginia Declaration of Rights.

#### ✓ Why did so many authors of the Constitution fear factions?

Many Framers, but especially Madison, feared factions because human nature divides people, and when they are divided they are likely to oppose one another and so threaten the chances of arriving at the common good.

#### ✓ Why did the Framers agree on the idea of a separation of powers?

Almost all of the Framers agreed that our government should be based on the separation of powers among its three branches because such a system would provide better checks on power than what they had experienced with England.

### RECONSIDERING WHO GOVERNS?

#### 1. What is the difference between a democracy and a republic?

A democracy means rule by the people; direct democracy means letting every important issue be decided by popular vote. A republic is a government in which authority has been given to elected representatives. The United States is a republic in which members of the House of Representatives are selected in democratic elections, members of the Senate (at least initially) were selected by state legislatures, and the courts are staffed by appointed judges.

#### 2. What branch of government has the greatest power?

Initially, Congress had the most authority. As we shall see in later chapters, the president and the federal courts grew in power, but even so Congress remains the most important institution.

## RECONSIDERING TO WHAT ENDS?

### 1. Does the Constitution tell us what goals the government should serve?

Not really. The preface tells us what the Founders hoped the federal government would do, but that preface has no legal authority. By and large, the government has to set its own goals.

### 2. Whose freedom does the Constitution protect?

It was intended to protect everybody's freedom, except that of slaves. To create a national government, it was necessary that the Constitution do nothing about slavery, but without the Constitution, there would have been no national government to challenge slavery during the Civil War. Though women are not mentioned, in fact there is nothing in the Constitution to prevent them from holding national office or from voting in federal elections. Voting was to be decided by each state until the passage of a constitutional amendment (the Nineteenth, ratified in 1920) that prohibited the states from denying the vote to women.

## QUESTIONS TO CONSIDER

1. Read your state's constitution and summarize how it is like and how it differs from the federal Constitution.
2. Only once were state ratifying conventions used to ratify a constitutional amendment (the Twenty-First). Learn why that happened.

## TO LEARN MORE

To find historical and legal documents:

**TeachingAmericanHistory.org**

National Constitution Center:

**www.constitutioncenter.org**

Congress:

**thomas.loc.gov/** (choose Historical Documents)

To look at court cases about the Constitution:

Cornell University: **www.law.cornell.edu/supct**

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