



The Constitution

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Summary

Gregory Lee Johnson knew little about the Constitution, but he knew he was upset. He felt that the buildup of nuclear weapons in the world threatened the planet's survival, and he wanted to protest presidential and corporate policies concerning nuclear weapons. Yet, he had no money to hire a lobbyist or purchase an ad in a newspaper. So he, along with some other demonstrators, marched through the streets of Dallas, chanting

political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. The demonstration ended in front of Dallas City Hall, where Gregory doused an American flag with kerosene and set it on fire.

Burning the flag violated the law, and Gregory was convicted of "desecration of a venerated object," sentenced to one year in prison, and fined \$2,000. He appealed his conviction, claiming



the law that prohibited burning the flag violated his freedom of speech. The U.S. Supreme Court agreed in the case of *Texas v. Gregory Lee Johnson*.

Gregory was pleased with the Court's decision, but he was nearly alone. The public howled its opposition to the decision, and President George Bush called for a constitutional amendment authorizing punishment of flag desecraters. Many public officials vowed to support the amendment, and organized opposition to the amendment was scarce. However, an amendment to prohibit burning the American flag did not obtain the two-thirds vote in each house of Congress necessary to send a constitutional amendment to the states for ratification.

Instead, Congress passed a law—the Flag Protection Act—that outlawed the desecration of the American flag. The next year, however, in *United*

States v. Eichman, the Supreme Court found the act an impermissible infringement on free speech.

After years of political posturing, legislation, and litigation, little has changed. Burning the flag remains a legally protected form of political expression despite the objections of the overwhelming majority of the American public. Gregory Johnson did not prevail because he was especially articulate; nor did he win because he had access to political resources such as money or powerful supporters. He won because of the nature of the Constitution.

Understanding how an unpopular protestor like Gregory Lee Johnson could prevail against the combined forces of the public and its elected officials is central to understanding the American system of government. The Constitution supersedes ordinary law, even when the law represents the wishes of a majority of citizens. The Constitution not only guarantees indi-

vidual rights but also decentralizes power. Even the president, “the leader of the free world,” cannot force Congress to act, as George Bush could not force Congress to start the process of amending the Constitution. Power is not concentrated efficiently in one person's hands, such as the president's. Instead, there are numerous checks on the exercise of power and many obstacles to change. Some complain that this system produces stalemate, while others praise the way it protects minority views. Both positions are correct.

Gregory Johnson's case raises some important questions about government in America. What does democracy mean if the majority does not get its way? Is this how we should be governed? And is it appropriate that the many limits on the scope of government action, both direct and indirect, prevent action desired by most people?

constitution

A nation's basic law. It creates political institutions, assigns or divides powers in government, and often provides certain guarantees to citizens. Constitutions can be either written or unwritten. See also U.S. Constitution.

A **constitution** is a nation's basic law. It creates political institutions, allocates power within government, and often provides guarantees to citizens. A constitution is also an unwritten accumulation of traditions and precedents that have established acceptable styles of behavior and policy outcomes.

A constitution sets the broad rules of the game of politics, allowing certain types of competition among certain players. *These rules are never neutral*, however. Instead, they give some participants and some policy options advantages over others in the policymaking process. This is why understanding these rules is so important to understanding government and to answering questions about how we are governed and what government does.

The Origins of the Constitution

In the summer of 1776, a small group of men met in Philadelphia and passed a resolution that began an armed rebellion against the government of the most powerful nation on earth. The resolution was, of course, the Declaration of Independence; the armed rebellion was the American Revolution.

The attempt to overthrow a government forcibly is a serious and unusual act. It is considered treasonous everywhere, including in the United States. Typically, it is punishable by death. A set of compelling ideas drove our forefathers to take such drastic and risky action. It is important to understand these ideas in order to understand the Constitution.

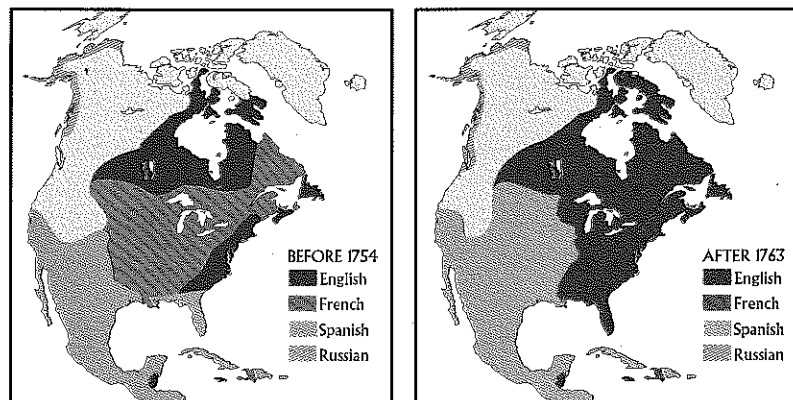
The Road to Revolution

By eighteenth-century standards, life was not bad for most people in America at the time of the Revolution (slaves and indentured servants being major exceptions). In fact, White colonists "were freer, more equal, more prosperous, and less burdened with cumbersome feudal and monarchical restraints than any other part of mankind."¹ Although the colonies were part of the British Empire, the king and Parliament generally confined themselves to governing America's foreign policy and trade. Almost everything else was left to the discretion of individual colonial governments. Although commercial regulations irritated colonial shippers, planters, land speculators, and merchants, these rules had little influence on the vast bulk of the population, who were self-employed farmers or artisans.

As you can see in Figure 2.1, Britain obtained an enormous new territory in North America after the French and Indian War (also known as the Seven Years' War) ended

Figure 2.1 European Claims in North America

Following its victory in the French and Indian War in 1763, Britain obtained an enormous new territory to govern. To raise revenues to defend and administer the territory, it raised taxes on the colonists and tightened enforcement of trade regulations.



in 1763. The cost of defending this territory against foreign adversaries was large, and Parliament reasoned that it was only fair that those who were the primary beneficiaries—the colonists—should contribute to their own defense. Thus, in order to raise revenue for colonial administration and defense, the British legislature passed a series of taxes on official documents, newspapers, paper, glass, paint, and tea. Britain also began tightening enforcement of its trade regulations, which were designed to benefit the mother country, not the colonists.

Colonists resented these taxes, especially because they were imposed while the colonists lacked direct representation in Parliament. They protested, boycotted the taxed goods, and as a symbolic act of disobedience even threw 342 chests of tea into Boston Harbor. Britain reacted by applying economic pressure through a naval blockade of the harbor, further fueling the colonists' anger. The colonists responded by forming the First Continental Congress in September 1774, sending delegates from each colony to Philadelphia to discuss the future of relations with Britain.

Declaring Independence

As colonial discontent with the English festered, the Continental Congress was in almost continuous session during 1775 and 1776. Talk of independence was common among the delegates. Virginia, as it often did in those days, played a leading role at the Philadelphia meeting of the Congress. It sent seven delegates to join the serious discussion of repudiating the rule of King George III. These delegates were joined later by a last-minute substitute for Peyton Randolph, who was needed back in Williamsburg to preside over Virginia's House of Burgesses.

The substitute, Thomas Jefferson, was a young, well-educated Virginia lawmaker who had just written a resolution in the Virginia legislature objecting to new British policies. Jefferson brought to the Continental Congress his talent as an author and his knowledge of political philosophy. He was not a rabble-rousing pamphleteer like Thomas Paine, whose fiery tract *Common Sense* had appeared in January 1776 and fanned the already hot flames of revolution. Jefferson was steeped in the philosophical writings of European moral philosophers, and his rhetoric matched his reading.²

In May and June of 1776, the Continental Congress began debating resolutions about independence. On June 7, Richard Henry Lee of Virginia moved "that these United States are and of right ought to be free and independent states." A committee composed of Thomas Jefferson of Virginia, John Adams of Massachusetts, Benjamin Franklin of Pennsylvania, Roger Sherman of Connecticut, and Robert Livingston of New York was formed to draft a document to justify the inevitable declaration. On July 2, Lee's motion to declare independence from England was formally approved. The famous **Declaration of Independence**, written primarily by Jefferson, was adopted two days later, on July 4.

The Declaration of Independence quickly became one of the most widely quoted and revered documents in America. Filled with fine principles and bold language, it can be read as both a political tract and a philosophical treatise. (It is reprinted in the Appendix of this book.)

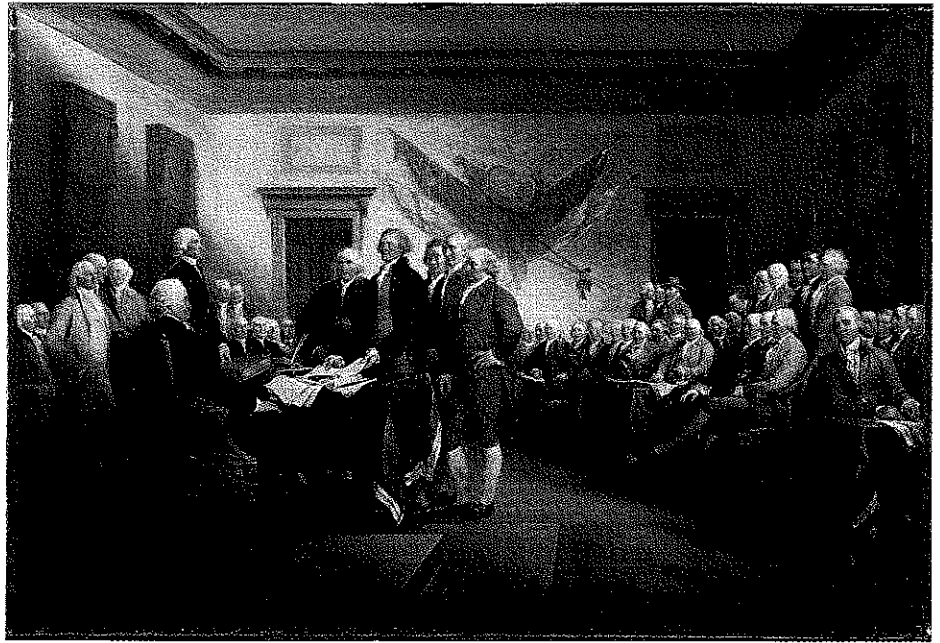
Politically, the Declaration was a polemic, announcing and justifying a revolution. Most of the document—27 of its 32 paragraphs—listed the ways the king had abused the colonies. George III was accused of all sorts of evil deeds, even though he personally had little to do with Parliament's colonial policies. King George was even blamed for inciting the "merciless Indian savages" to make war on the colonists. The king received the blame because the Convention delegates held that Parliament lacked authority over the colonies.

The Declaration's polemical aspects were important because the colonists needed foreign assistance to take on the most powerful nation in the world. France, which was engaged in a war with Britain, was a prime target for the delegates' diplomacy and eventually provided aid that was critical to the success of the Revolution.

Declaration of Independence

The document approved by representatives of the American colonies in 1776 that stated their grievances against the British monarch and declared their independence.

John Adams (from right), Roger Sherman, Robert R. Livingston, Thomas Jefferson, and Benjamin Franklin submit the Declaration of Independence to Continental Congress President John Hancock. Legend has it that Hancock remarked, "We must be unanimous; there must be no pulling different ways; we must hang together," to which Franklin replied, "We must indeed all hang together, or, most assuredly, we shall hang separately."



Today, the Declaration of Independence is studied more as a statement of philosophy than as a political call to arms. In just a few sentences, Jefferson set forth the American democratic creed, the most important and succinct statement of the philosophy underlying American government—as applicable in the year 2001 as it was in 1776.

The English Heritage: The Power of Ideas

Philosophically, the Jeffersonian pen put on paper ideas that were by then common knowledge on both sides of the Atlantic, especially among those people who wished to challenge the power of kings. Franklin, Jefferson, James Madison of Virginia, Robert Morris of Pennsylvania, Alexander Hamilton of New York, and other intellectual leaders in the colonies were learned and widely read men, familiar with the works of English, French, and Scottish political philosophers. These leaders corresponded about the ideas they were reading, quoted philosophers in their debates over the Revolution, and applied those ideas to the new government they formed in the framework of the Constitution.

John Locke was one of the most influential philosophers read by the colonists. His writings, especially *The Second Treatise of Civil Government* (1689), profoundly influenced American political leaders. His work was "the dominant political faith of the American colonies in the second quarter of the eighteenth century. A thousand pulpits thundered with its benevolent principles; a hundred editors filled their pages with its famous slogans."³

The foundation upon which Locke built his powerful philosophy was a belief in **natural rights**—rights inherent in human beings, not dependent on governments. Before governments arise, Locke held, people exist in a state of nature in which there are no formal laws or governments. Instead, the laws of nature govern people, laws determined by people's innate moral sense. This natural law brings natural rights, including life, liberty, and property. Natural law can even justify a challenge to the rule of a tyrannical king, because it is superior to human law.

natural rights

Rights inherent in human beings, not dependent on governments, which include life, liberty, and property. The concept of natural rights was central to English philosopher John Locke's theories about government, and was widely accepted among America's founding fathers.

Government, Locke argued, must be built on the **consent of the governed**; in other words, the people must agree on who their rulers will be. It should also be a **limited government**; that is, there must be clear restrictions on what rulers can do. Indeed, the sole purpose of government, according to Locke, was to protect natural rights. The idea that certain things were beyond the realm of government contrasted sharply with the traditional notion that kings had been divinely granted absolute rights over subjects.

Two limits on government were particularly important to Locke. First, governments must provide standing laws so that people know in advance whether their acts will be acceptable. Second, and Locke was very forceful on this point, “the supreme power cannot take from any man any part of his property without his consent.” To Locke, “the preservation of property was the end of government.” The sanctity of property was one of the few ideas absent in Jefferson’s draft of the Declaration of Independence. Even though Jefferson borrowed from and even paraphrased Lockean ideas, he altered Locke’s phrase “life, liberty, and property” to “life, liberty, and the pursuit of happiness.” We shall soon see, though, how the Lockean idea of the sanctity of property figured prominently at the Constitutional Convention. James Madison, the most influential member of that body, directly echoed Locke’s view that the preservation of property is the purpose of government.

In an extreme case, said Locke, people have a right to revolt against a government that no longer has their consent. Locke anticipated critics’ charges that this right would lead to constant civil disturbances. He emphasized that people should not revolt until injustices become deeply felt. The Declaration of Independence accented the same point, declaring that “governments long established should not be changed for light and transient causes.” But when matters went beyond “patient sufferance,” severing these ties was not only inevitable but also necessary.

Jefferson’s Handiwork: The American Creed

There are some remarkable parallels between Locke’s thought and Jefferson’s language in the Declaration of Independence (see Table 2.1). Jefferson, like Locke, finessed his way past the issue of how the rebels knew men had rights. Jefferson simply declared that it was “self-evident” that men were equally “endowed by their Creator with certain unalienable rights,” including “life, liberty, and the pursuit of happiness.” Because it was the purpose of government to “secure” these rights, if it failed to do so, the people could form a new government.⁴

Locke represented only one element of revolutionary thought from which Jefferson borrowed. In the English countryside, there was also a well-established tradition of opposition to the executive power of the Crown and support for recovering the rights of the people. An indigenous American republicanism—stressing moral virtue, patriotism, relations based on natural merit, and the equality of independent citizens—intensified the radicalism of this “country” ideology and linked it with older currents of European thought stretching back to antiquity.

It was in the American colonies that the powerful ideas of European political thinkers took root and grew into what Seymour Martin Lipset has termed the “first new nation.”⁵ With these revolutionary ideas in mind, Jefferson claimed in the Declaration of Independence that people should have primacy over governments, that they should rule instead of be ruled. Moreover, each person was important as an individual, “created equal” and endowed with “unalienable rights.” Consent of the governed, not divine rights or tradition, made the exercise of political power legitimate.

No government had ever been based on these principles. Ever since 1776, Americans have been concerned about fulfilling the high aspirations of the Declaration of Independence.

consent of the governed

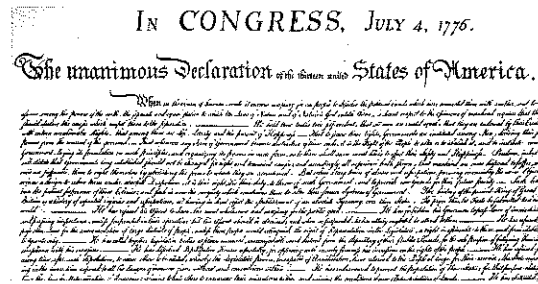
The idea that government derives its authority by sanction of the people.

limited government

The idea that certain restrictions should be placed on government to protect the **natural rights** of citizens.

Table 2.1 Locke and the Declaration of Independence: Some Parallels

LOCKE	DECLARATION OF INDEPENDENCE
<p>Natural Rights “The state of nature has a law to govern it” “life, liberty, and property”</p>	<p>“Laws of Nature and Nature’s God” “life, liberty, and the pursuit of happiness”</p>
<p>Purpose of Government “to preserve himself, his liberty, and property”</p>	<p>“to secure these rights”</p>
<p>Equality “men being by nature all free, equal and independent”</p>	<p>“all men are created equal”</p>
<p>Consent of the Governed “for when any number of men have, by the consent of every individual, made a community, with a power to act as one body, which is only by the will and determination of the majority”</p>	<p>“Governments are instituted among men, deriving their just powers from the consent of the governed.”</p>
<p>Limited Government “Absolute arbitrary power, or governing without settled laws, can neither of them consist with the ends of society and government.” “As usurpation is the exercise of power which another has a right to, so tyranny is the exercise of power beyond right, which nobody can have a right to.”</p>	<p>“The history of the present King of Great Britain is a history of repeated injuries and usurpations.”</p>
<p>Right to Revolt “The people shall be the judge. . . . Oppression raises ferments and makes men struggle to cast off an uneasy and tyrannical yoke.”</p>	<p>“Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes. . . . But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government.”</p>



Winning Independence

The pen may be mightier than the sword, but declaring independence did not win the Revolution—it merely announced its beginning. John Adams wrote to his wife Abigail, “You will think me transported with enthusiasm, but I am not. I am well aware of the toil, blood, and treasure that it will cost us to maintain this Declaration, and support and defend these states.” Adams was right. The colonists seemed little match for the finest army in the world, whose size was nearly quadrupled by hired guns from the German state of Hesse and elsewhere. In 1775, the British had 8,500 men stationed in the colonies and had hired nearly 30,000 mercenaries. Initially, the colonists had only

5,000 men in uniform, and their number waxed and waned as the war progressed. Nevertheless, in 1783, the American colonies won their war of independence. How they eventually won is a story best left to history books. How they formed a new government, however, will be explored in the following sections.

The “Conservative” Revolution

Revolutions such as the 1789 French Revolution, the 1917 Russian Revolution, and the 1978–1979 Iranian Revolution produced great societal change—as well as plenty of bloodshed. The American Revolution was different. Although many people lost their lives during the Revolutionary War, the Revolution itself was essentially a conservative movement that did not drastically alter the colonists’ way of life. Its primary goal was to restore rights the colonists felt were already theirs as British subjects.

American colonists did not feel the need for great social, economic, or political upheavals. They “were not oppressed people; they had no crushing imperial shackles to throw off.”⁶ As a result, the Revolution did not create class conflicts that would split society for generations to come. The colonial leaders’ belief that they needed the consent of the governed blessed the new nation with a crucial element of stability—a stability the nation would need.

The Government That Failed: 1776–1787

The Continental Congress that adopted the Declaration of Independence was only a voluntary association of the states. In 1776, the Congress appointed a committee to draw up a plan for a permanent union of the states. That plan, our first constitution, was the **Articles of Confederation**.⁷

The Articles of Confederation

The Articles established a government dominated by the states. The United States, according to the Articles, was a confederation, a “league of friendship and perpetual union” among 13 states. The Articles established a national legislature with one house; states could send as many as seven delegates or as few as two, but each state had only one vote. There was no president and no national court, and the powers of the national legislature—the Congress—were strictly limited. Most authority rested with the state legislatures because the new nation’s leaders feared a strong central government would become as tyrannical as British rule.

Because unanimous consent of the states was needed to put the Articles into operation, the Articles adopted by Congress in 1777 did not go into effect until 1781, when laggard Maryland finally ratified them. In the meantime, the Continental Congress barely survived, lurching from crisis to crisis. At one point during the war, some of Washington’s troops threatened to create a monarchy with him as king unless Congress paid their overdue wages.

Even after the Articles were ratified, many logistical and political problems plagued the Congress. State delegations attended haphazardly. Thomas Jefferson, a delegate to a meeting of the Congress, complained to his friend and fellow Virginian James Madison on February 20, 1784:

*We cannot make up a congress at all. There are eight states in town, six of which are represented by two members only. Of these, two members of different states are confined by gout, so that we cannot make . . . a quorum. We have not sat above three days, I believe, in as many weeks. Admonition after admonition has been sent to the states to no effect. We have sent one today. If it fails, it seems as well we should all retire.*⁸

Articles of Confederation

The first constitution of the United States, adopted by Congress in 1777 and enacted in 1781. The Articles established a national legislature, the Continental Congress, but most authority rested with the state legislatures.

Why does it matter?

One of the central features of the Constitution is the creation of a strong national government. How might things be different if the framers had retained a weak national government, as under the Articles of Confederation? For example, how would the American economy be affected if Congress lacked the power to regulate interstate commerce? How would racial policy be different if the federal courts could not issue orders to protect civil rights? Would you be comfortable if some states still had segregated universities?

The Congress had few powers outside maintaining an army and navy—and little money to do even that. It had to request money from the states because it had no power to tax. If states refused to send money (which they often did), Congress did without. In desperation, Congress sold off western lands (land east of the Mississippi and west of the states) to speculators, issued securities that sold for less than their face value, or used its own presses to print money that was virtually worthless. Congress also voted to disband the army, despite continued threats from Britain and Spain.

Congress lacked the power to regulate commerce, which inhibited foreign trade and the development of a strong national economy. It did, however, manage to develop sound policies for the management of the western frontiers, passing the Northwest Ordinance of 1787 that encouraged the development of the Great Lakes region.

In general, the weak and ineffective national government could take little independent action. All government power rested in the states. The national government could not compel the states to do anything, and it had no power to deal directly with individual citizens. The weakness of the national government prevented it from dealing with the hard times that faced the new nation. There was one benefit of the Articles, however: When the nation's leaders began to write a new Constitution, they could look at the provisions of the Articles of Confederation and know some of the things they should avoid.

Changes in the States

What was happening in the states was more important than what was happening in the Congress. The most important change was a dramatic increase in democracy and liberty, at least for White males. Many states adopted bills of rights to protect freedoms, abolished religious qualifications for holding office, and liberalized requirements for voting. Expanded political participation brought a new middle class to power.

This middle class included farmers who owned small homesteads rather than manorial landholders, and artisans instead of lawyers. Before the Revolution, almost all members of New York's assembly were either urban merchants or wealthy landowners. In the 1769 assembly, for example, 25 percent of the legislators were farmers even though nearly 95 percent of New Yorkers were farmers. But after the Revolution, a major power shift occurred. With expanded voting privileges, farmers and craftworkers became a decisive majority, and the old elite of professionals, wealthy merchants, and large landholders saw its power shrink. The same change happened in other states as power shifted from a handful of wealthy individuals to a more broad-based group (see Table 2.2). After a careful examination of the economic backgrounds of pre- and post-Revolutionary legislators, Jackson Turner Main concluded,

The voters had ceased to confine themselves to an elite, but were selecting instead men like themselves. The tendency to do so had started during the colonial period, especially in the North, and had now increased so dramatically as almost to revolutionize the legislatures.⁹

Democracy was taking hold everywhere.

The structure of government in the states also became more responsive to the people. Power was concentrated in the legislatures because legislators were considered closer to the voters than governors or judges. Governors were often selected by the legislatures and were kept on a short leash, with brief tenures and limited veto and appointment powers. Legislatures overruled court decisions and criticized judges for unpopular decisions.

The idea of equality was driving change throughout the nation. Although the Revolutionary War itself did not transform American society, it unleashed the republi-

Table 2.2 Power Shift: Economic Status of State Legislators Before and After the Revolutionary War

After the Revolution, power in the state legislatures shifted from the hands of the wealthy to those with more moderate incomes, and from merchants and lawyers to farmers. This trend was especially evident in the northern states.

STATUS OF LEGISLATORS	Three Northern States ^a		Three Southern States ^b	
	PREWAR	POSTWAR	PREWAR	POSTWAR
Wealthy	36%	12%	52%	28%
Well to do	47%	26%	36%	42%
Moderate Income	17%	62%	12%	30%
Merchants and lawyers	43%	18%	23%	17%
Farmers	23%	55%	12%	26%

^aNew York, New Jersey, and New Hampshire.

^bMaryland, Virginia, and South Carolina.

Source: From Jackson Turner Main, "Government by the People: The American Revolution and the Democratization of the Legislatures," *The William and Mary Quarterly*, 3rd ser. 23 (July 1966): Reprinted by permission of the Omohandro Institute of Early American History and Culture.

can tendencies in American life. Americans were in the process of becoming "the most liberal, the most democratic, the most commercially minded, and the most modern people in the world."¹⁰ Members of the old colonial elite found this turn of affairs quite troublesome because it challenged their hold on power.

Economic Turmoil

After the Revolution, James Madison observed that "the most common and durable source of factions [special interests] has been the various and unequal division of property."¹¹ The post-Revolutionary legislatures epitomized Madison's argument that economic inequality played an important role in shaping public policy. At the top of the political agenda were economic issues. A postwar depression had left many small farmers unable to pay their debts and threatened them with mortgage foreclosures. Now under control of people more sympathetic to debtors, the state legislatures listened to the demands of small farmers. A few states, notably Rhode Island, demonstrated their support of debtors, passing policies favoring them over creditors. Some printed tons of paper money and passed "force acts" requiring reluctant creditors to accept the almost worthless money. Debtors could thus pay big debts with cheap currency.

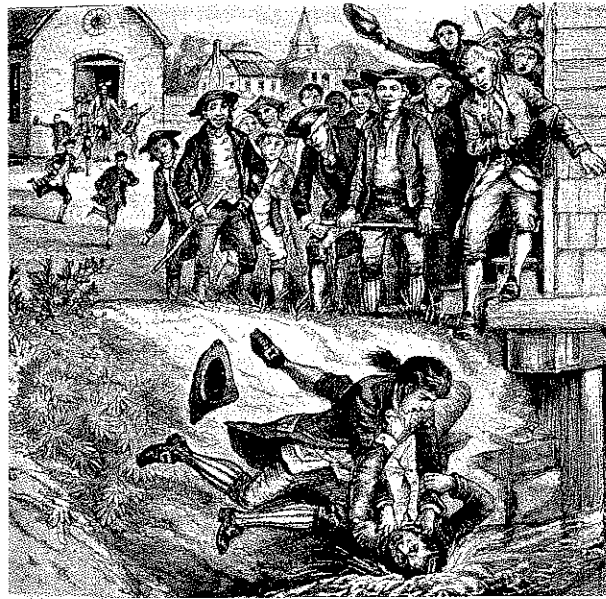
Shays' Rebellion

Policies favoring debtors over creditors did not please the economic elite who had once controlled nearly all the state legislatures. They were further shaken when, in 1786, a small band of farmers in western Massachusetts rebelled at losing their land to creditors. Led by Revolutionary War Captain Daniel Shays, this rebellion, called **Shays' Rebellion**, was a series of armed attacks on courthouses to prevent judges from foreclosing on farms. Farmers in other states—though never in large numbers—were also unruly. Jefferson was not distressed at this behavior, calling the attack a "little rebellion," but it remained on the minds of the economic elite. They were scared at the thought that people had taken the law into their own hands and violated

Shays' Rebellion

A series of attacks on courthouses by a small band of farmers led by Revolutionary War Captain Daniel Shays to block foreclosure proceedings.

Shays' Rebellion, in which farmers physically prevented judges from foreclosing on farms, helped spur the birth of the Constitution. News of the small rebellion quickly spread around the country, and some of the Philadelphia delegates thought a full-fledged revolution would result. The event reaffirmed the framers' belief that the new federal government needed to be a strong one.



the property rights of others. Neither Congress nor the state was able to raise a militia to stop Shays and his followers, and a privately paid force was assembled to do the job, which further fueled dissatisfaction with the weakness of the Articles of Confederation system.

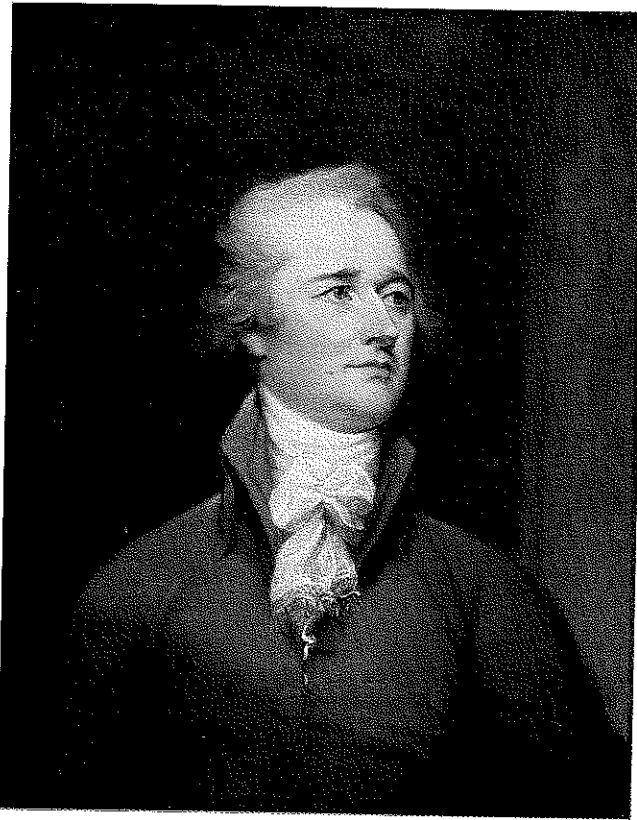
The Aborted Annapolis Meeting

In September 1786, a handful of leaders assembled at Annapolis, Md., to discuss problems with the Articles of Confederation and suggest solutions. The assembly was an abortive attempt at reform. Only five states—New York, New Jersey, Delaware, Pennsylvania, and Virginia—were represented at the meeting; the 12 delegates were few enough in number to meet around a dinner table. Called to consider commercial conflicts that had arisen among the states under the Articles of Confederation, the Annapolis delegates decided that a larger meeting and a broader proposal were needed to organize the states. Holding most of their meetings at a local tavern, this small and unofficial band of reformers issued a call for a full-scale meeting of the states in Philadelphia the following May—in retrospect, a rather bold move by so small a group. Their request was granted, however; the Continental Congress called for a meeting of all the states. In May 1787, what we now call the Constitutional Convention got down to business in Philadelphia.

Making a Constitution: The Philadelphia Convention

Representatives from 12 states came to Philadelphia to heed the Continental Congress' call to "take into consideration the situation in the United States." Only Rhode Island, a stronghold of paper-money interests, refused to send delegates. Virginia's Patrick Henry (the colonial firebrand who had declared, "Give me liberty or give me death!"), fearing a centralization of power, also "smelled a rat" in the developments in Philadelphia and did not attend.

The delegates were ordered to meet "for the sole and express purpose of revising the Articles of Confederation." The Philadelphia delegates did not pay much attention



Alexander Hamilton, a New York delegate to the Convention, favored a strong central government; in fact, he favored an elected king. Hamilton was less influential at the Convention than he would be later as an architect of the nation's economic policy.

to this order, however, because amending the Articles required the unanimous consent of the states, which they knew would be impossible. Thus, the 55 delegates ignored their instructions and began writing what was to become the U.S. Constitution.

Gentlemen in Philadelphia

Who were these 55 men? They may not have been “demigods,” as Jefferson, perhaps sarcastically, called them, but they were certainly a select group of economic and political notables. They were mostly wealthy planters, successful (or once-successful) lawyers and merchants, and men of independent wealth. Many were college graduates and most had practical political experience. Most were coastal residents, rather than residents of the expanding western frontiers, and a significant number were urbanites, rather than part of the primarily rural American population.

Philosophy Into Action

The delegates in Philadelphia were an uncommon combination of philosophers and shrewd political architects. The debates moved from high principles on the big issues to self-interest on the small ones.¹² The first two weeks were mainly devoted to general debates about the nature of republican government (government in which ultimate power rests with the voters). After that, practical and divisive issues sometimes threatened to dissolve the meeting.

Obviously, these 55 men did not share the same political philosophy. Democratic Benjamin Franklin held very different views from aristocratic Alexander Hamilton, who hardly hid his disgust for democracy. Yet, at the core of their ideas, even those of Franklin and Hamilton, existed a common center. The group agreed on questions of

U.S. Constitution

The document written in 1787 and ratified in 1788 that sets forth the institutional structure of U.S. government and the tasks these institutions perform. It replaced the Articles of Confederation.

(1) human nature, (2) the causes of political conflict, and (3) the object, and (4) nature of a republican government.

Human Nature. In his famous work entitled *Leviathan* written in 1651, Thomas Hobbes argued that man's natural state was war and that a strong absolute ruler was necessary to restrain man's bestial tendencies. Without a strong government, Hobbes wrote, life would be "solitary, poor, nasty, brutish, and short." The delegates were not convinced of the need for a monarch, but they did hold a cynical view of human nature.

People, they thought, were self-interested. Franklin and Hamilton, poles apart philosophically, both voiced this sentiment. Said Franklin, "There are two passions which have a powerful influence on the affairs of men: the love of power and the love of money." Hamilton agreed in his characteristically blunt manner: "Men love power." The men at Philadelphia believed that government should play a key role in containing the natural self-interest of people.¹³

Political Conflict. Of all the words written by and about the delegates, none have been more widely quoted than these by James Madison: "The most common and durable source of factions has been the various and unequal distribution of property." In other words, *the distribution of wealth* (land was the main form of wealth in those days) *is the source of political conflict*. "Those who hold and those who are without property," Madison went on, "have ever formed distinct interests in society." Other sources of conflict included religion, views of governing, and attachment to various leaders.¹⁴

Arising from these sources of conflict are **factions**, which we might call parties or interest groups. A majority faction might well be composed of the many who have little or no property; the minority faction, of those with property. If unchecked, the delegates thought, one of these factions would eventually tyrannize the other. The majority would try to seize the government to reduce the wealth of the minority; the

factions

Interest groups arising from the unequal distribution of property or wealth that James Madison attacked in *Federalist Paper # 10*. Today's parties or interest groups are what Madison had in mind when he warned of the instability in government caused by factions.

Pennsylvania delegate Gouverneur Morris was a man of considerable means and, like Hamilton, an extreme antideocrat primarily concerned with protecting property holders. He was responsible for the style and wording of the Constitution.



minority would try to seize the government to secure its own gains. Governments that are run by factions, the Founders believed, are prone to instability, tyranny, and even violence. The effects of factions had to be checked.

Objects of Government. To Gouverneur Morris of Pennsylvania, the preservation of property was the “principal object of government.” Morris was outspoken and plainly overlooked some other objects of government, including security from invasion, domestic tranquillity, and promotion of the general welfare. However, Morris’s remark typifies the philosophy of many of the delegates. John Locke (who was, remember, the intellectual patron saint of many of the delegates) had said a century before that “The preservation of property is the end of government.” Few of these men would have disagreed. As property holders themselves, these delegates could not imagine a government that did not make its principal objective an economic one: the preservation of individual rights to acquire and hold wealth. A few (like Morris) were intent on shutting out the propertyless altogether. “Give the votes to people who have no property,” Morris claimed, “and they will sell them to the rich who will be able to buy them.”

Nature of Government. Given their beliefs about human nature, the causes of political conflict, the need to protect property, and the threat of tyranny by a faction, what sort of government did the delegates believe would work? They answered in different ways, but the message was always the same. Power should be set against power, so that no one faction would overwhelm the others. The secret of good government is “balanced” government. They were influenced in their thinking by writings of a French aristocrat, Baron Montesquieu, who advocated separate branches of government with distinct powers and the ability to check the other branches. The Founders agreed, concluding that a limited government would have to contain checks on its own power. So long as no faction could seize the whole of government at once, tyranny could be avoided. A complex network of checks, balances, and separation of powers would be required for a balanced government.

The Agenda in Philadelphia

The delegates in Philadelphia could not merely construct a government from ideas. They wanted to design a government that was consistent with their political philosophy, but they also had to meet head-on some of the thorniest issues confronting the fledgling nation at the time—issues of equality, the economy, and individual rights.

The Equality Issues

The Declaration of Independence states that all men are created equal; the Constitution, however, is silent on equality. Nevertheless, some of the most important issues on the policy agenda in Philadelphia concerned equality. Three issues occupied more attention than almost any others: whether the states were to be equally represented, what to do about slavery, and whether to ensure political equality.

Equality and Representation of the States. One crucial policy issue was how the new Congress would be constituted. The **New Jersey Plan**, proposed by William Paterson of New Jersey, called for each state to be equally represented in the new Congress. The opposing strategy, suggested by Edmund Randolph of Virginia, is usually called the **Virginia Plan**. It called for giving each state representation in Congress based on the state’s share of the American population.

New Jersey Plan

The proposal at the Constitutional Convention that called for equal representation of each state in Congress regardless of the state’s population.

Virginia Plan

The proposal at the Constitutional Convention that called for representation of each state in Congress in proportion to that state’s share of the U.S. population.

Connecticut Compromise

The compromise reached at the Constitutional Convention that established two houses of Congress: the House of Representatives, in which representation is based on a state's share of the U.S. population, and the Senate, in which each state has two representatives.

Why does it matter?

You have seen that the Senate overrepresents states with small populations. What would be the consequences if there were only one house of Congress and it were based solely on population? Would the government be more efficient if bills only had to pass in one house? Would certain interests be less likely to get their way? If your family were farmers, would you favor equality of representation? Would you favor it if you depended on public transportation in a large city?

The delegates resolved this conflict with a compromise devised by Roger Sherman and William Johnson of Connecticut. The solution proposed by this **Connecticut Compromise** was to create two houses in Congress. One body, the Senate, would have two members from each state (the New Jersey Plan), and the second body, the House of Representatives, would have representation based on population (the Virginia Plan). The U.S. Congress is still organized in exactly the same way. Each state has two senators, and the state's population determines its representation in the House.

Although the Connecticut Compromise was intended to maximize equality between the states, it actually gives more power to people who live in states with small populations than to those who live in more heavily populated states. Every state has two senators and at least one member of the House, no matter how small its population. To take the most extreme case, Wyoming and California have the same number of votes in the Senate (two), although Wyoming has less than 2 percent of California's population. Thus, a citizen of Wyoming has more than 50 times the representation in the Senate as does a citizen of California.¹⁵

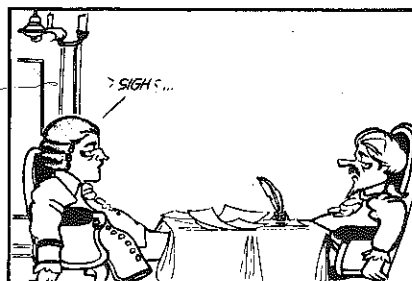
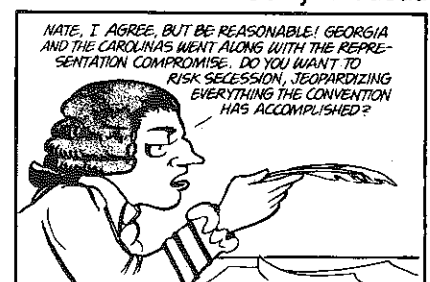
Because it is the Senate, not the House, that ratifies treaties, confirms presidential nominations, and hears trials of impeachment, citizens in less populated states have a greater say in these key tasks. In addition, the Electoral College (which is the body that actually elects the president and is discussed in Chapter 10) gives small states greater weight. If no presidential candidate receives a majority in the Electoral College, the House of Representatives make the final decision—with each state having one vote. In such a case (which has not occurred since 1824), the votes of citizens of Wyoming would again carry over 50 times as much weight as those of Californians.

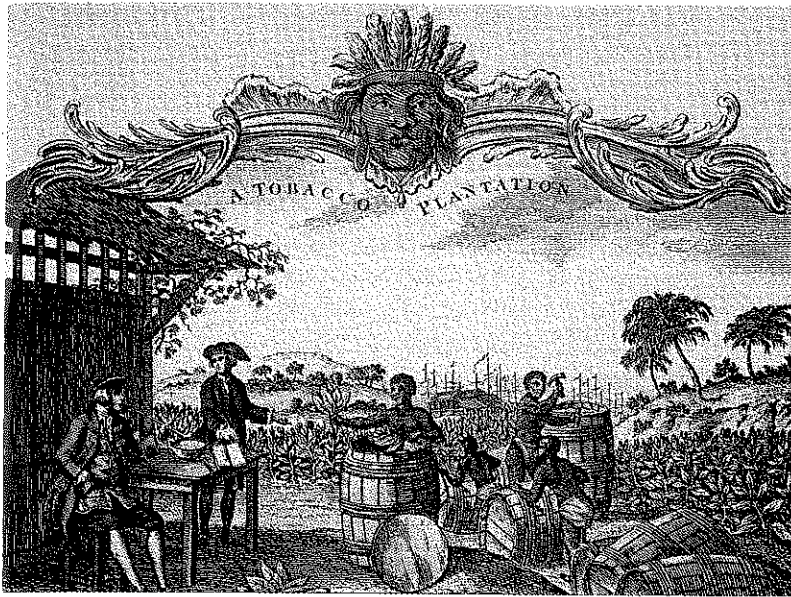
Whether representation in the Senate is "fair" is a matter of debate. What is not open to question is that the delegates to the 1787 convention had to accommodate various interests and viewpoints in order to convince all the states to join an untested union.

Some experts have described the conflict as a struggle between big and small states (that is, states with large and small populations), each presumably looking for a plan that would maximize its representation. The votes in Philadelphia do not support this interpretation. Eight states voted on the New Jersey Plan (Georgia's delegation was split and did not vote), which supposedly favored the small states. In fact, three big states (New York, Maryland, and Connecticut) lined up with two small states

DOONESBURY

Garry Trudeau





When the Constitution was written, many Northern and Southern delegates assumed that slavery, being relatively unprofitable, would soon die out. A single invention—Eli Whitney's cotton gin—made it profitable again. Although Congress did act to control the growth of slavery, the slave economy became entrenched in the South.

(Delaware and New Jersey) to support equal representation of the states. The two Carolinas, small states at the time, voted against the New Jersey Plan.¹⁶ It was not a sharp cleavage of small versus large. Rather, the vote depended on different views about how to achieve equality of representation, one side favoring equal representation of the states and the other favoring equal representation of people.

Slavery. The second equality issue was slavery. The contradictions between slavery and the sentiments of the Declaration of Independence are obvious, but slavery was legal in every state except Massachusetts. It was concentrated in the South, however, where slave labor was commonplace in agriculture. Some delegates, like Gouverneur Morris, denounced slavery in no uncertain terms. But the Convention could not accept Morris' position in the face of powerful Southern opposition led by Charles C. Pinckney of South Carolina. The delegates did agree that Congress could limit *future importing* of slaves (they allowed it to be outlawed after 1808), but they did not forbid slavery itself. The Constitution, in fact, inclines toward recognizing slavery; it stated that persons legally "held to service or labour" (referring to slaves) who escaped to free states had to be returned to their owners.

Another difficult question about slavery arose at the Convention. How should slaves be counted in determining representation in Congress? Southerners were happy to see slaves counted toward determining their representation in the House of Representatives (though reluctant to count them for apportionment of taxation). Here the result was the famous *three-fifths compromise*. Representation and taxation were to be based on the "number of free persons," plus three-fifths of the number of "all other persons." Everyone, of course, knew who those other persons were.

Political Equality. The delegates dodged one other issue on equality. A handful of delegates, led by Franklin, suggested that national elections should require universal manhood suffrage (that is, a vote for all free adult males). This still would have left a majority of the population disenfranchised, but for those still smarting from Shays' Rebellion and the fear of mob rule, the suggestion was too democratic. Many delegates wanted to put property qualifications on the right to vote. Ultimately, as the debate wound down, they decided to leave the issue to the states. People qualified to vote in state elections could also vote in national elections (see Table 2.3).

Table 2.3 How Three Issues of Equality Were Resolved: A Summary

PROBLEM	SOLUTION
<p>Equality of the States Should states be represented equally (the New Jersey Plan) or in proportion to their population (the Virginia Plan)?</p>	Both, according to the Connecticut Compromise. States have equal representation in the Senate, but representation in the House is proportionate to population.
<p>Slavery What should be done about slavery?</p>	Although Congress was permitted to stop the importing of slaves after 1808, the Constitution is mostly silent on the issue of slavery.
<p>How should slaves be counted for representation in the House of Representatives?</p>	Count each slave as three-fifths of a person.
<p>Political Equality Should the right to vote be based on universal manhood suffrage, or should it be very restricted?</p>	Finesse the issue. Let the states decide qualifications for voting.

The Economic Issues

The Philadelphia delegates were deeply concerned about the state of the American economy. Economic issues were high on the Constitution writers' policy agenda. People disagreed (in fact, historians still disagree) as to whether the postcolonial economy was in a shambles. Advocates of the Constitution, called Federalists, stressed the economy's "weaknesses, especially in the commercial sector, and Anti-Federalists (those opposed to a strong national government, and thus opposed to a new constitution) countered with charges of exaggeration."¹⁷ The writers of the Constitution, already committed to a strong national government, charged that the economy was indeed in disarray. Specifically, they claimed that the following problems had to be addressed:

- The states had erected tariffs against products from other states.
- Paper money was virtually worthless in some states, but many state governments, which were controlled by debtor classes, forced it on creditors anyway.
- The Congress was having trouble raising money because the economy was in a recession.

Understanding something about the delegates and their economic interests gives us insight into their views on political economy. They were, by all accounts, the nation's postcolonial economic elite. Some were budding capitalists. Others were creditors whose loans were being wiped out by cheap paper money. Many were merchants who could not even carry on trade with a neighboring state. Virtually all of them thought a strong national government was needed to bring economic stability to the chaotic union of states that existed under the Articles of Confederation.¹⁸

It is not surprising, then, that the framers of the Constitution would seek to strengthen the economic powers (and thus the scope) of the new national government. One famous historian, Charles A. Beard, claimed that their principal motivation for doing so was to increase their personal wealth. The framers, he said, not only were propertied, upper-class men protecting their interests but also held bonds and investments whose value would increase if the Constitution were adopted. The best evidence, however, indicates that although they were concerned about protecting property rights, the Founders' motivations were in the broad sense of building a strong economy rather than in the narrow sense of increasing their personal wealth.¹⁹

The delegates made sure that the Constitution clearly spelled out the economic powers of Congress (see Table 2.4). Consistent with the general allocation of power in the Constitution, Congress was to be the chief economic policymaker. It could obtain revenues through taxing and borrowing. These tools, along with the power to appropriate funds, became crucial instruments for influencing the economy (as we will see in Chapter 17). By maintaining sound money and guaranteeing payment for the national debt, Congress was to encourage economic enterprise and investment in the United States. Congress was also given power to build the nation's infrastructure by constructing post offices and roads and to establish standard weights and measures. To protect property rights, Congress was charged with punishing counterfeiters and pirates, ensuring patents and copyrights, and legislating rules for bankruptcy. Equally important (and now a key congressional power, with a wide range of implications for the economy) was Congress's new ability to regulate interstate and foreign commerce. In sum, the Constitution granted Congress the power to create the conditions within which markets could flourish.

In addition, the framers prohibited practices in the states that they viewed as inhibiting economic development, such as maintaining individual state monetary systems, placing duties on imports from other states, and interfering with lawfully contracted debts. Moreover, the states were to respect civil judgments and contracts made in other states, and they were to return runaway slaves to their owners. (This last protection of "property" rights is now, of course, defunct as a result of the Thirteenth Amendment, which outlawed slavery.) To help the states, the national government guaranteed them "a republican form of government" to prevent a recurrence of Shays' Rebellion, in which violence, instead of legislation and the courts, was used to resolve commercial disputes.

The Constitution also obligated the new government to repay all the public debts incurred under the Continental Congress and the Articles of Confederation—debts that totaled \$54 million. Although this requirement may seem odd, there was sound economic reason for it. Paying off the debts would ensure from the outset that money would flow into the American economy and would also restore the confidence of investors in the young nation. Even today, people trade in government debt (in the form of bonds) just as they do in the stocks of corporations. Thus, the Constitution helped to spur a capitalist economy.

Table 2.4 Economics in the Constitution

Powers of Congress

- | | |
|--|--|
| 1. Levy taxes. | 7. Punish piracy. |
| 2. Pay debts. | 8. Punish counterfeiting. |
| 3. Borrow money. | 9. Create standard weights and measures. |
| 4. Coin money and regulate its value. | 10. Establish post offices and post roads. |
| 5. Regulate interstate and foreign commerce. | 11. Protect copyrights and patents. |
| 6. Establish uniform laws of bankruptcy. | |

Prohibitions on the States

- | | |
|---|---|
| 1. States cannot pass laws impairing the obligations of contract. | 4. States cannot tax imports or exports from abroad or from other states. |
| 2. States cannot coin money or issue paper money. | 5. States cannot free runaway slaves from other states (now defunct). |
| 3. States cannot require payment of debts in paper money. | |

Other Key Provisions

- | | |
|---|--|
| 1. The new government assumes the national debt contracted under the Articles of Confederation. | 3. The states must respect civil court judgments and contracts made in other states. |
| 2. The Constitution guarantees a republican form of government. | |

The Individual Rights Issues

There was another major item on the Constitutional Convention agenda; the delegates had to design a system that would preserve individual rights. There was no dispute about the importance of safeguarding individualism, and the Founders believed that this would be relatively easy. After all, they were constructing a limited government that, by design, could not threaten personal freedoms. In addition, they dispersed power among the branches of the national government and between the national and state governments so that each branch or level could restrain the other. Also, most of the delegates believed that the various states were already doing a sufficient job of protecting individual rights.

As a result, the Constitution says little about personal freedoms. The protections it does offer are as follows:

writ of habeas corpus

A court order requiring jailers to explain to a judge why they are holding a prisoner in custody.

- It prohibits suspension of the writ of habeas corpus (except during invasion or rebellion). Such a court order enables persons detained by authorities to secure an immediate inquiry into the causes of their detention. If no proper explanation is offered, a judge may order their release. (Article I, Section 9)
- It prohibits Congress or the states from passing bills of attainder (which punish people without a judicial trial). (Article I, Section 9)
- It prohibits Congress or the states from passing *ex post facto* laws (which punish people or increase the penalties for acts that were not illegal or not as punishable when the act was committed). (Article I, Section 9)
- It prohibits the imposition of religious qualifications for holding office in the national government. (Article VI)
- It narrowly defines and outlines strict rules of evidence for conviction of treason. To be convicted, a person must levy war against the United States or adhere to and aid its enemies during war. Conviction requires confession in open court or the testimony of two witnesses to the same overt act. The framers of the Constitution would have been executed as traitors if the Revolution had failed, and they were therefore sensitive to treason laws. (Article III, Section 3)
- It upholds the right to trial by jury in criminal cases. (Article III, Section 2)

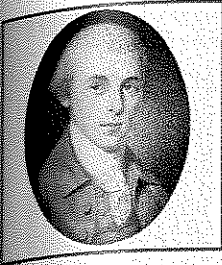
The delegates were content with their document. When it came time to ratify the Constitution, however, there was widespread criticism of the absence of specific protections of individual rights, such as free expression and the rights of the accused.

The Madisonian Model

The framers believed that human nature was self-interested and that inequalities of wealth were the principal source of political conflict. Regardless, they had no desire to remove the divisions in society by converting private property to common ownership; they also believed that protecting private property was a key purpose of government. Their experience with state governments under the Articles of Confederation reinforced their view that democracy was a threat to property. Many of them felt that the nonwealthy majority—an unruly mob—would tyrannize the wealthy minority if given political power. Thus, the delegates to the Constitutional Convention were faced with the dilemma of reconciling economic inequality with political freedom.

Thwarting Tyranny of the Majority

James Madison was the principal architect of the government's final structure, and his work still shapes our policymaking process²⁰ (see "Making a Difference: James Madison"). He and his colleagues feared both majority and minority factions. Either could take control of the government and use it to their own advantage. Factions of the minority, however, were easy to handle; the majority could simply out-vote them. Factions of the majority were harder to handle. If the majority united around some pol-



Making a Difference

James Madison

James Madison was an unlikely hero. The oldest of 10 children, he was born in Virginia in 1751. An excellent scholar though frail and sickly in his youth, he graduated from the College of New Jersey (later Princeton) in 1771, where he demonstrated special interest in government and the law. Considering the ministry for a career, however, he stayed on for a year of post-graduate study in theology. His health was too frail to fight in the Revolution in 1776, but at age 29 Madison was chosen to represent Virginia in the Continental Congress in 1780. Although originally the youngest delegate, he played a major role in the deliberations of that body. He wrote extensively about deficiencies in the Articles of Confederation, and he was highly instrumental in the convening of the Constitutional Convention in 1787.

Madison was not a great orator, nor was he a man of great wealth. He was a

careful student of politics and government. Relying on the force of his intellect, he was clearly the preeminent figure at the Constitutional Convention—a gathering that included Benjamin Franklin, George Washington, and other giants of American history who were many years his senior. Though many of his proposals were rejected, he tirelessly advocated a strong government. Despite his poor speaking capabilities, he took the floor more than 150 times, third only to Gouverneur Morris and James Wilson. Ultimately, the Constitution reflected his thinking more than that of any other delegate. His journal of the convention is the best single record of the event.

Playing a lead in the ratification process in Virginia, too, Madison defended the document against such powerful opponents as Patrick Henry, George Mason, and Richard Henry Lee. In New York, where Madison was serving in the Continental Congress, he collaborated

with Alexander Hamilton and John Jay in a series of essays that appeared in the newspapers in 1787–1788 and were soon published in book form as *The Federalist* (1788). This set of essays is a classic of political theory and a lucid exposition of the republican principles that dominated the framing of the Constitution.

Elected to the new House of Representatives in 1789, Madison helped frame and ensure passage of the Bill of Rights. He also assisted in organizing the executive department and creating a system of federal taxation. As leaders of the opposition to Hamilton's policies, he and Thomas Jefferson founded the Democratic-Republican Party.

Madison went on to become secretary of state and then succeeded Jefferson as president. He is best remembered, however, as a young man who fought for his ideas and, as a result, became the father of the Constitution.

icy issue, such as the redistribution of wealth, they could oppress the minority, violating the latter's basic rights.²¹

As Madison would later explain:

Ambition must be made to counteract ambition. . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls 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 then in the next place oblige it to control itself.²²

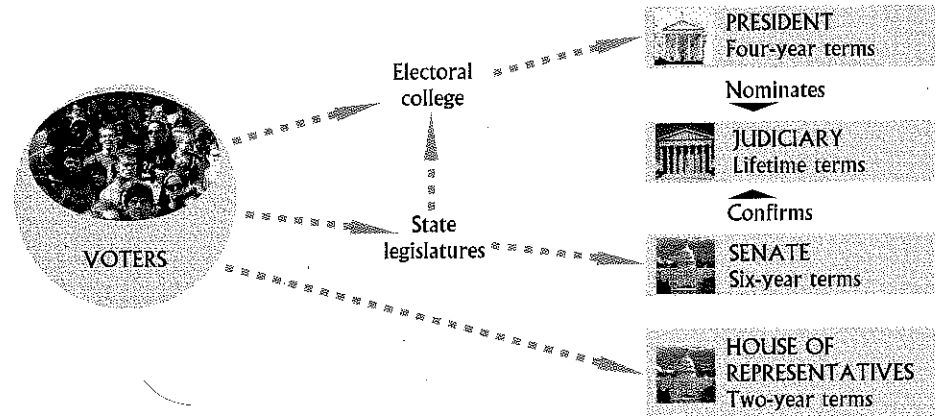
To prevent the possibility of a tyranny of the majority, Madison proposed the following:

1. Place as much of the government as possible beyond the direct control of the majority.
2. Separate the powers of different institutions.
3. Construct a system of checks and balances.

Limiting Majority Control. Madison believed that to thwart tyranny by the majority, it was essential to keep most of the government beyond their power. His plan placed only one element of government, the House of Representatives, within direct control of the votes of the majority. In contrast, state legislatures were to elect senators and special electors were to select the president; in other words, government officials would be elected by a small minority, not by the people themselves. Judges were to be nominated by the president (see Figure 2.2). Even if the majority

Figure 2.2 The Constitution and the Electoral Process: The Original Plan

Under Madison's plan, which was incorporated in the Constitution, voters' electoral influence was limited. Only the House of Representatives was directly elected. Senators and presidents were indirectly elected, and judges were nominated by the president. Over the years, Madison's original model has been substantially democratized. The Seventeenth Amendment (1913) established direct election of senators by popular majorities. Today, the Electoral College has become largely a rubber stamp, voting the way the popular majority in each state votes.



seized control of the House of Representatives, they still could not enact policies without the agreement of the Senate and the president. To further insulate governmental officials from public opinion, judges were given lifetime tenure and senators were given terms of six years, with only one-third elected every two years, compared with the two-year election intervals of all members of the House of Representatives.

separation of powers

A feature of the Constitution that requires each of the three branches of government—executive, legislative, and judicial—to be relatively independent of the others so that one cannot control the others. Power is shared among these three institutions.

checks and balances

Features of the Constitution that limit government's power by requiring that power be balanced among the different governmental institutions. These institutions continually check one another's activities.



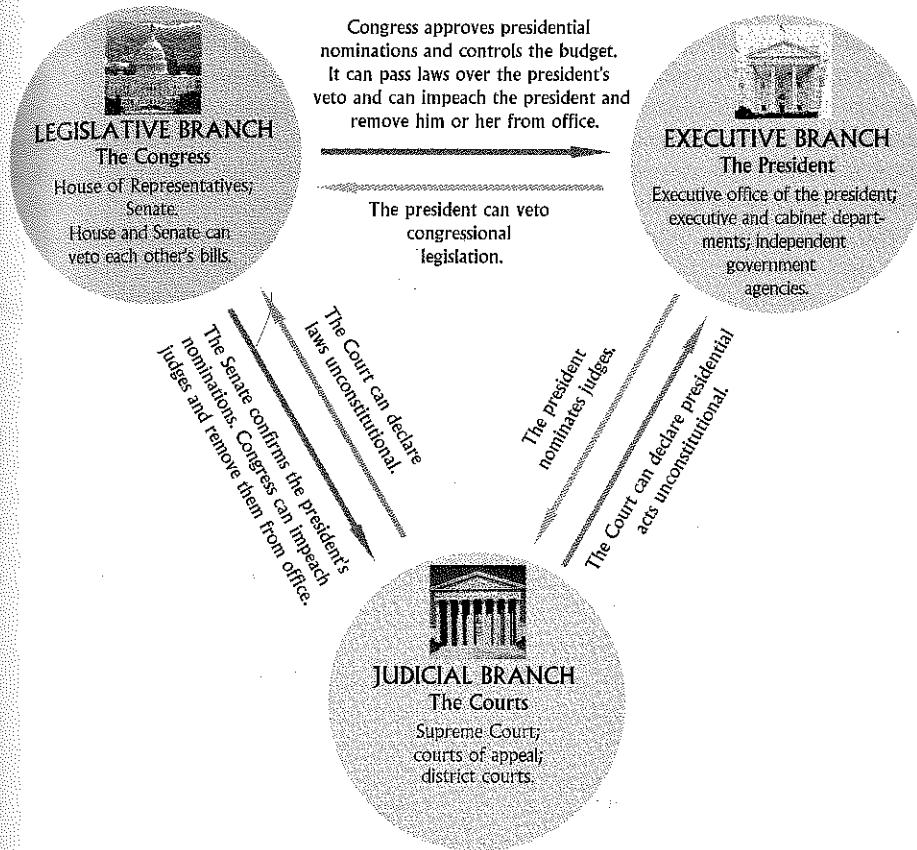
Separating Powers. The Madisonian scheme also provided for a **separation of powers**. Each of the three branches of government—executive (the president), legislative (Congress), and judicial (the courts)—would be relatively independent of one another so that no single branch could control the others. The president, Congress, and the courts were all given independent elements of power. Power was not divided absolutely, however; rather, it was *shared* among the three institutions.

Creating Checks and Balances. Because powers were not completely separate, each branch required the consent of the others for many of its actions. This created a system of **checks and balances** that reflected Madison's goal of setting power against power to constrain government actions. He reasoned that if a faction seized one institution, it still could not damage the whole system. The system of checks and balances was an elaborate and delicate creation. The president checks Congress by holding veto power; Congress holds the purse strings of government and must approve presidential appointments.

The courts also figured into the system of checks and balances. Presidents could nominate judges, but their confirmation by the Senate was required. The Supreme Court itself, in *Marbury v. Madison* (1803), asserted its power to check the other branches through judicial review: the right to hold actions of the other two branches unconstitutional. This right, which is not specifically outlined in the Constitution, considerably strengthened the Court's ability to restrain the other branches of government. For a summary of separation of powers and the checks and balances system, see Figure 2.3.

Establishing a Federal System. As we will discuss in detail in Chapter 3, the Founders also established a federal system of government that divided the power of government between a national government and the individual states. Most government activity at the time occurred in the states. The framers of the Constitution anticipated that this would be an additional check on the national government.

Figure 2.3 Separation of Powers and Checks and Balances in the Constitution



The doctrine of separation of powers allows the three institutions of government to check and balance one another. Judicial review—the power of courts to hold executive and congressional policies unconstitutional—was not explicit in the Constitution, but was asserted by the Supreme Court in *Marbury v. Madison*.

The Constitutional Republic

When asked what kind of government the delegates had produced, Benjamin Franklin is said to have replied, “A republic . . . if you can keep it.” Because the Founders did not wish to have the people directly make all decisions (as in a town meeting where everyone has one vote), and because even then the country was far too large for such a proposal to be feasible, they did not choose to create a direct democracy. Their solution was to establish a **republic**: a system based on the consent of the governed in which representatives of the public exercise power. This deliberative democracy required and encouraged reflection and refinement of the public’s views through an elaborate decision-making process.

The system of checks and balances and separation of powers favors the status quo. People who desire change must usually have a sizable majority, not just a simple majority of 51 percent. Those opposed to change need only win at one point in the policymaking process—say in obtaining a presidential veto—whereas those who favor change must win *every* battle along the way. Change usually comes slowly, if at all. As a result, the Madisonian system encourages moderation and compromise and slows change. It is difficult for either a minority or a majority to tyrannize; and both property rights and personal freedoms (with only occasional lapses) have survived.

Franklin was correct that such a system is not easy to maintain. It requires careful nurturing and balancing of diverse interests. Some critics argue that the policymaking process lacks efficiency, preventing effective responses to pressing matters. We will examine this issue closely throughout *Government in America*.

republic

A form of government in which the people select representatives to govern them and make laws.

Why does it matter?

The checks and balances in the Constitution favor the status quo. Is this a problem? Would it be better for America if there were less gridlock and policymakers could act swiftly to bring about change? For example, would you prefer a narrow majority in Congress to be able to reinstate the military draft, or would you prefer that the draft could only become law with the support of a large majority?

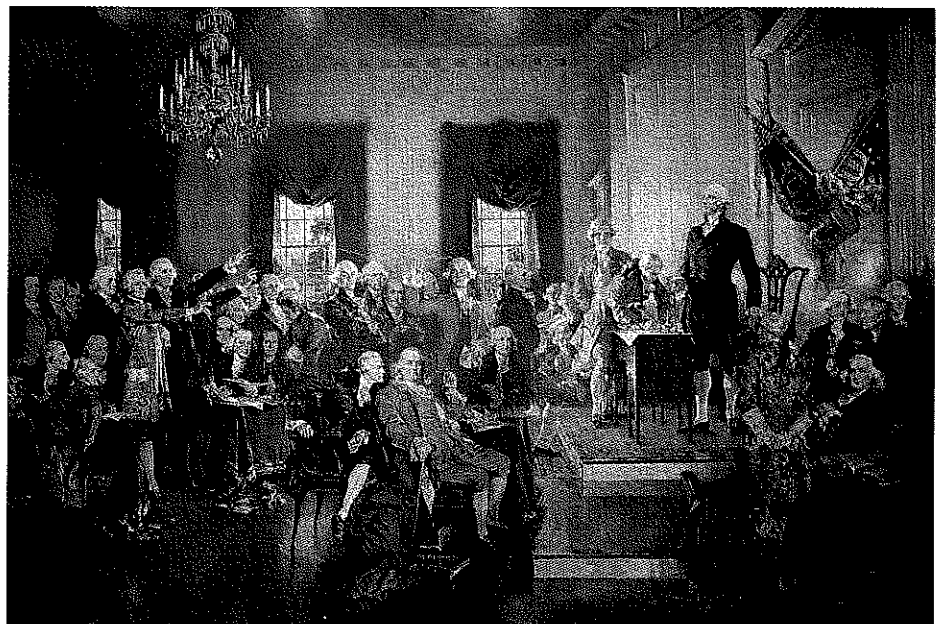
The End of the Beginning

On the 109th day of the meetings, in stifling heat made worse because the windows of the Pennsylvania statehouse were closed to ensure secrecy, the final version of the Constitution was read aloud. Then Dr. Franklin rose with a speech he had written, but was so enfeebled he had to ask James Wilson to deliver it. In it, Franklin noted that "There are several parts of this Constitution of which I do not at present approve, but I am not sure that I shall never approve them." He then offered a few political witticisms, defended their handiwork, and concluded by saying, "On the whole, Sir, I cannot help expressing a wish that every member of the Convention who may still have an objection to it, would with me on this occasion, doubt a little of his own infallibility—and make manifest our unanimity, put his name to this instrument."

Nonetheless, Edmund Randolph of Virginia rose to announce apologetically that he did not intend to sign. Gouverneur Morris of Pennsylvania stated his reservations about the compromises but called the document the "best that was to be attained" and said he would "take it with all its faults." Alexander Hamilton of New York again made a plea for unity, but Elbridge Gerry of Massachusetts was adamant in opposition. Taking Franklin's remarks personally, he "could not but view them as levelled against himself and the other gentlemen who meant not to sign." He bluntly predicted that a "civil war may result from the present crisis of the United States."

On Franklin's motion, a vote was taken. Ten states voted yes, and none voted no, but South Carolina's delegates were divided. As the records so quaintly put it, "The Members then proceeded to sign the instrument." Edmund Randolph, Elbridge Gerry, and George Mason of Virginia, however, refused to sign. Franklin then made another short speech, saying that the sun pictured on the chair of convention president George Washington represented the new nation and was rising, not setting. Then (quoting the records again) "the Constitution being signed . . . the convention dissolved itself by Adjournment." The members then adjourned to a tavern. The experience of the last few hours, when conflict intermingled with consensus, reminded them that implementing this new document would be no small feat.

George Washington presides over the signing of the Constitution. "The business being closed," he wrote, "the members adjourned to the City Tavern, dined together and took cordial leave of each other."



Ratifying the Constitution

The Constitution did not go into effect once the Constitutional Convention in Philadelphia was over. It had to be ratified by the states. Our awe of the Founders sometimes blinds us to the bitter politics of the day. There is no way of determining the public's feelings about the new document, but as John Marshall (who later became Chief Justice) suggested, "It is scarcely to be doubted that *in some of the adopting states, a majority of the people were in opposition.*" (Italics ours.)²³ The Constitution itself required that only 9 of the 13 states approve the document before it could be implemented, ignoring the requirement that the Articles of Confederation be amended only by unanimous consent.

Federalists and Anti-Federalists

Throughout the states, a fierce battle erupted between the **Federalists**, who supported the Constitution, and the **Anti-Federalists**, who opposed it. Newspapers were filled with letters and articles, many written under pseudonyms, praising or condemning the document. In praise of the Constitution, three men—James Madison, Alexander Hamilton, and John Jay—wrote a series of articles under the name Publius. These articles, known as the *Federalist Papers*, are second only to the Constitution itself in characterizing the framers.

Beginning on October 27, 1787, barely a month after the Convention ended, the *Federalist Papers* began to appear in New York newspapers as part of the ratification debate in New York. Eighty-five were eventually published. They not only defended the Constitution detail by detail but also represented an important statement of political philosophy. (The essays influenced few of the New York delegates, however, who voted to ratify the Constitution only after New York City threatened to secede from the state if they did not.)

Federalists

Supporters of the U.S. Constitution at the time the states were contemplating its adoption.

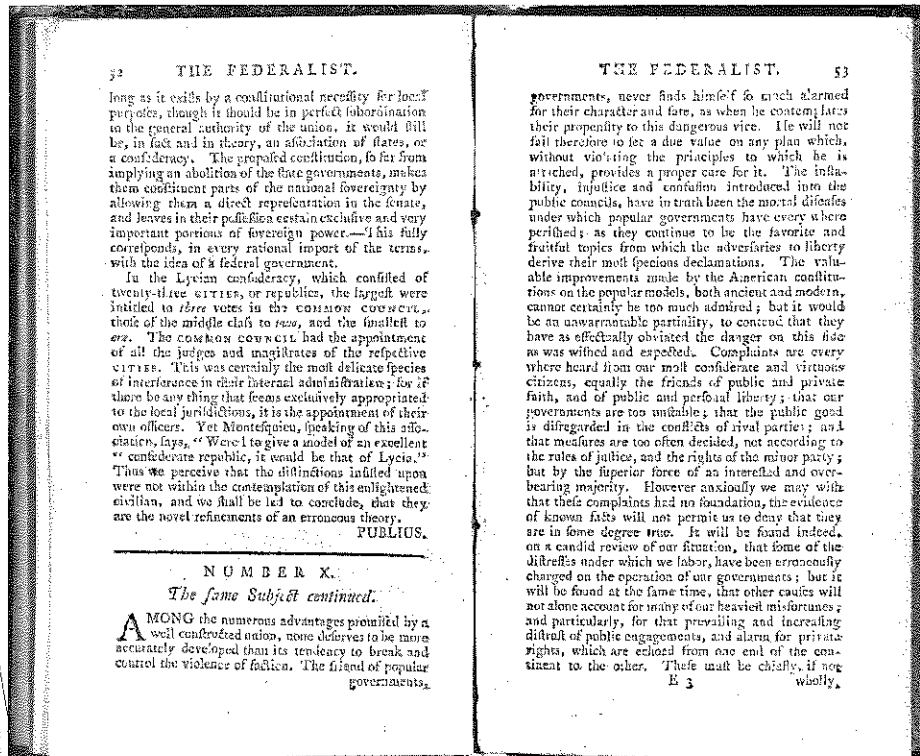
Anti-Federalists

Opponents of the American Constitution at the time when the states were contemplating its adoption.

Federalist Papers

A collection of 85 articles written by Alexander Hamilton, John Jay, and James Madison under the name "Publius" to defend the Constitution in detail.

As an explanation and defense of the Constitution, the *Federalist Papers* were often discussed at dinner parties and debated in public places. Despite today's high literacy rates, it is doubtful that a similar set of documents, so rich in political philosophy, would be so widely read in modern America.



Far from being unpatriotic or un-American, the Anti-Federalists sincerely believed that the new government was an enemy of freedom, the very freedom they had just fought a war to ensure. Adopting names like Agrippa, Cornelius, and Monteczuma, the Anti-Federalists launched bitter, biting, even brilliant attacks on the Philadelphia document. They frankly questioned the motives of the Constitution writers.

One objection was central to the Anti-Federalists' attacks: The new Constitution was a class-based document, intended to ensure that a particular economic elite controlled the public policies of the national government. The following quotations are from three Anti-Federalist critics of the Constitution.

This government will commence in a moderate aristocracy; it is at present impossible to foresee whether it will, in its operation, produce a monarchy, or a corrupt, oppressive aristocracy.
—George Mason

Thus, I conceive, a foundation is laid for throwing the whole power of the federal government into the hands of those who are in the mercantile interest; and for the landed, which is the great interest of this country to lie unrepresented, forlorn and without hope.
—“Cornelius”

These lawyers, men of learning, and moneyed men . . . expect to get into Congress themselves . . . so they can get all the power and all the money into their own hands.
—Amos Singletary of Massachusetts²⁴

Remember that these charges of conspiracy and elitism were being hurled at the likes of Washington, Madison, Franklin, and Hamilton.

The Anti-Federalists had other fears. Not only would the new government be run by a few, but it would also erode fundamental liberties. James Lincoln was quoted in the records of the South Carolina ratifying convention as saying that he “would be glad to know why, in this Constitution, there is a total silence with regard to the liberty of the press. Was it forgotten? Impossible! Then it must have been purposely omitted; and with what design, good or bad, I leave the world to judge.” You can compare the views of the Federalists and Anti-Federalists in Table 2.5.

These arguments were persuasive. To allay fears that the Constitution would restrict personal freedoms, the Federalists promised to add amendments to the document specifically protecting individual liberties. They kept their word; James Madison introduced 12 constitutional amendments during the First Congress in 1789. Ten were ratified by the states and took effect in 1791. These first 10 amendments to the Constitution, which restrain the national government from limiting personal freedoms, have come to be known as the **Bill of Rights** (see Table 2.6). Another of Madison's original 12 amendments, one dealing with congressional salaries, was ratified 201 years later as the Twenty-seventh Amendment (see the Appendix in this book).

Opponents also feared that the Constitution would weaken the power of the states (which it did). Patrick Henry railed against strengthening the federal government at the expense of the states. “We are come hither,” he told his fellow delegates to the Virginia

Bill of Rights

The first 10 amendments to the U.S. Constitution, drafted in response to some of the Anti-Federalist concerns. These amendments define such basic liberties as freedom of religion, speech, and press and guarantee defendants' rights.

Table 2.5 Federalists and Anti-Federalists Compared

	ANTI-FEDERALISTS	FEDERALISTS
Backgrounds	Small farmers, shopkeepers, laborers	Large landowners, wealthy merchants, professionals
Government Preferred	Strong state government Weak national government Direct election of officials Shorter terms Rule by the common man Strengthened protections for individual liberties	Weaker state governments Strong national government Indirect election of officials Longer terms Government by the elite Less concern for individual liberties

Table 2.6 The Bill of Rights (Arranged by Function)

Protection of Free Expression	
Amendment 1:	Freedom of speech, press, and assembly Freedom to petition government
Protection of Personal Beliefs	
Amendment 1:	No government establishment of religion Freedom to exercise religion
Protection of Privacy	
Amendment 3:	No forced quartering of troops in homes during peacetime
Amendment 4:	No unreasonable searches and seizures
Protection of Defendants' Rights	
Amendment 5:	Grand-jury indictment required for prosecution of serious crime No second prosecution for the same offense No compulsion to testify against oneself No loss of life, liberty, or property without due process of law
Amendment 6:	Right to a speedy and public trial by a local, impartial jury Right to be informed of charges against oneself Right to legal counsel Right to compel the attendance of favorable witnesses Right to cross-examine witnesses
Amendment 7:	Right to jury trial in civil suit where the value of controversy exceeds \$20
Amendment 8:	No excessive bail or fines No cruel and unusual punishments
Protection of Other Rights	
Amendment 2:	Right to bear arms
Amendment 5:	No taking of private property for public use without just compensation
Amendment 9:	Unlisted rights are not necessarily denied
Amendment 10:	Powers not delegated to the national government or denied to the states are reserved for the states or the people

ratifying convention, "to preserve the poor commonwealth of Virginia."²⁵ Many state political leaders feared that their own power would be diminished as well.

Finally, not everyone wanted the economy to be placed on a more sound foundation. Creditors opposed the issuance of paper money because it would produce inflation and make the money they received as payment on their loans decline in value. Debtors favored paper money, however. Their debts (such as the mortgages on their farms) would remain constant, but if money became more plentiful, it would be easier for them to pay off their debts.

Ratification

Federalists may not have had the support of the majority, but they made up for it in shrewd politicking. They knew that many members of the legislatures of some states were skeptical of the Constitution and that state legislatures were populated with political

leaders who would lose power under the Constitution. Thus, the Federalists specified that the Constitution be ratified by special conventions in each of the states—not by state legislatures.

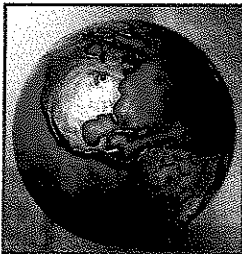
Delaware was the first to approve, on December 7, 1787. Only six months passed before New Hampshire's approval (the ninth) made the Constitution official. Virginia and New York then voted to join the new union. Two states were holdouts: North Carolina and Rhode Island made the promise of the Bill of Rights their price for joining the other states.

With the Constitution ratified, it was time to select officeholders. The framers of the Constitution assumed that George Washington would be elected the first president of the new government—even giving him the Convention's papers for safekeeping—and they were right. The general was the unanimous choice of the Electoral College for president. He took office on April 30, 1789, in New York City, the first national capital. New Englander John Adams became "His Superfluous Excellence," as Franklin called the vice president.

Constitutional Change

"The Constitution," said Jefferson, "belongs to the living and not to the dead." The U.S. Constitution is frequently—and rightly—referred to as a living document. It is constantly being tested and altered.

Generally, constitutional changes are made either by formal amendments or by a number of informal processes. Formal amendments change the letter of the Constitution. There is also an unwritten body of tradition, practice, and procedure that, when altered, may change the spirit of the Constitution. In fact, not all nations, even those that we call democratic, have written constitutions (see "America in Perspective: Democracy *Without* a Constitution?").



America in Perspective

Democracy *Without* a Constitution

Sometimes it is difficult for Americans to understand that constitutions can be both *written* and *unwritten*. They may be surprised to learn that Great Britain—often called "the cradle of democracy"—has no written constitution at all. The unwritten constitution of Britain is a mixture of acts of Parliament, judicial pronouncements, customs, and conventions about the rules of the political game. A number of documents are British constitutional landmarks, including the Magna Carta (the Great Charter), which King John accepted at Runnymede in 1215 and which limited the power of the monarch. None of these documents, however, out-

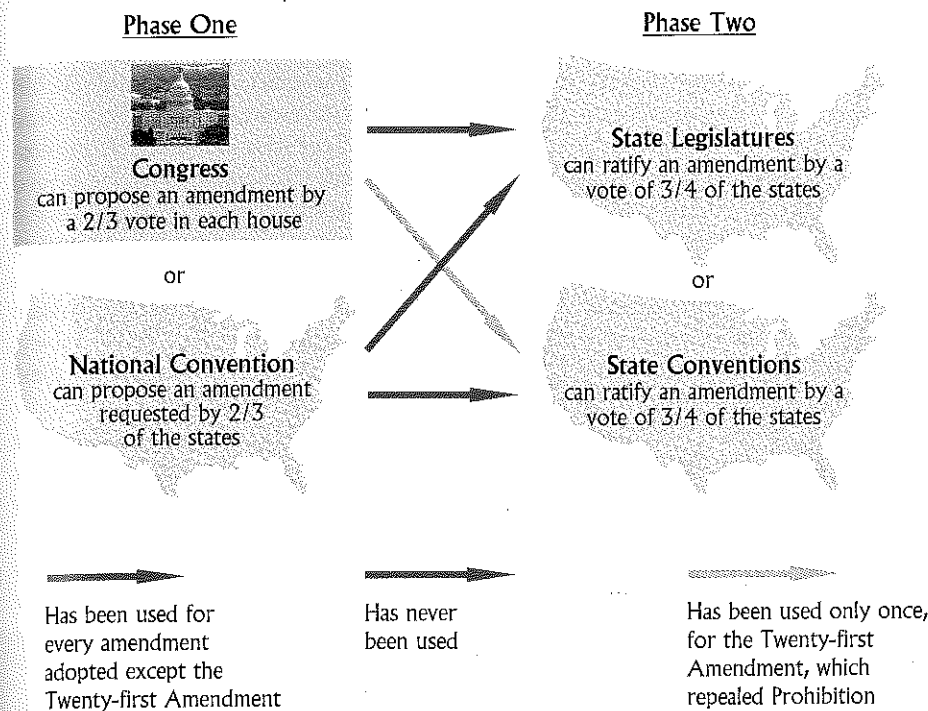
lines Britain's entire governmental system, as does the U.S. Constitution for the United States.

Although in theory the British monarch has the power to overrule laws passed by Parliament (the British legislature), the last time the monarch did so was in 1707, when Queen Anne vetoed the Scottish Militia bill. Today, it is unthinkable that the British monarch would veto an act of Parliament. Thus, in Great Britain, there is no way to argue that an act of Parliament is *unconstitutional*, since there is no written constitution to which one can appeal. If Parliament passes a law, it remains a law.

Nevertheless, Britain is undeniably a democracy. The political system allows

free speech, open and free elections, vigorously competing political parties, and all the other characteristics generally associated with democracy. British politicians simply have not had a need to produce a single constitutional document.

Britain has never experienced a sharp break with tradition—as in the American Revolution—forcing politicians to think about the basis of authority and the allocation of power, and then to write down how the country should be governed. As long as there is a basic consensus on how governing should take place, the British system works fine. When such a consensus is lacking, no government, whether it has a written or an unwritten constitution, can endure.

Figure 2.4 How the Constitution Can Be Amended

The Constitution sets up two alternative routes for proposing amendments and two for ratifying them. Only one of the four combinations has been used in every case but one.

The Formal Amending Process

The most explicit means of changing the Constitution is through the formal process of amendment. Article V of the Constitution outlines procedures for formal amendment. There are two stages to the amendment process—proposal and ratification—and each stage has two possible avenues (see Figure 2.4). An amendment may be proposed either by a two-thirds vote in each house of Congress or by a national convention called by Congress at the request of two-thirds of the state legislatures. An amendment may be ratified either by the legislatures of three-fourths of the states or by special state conventions called in three-fourths of the states. The president has no formal role in amending the Constitution, although the chief executive may influence the success of proposed amendments.

All but one of the successful amendments to the Constitution have been proposed by Congress and ratified by the state legislatures. The exception was the Twenty-first Amendment, which repealed the short-lived Eighteenth Amendment—the prohibition amendment that outlawed the sale and consumption of alcohol. The amendment was ratified by special state conventions rather than by state legislatures. Because proponents of repeal doubted that they could win in conservative legislatures, they persuaded Congress to require that state conventions be called.

Unquestionably, formal amendments have made the Constitution more egalitarian and democratic. The emphasis on economic issues in the original document is now balanced by amendments that emphasize equality and increase the ability of a popular majority to affect government. The amendments are headed by the Bill of Rights (see Table 2.6), which Chapter 4 will discuss in detail. Later amendments, including the Thirteenth Amendment abolishing slavery, have forbidden various political and social inequalities based on race, gender, and age (these amendments will be discussed in Chapter 5). Other amendments, discussed later in this chapter, have democratized the political system, making it easier for voters to influence the government. Only one existing amendment specifically addresses the economy—the



comparative
Constitutions

Equal Rights Amendment

A constitutional amendment passed by Congress in 1972 stating that “equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.” The amendment failed to acquire the necessary support from three-fourths of the state legislatures.



The History of
Constitutional
Amendments

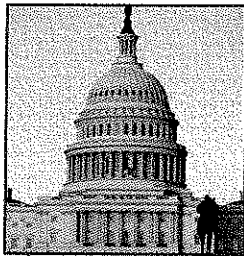
Sixteenth, or “income tax,” Amendment. Overall, it is clear that the most important effect of these constitutional amendments has been to expand liberty and equality in the United States.

Some amendments have been proposed but not ratified. The best known of these in recent years is the **Equal Rights Amendment**, or **ERA**. First introduced in Congress in 1923 by the nephew of suffragist Susan B. Anthony, the ERA had to wait 49 years—until 1972—before Congress passed it and sent it to the states for ratification. The ERA stated simply that “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”

This seemingly benign amendment sailed through Congress and the first few state legislatures. The Hawaiian legislature, in fact, arranged for Senator Daniel Inouye’s office to signal when the Senate passed the ERA so that Hawaii could be the first state to ratify.²⁶ Public opinion polls showed substantial support for the ERA. Surveys revealed that even people who held traditional views of women’s roles still supported the ERA.²⁷

Nevertheless, the ERA was not ratified. It failed, in part, because of the system of checks and balances. The ERA had to be approved not by a national majority but by three-fourths of the states. Many conservative Southern states opposed it, thus exercising their veto power despite approval by a majority of Americans.

Proponents of other constitutional amendments have been especially active in recent years. You can consider the issue of frequently amending the Constitution in “You Are the Policymaker: How Frequently Should We Amend the Constitution?”



You Are the Policymaker

How Frequently Should We Amend the Constitution?

Since the ratification of the Bill of Rights in 1791, there have been only 17 amendments to the Constitution—an average of one amendment every 13 years. It is now common, however, for political activists—and even political party platforms—to call for amendments. Some recent examples include prohibiting the burning of the American flag, permitting prayer in the public schools, making abortions unconstitutional, requiring a balanced national budget, limiting the length of congressional terms, and protecting victims’ rights—as well as guaranteeing women’s rights (the ERA).

Conservatives have been in the forefront of most recent calls for amendments (the ERA being an exception); many of the proposals for constitutional change are designed to overcome liberal Supreme Court decisions. Liberals, quite naturally, have opposed these amend-

ments. There is a larger question here than just the particular changes that advocates of amending the Constitution support, however. The big question is, How frequently should we change the fundamental law of the land?

Those who support amending the Constitution argue that the Constitution should reflect the will of the people. If the overwhelming majority of the public wants to prohibit burning the American flag, for example, why shouldn’t the Constitution reflect their preference? There is little possibility that a minority or even a narrow majority will be able to impose its will on the people, they argue, because the Constitution requires an extraordinary majority to ratify an amendment. So why should we be reluctant to test the waters of change?

Opponents of changing the Constitution frequently have their own arguments. It is ironic, they say, that conservatives, who typi-

cally wish to preserve the status quo, should be in the forefront of fundamental change. They argue that the Constitution has served the United States very well for more than two centuries with few changes. Why should we risk altering the fundamentals of the political system? And if we do, will we be setting a dangerous precedent that will encourage yet more change in the future? Will such changes undermine the very nature of a constitution that is designed to set the basic rules of the game and be above the political fray?

What do you think? Are the arguments simply a reflection of ideologies? Should the Constitution reflect the current sentiment of the public and be changed whenever that opinion changes? Or should we show more caution in amending the Constitution no matter how we feel about a specific amendment?

The Informal Process of Constitutional Change

The members of the Constitutional Convention preserved the written document called The Constitution. They hired Jacob Shallus, a German immigrant in Philadelphia, to write out the Constitution and paid him the handsome sum of \$30 to do so. The Convention was disbanding, having finished its work, and needed a rush job. On September 15, 1787, the conventioners gave Shallus only 40 hours to copy the Constitution itself. Prepared on four pieces of parchment made from lamb or calf skin and written with a quill pen in Shallus' elegant script, the actual document bounced from capital to capital during the early days of the Republic. Today it sits at the National Archives, bathed in helium and under the watchful eye of an electronic camera.

Of course, the written Constitution itself is never changed, even when we pass a constitutional amendment. We do not haul out Shallus' old parchment and then write in some lines to abolish slavery or to create an income tax; the amendments, too, are deposited in the National Archives. Think for a moment of all the changes in American government that have taken place without altering a word or a letter of the written document. In fact, there is not a word in the Constitution that would lead us to suspect any of the following developments:



How You Can Make A Difference

Amending the Constitution

Today, it's not likely that anyone could have the kind of impact that James Madison had on the Constitution. Nevertheless, there are opportunities for average Americans to influence this enduring but malleable document. If you can't write the original document, you at least have a chance to change it! Every year advocates propose and champion new constitutional amendments. Some never get noticed while others keep percolating year after year. Inevitably, every advocate of a proposed amendment generates a vocal opponent. This is evident in two proposals gaining prominent attention in recent years: the Flag Protection Amendment and the Victims' Rights Amendment.

The drive for the Flag Protection Amendment began in the 1990s after the Supreme Court ruled that state and national laws that prohibited flag desecration were unconstitutional. A constitutional amendment seemed the only alternative to proponents of flag protec-

tion. In 1995, 1997, and 2000, only close votes in the Senate prevented the passage of such resolutions. If it passes both the House and the Senate, it appears extremely likely that it would be ratified by the states. Advocates of this amendment like the Citizens Flag Alliance (www.cfa-inc.org) argue that the flag deserves to be protected as the nation's most significant and important symbol of unity. Opponents like the ACLU (www.aclu.org) counter that this amendment would limit freedom of speech and squelch dissent in America.

The Victims' Rights Amendment, another recent proposal, evokes a similar split in public opinion. This amendment would guarantee victims of crime specific rights including restitution and an increased role in criminal proceedings. The National Victims' Constitutional Amendment Network (www.ncvan.org) claims that this amendment would restore balance to a criminal justice system without restricting the rights due to those accused of crimes. Opponents of

this amendment come from a wide spectrum of American political thought. Fears of undermining the Bill of Rights drives the ACLU's opposition to this amendment while the libertarian Cato Institute (www.cato.org) argues that the federal government has no responsibility to address criminal problems. Like the Flag Protection Amendment, however, widespread public support within the states make eventual ratification of this amendment a distinct possibility if it ever passes both the House and the Senate.

You can make a difference in the battle for or against either of these proposed amendments by contacting the organizations listed and volunteering to take part in their advocacy efforts. You can also influence the shaping and interpretation of the Constitution by using more informal methods. Voting for presidential candidates that mirror your constitutional positions will enhance the likelihood that future Supreme Court justices and federal judges will interpret the Constitution along similar lines.

- The United States has the world's oldest two-party system, wherein almost every member of Congress and every president since Washington has declared, "I am a Democrat (or Republican, or Federalist, or Whig, or whatever)."
- Abortions through the second trimester of pregnancy (when the fetus cannot live outside the mother's womb) are legal in the United States.
- Members of the Electoral College consider themselves honor bound (and in some places even legally bound) to follow the preference of their state's electorate.
- Proceedings of both the Senate and the House are on TV; TV influences our political agenda and guides our assessments of candidates and issues.
- Government now taxes and spends about one-third of our gross domestic product, an amount the Convention delegates might have found gargantuan.

None of these things is "unconstitutional." The parties emerged, television came to prominence in American life, first technology and then the law permitted abortions—all without having to tinker with the Founders' handiwork. These developments could occur because the Constitution changes *informally* as well as formally. There are several ways in which the Constitution changes informally: through judicial interpretation, through political practice, and as a result of changes in technology and changes in the demands on policymakers.

Judicial Interpretation. Disputes often arise about the meaning of the Constitution. If it is the "supreme law of the land," then someone has to decide how to interpret the Constitution when disputes arise. In 1803, in the famous case of *Marbury v. Madison*, the Supreme Court decided it would be the one to resolve differences of opinion (Chapter 16 discusses this case in detail). It claimed for itself the power of **judicial review**. Implied but never explicitly stated in the Constitution,²⁸ this power gives courts the right to decide whether the actions of the legislative and executive branches of state and national governments are in accord with the Constitution.

Judicial interpretation can profoundly affect how the Constitution is understood because the Constitution usually means what the Supreme Court says it means. For example, in 1896 the Supreme Court decided that the Constitution allowed racial discrimination despite the presence of the Fourteenth Amendment. Fifty-eight years later it overruled itself and concluded that segregation by law violated the Constitution. In 1973, the Supreme Court decided that the Constitution protected a woman's right to an abortion during the first two trimesters of pregnancy when the fetus is not viable outside the womb—an issue the Founders never imagined. (These cases will be discussed in Chapters 4 and 5.)

Changing Political Practice. Current political practices also change the Constitution—stretching it, shaping it, and giving it new meaning. Probably no changes are more important than those related to parties and presidential elections.

Political parties as we know them did not exist when the Constitution was written. In fact, its authors would have disliked the idea of parties, which encourage factions. Regardless, by 1800 a party system had developed, and it plays a key role in making policy today. American government would be radically different if there were no political parties, even though the Constitution is silent about them.

Changing political practice has also altered the role of the Electoral College, which has now been reduced to a clerical one in selecting the president. The writers of the Constitution, eager to avoid giving too much power to the uneducated majority, intended that there be no popular vote for the president; instead, state legislatures or the voters (depending on the state) would select wise electors who would then choose a "distinguished character of continental reputation" (as the *Federalist Papers* put it) to be president. These electors formed the Electoral College. Each state would have the same number of electors to vote for the president as it had senators and representatives in Congress.

Marbury v. Madison

The 1803 case in which Chief Justice John Marshall and his associates first asserted the right of the **Supreme Court** to determine the meaning of the **U.S. Constitution**. The decision established the Court's power of **judicial review** over acts of Congress, in this case the Judiciary Act of 1789.

Judicial review

The power of the courts to determine whether acts of Congress, and by implication the executive, are in accord with the **U.S. Constitution**. Judicial review was established by John Marshall and his associates in *Marbury v. Madison*.

In 1796, the first election in which George Washington was not a candidate, electors scattered their votes among 13 candidates. By the election of 1800, domestic and foreign policy issues had divided the country into two political parties. To avoid dissipating their support, the parties required electors to pledge in advance to vote for the candidate who won their state's popular vote, leaving electors with a largely clerical function.

Although electors are now rubber stamps for the popular vote, nothing in the Constitution prohibits an elector from voting for any candidate. Every so often, electors have decided to cast votes for their own favorites; some state laws require electors to vote for the candidate chosen by a plurality of their state's citizens, but such laws have never been enforced. The idea that the Electoral College would exercise wisdom independent of the majority of people is now a constitutional anachronism, changed not by formal amendment but by political practice.

Technology. The Constitution has also been changed greatly by technology. The media have always played an important role in politics—questioning governmental policies, supporting candidates, and helping shape citizens' opinions. Modern technology, however, has spurred the development of a *mass* media that can rapidly reach huge audiences, something unimaginable in the eighteenth century. The bureaucracy has grown in importance with the development of computers, which create new potential for bureaucrats to serve the public (such as writing over 40 million Social Security checks each month)—and, at times, create mischief. Electronic communications and the development of atomic weapons have given the president's role as commander in chief added significance, increasing the power of the president in the constitutional system.

Increasing Demands on Policymakers. The significance of the presidency has also grown as a result of increased demands for new policies. The United States' evolution in the realm of international affairs—from an insignificant country that kept to itself to a superpower with an extraordinary range of international obligations—has concentrated additional power in the hands of the chief executive, who is designated to take the lead in foreign affairs. Similarly, the increased demands of domestic policy have positioned the president in a more prominent role in preparing the federal budget and a legislative program.

The Importance of Flexibility

The Constitution, even with all 27 amendments, is a short document containing fewer than 8,000 words. It does not prescribe in detail the structure and functioning of the national government. Regarding the judiciary, Congress is told simply to create a court system as it sees fit. The Supreme Court is the only court required by the Constitution, and even here the number of justices and their qualifications are left up to Congress. Similarly, many of the governing units we have today—such as the executive departments, the various offices in the White House, the independent regulatory commissions, and the committees of Congress, to name only a few examples—are not mentioned at all in the Constitution.

It is easy to see that the document the framers produced over 200 years ago was not meant to be static, written in stone. Instead, the Constitution's authors created a flexible system of government, one that could adapt to the needs of the times without sacrificing personal freedom. The framers allowed future generations to determine their own needs. As muscle grows on the constitutional skeleton, it inevitably gives new shape and purpose to the government. This flexibility has helped ensure the Constitution's—and the nation's—survival. Although the United States is young compared to other Western nations, it has the oldest functioning Constitution. France, which experienced a revolution in 1789, the same year the Constitution took effect,



has had 12 constitutions over the past two centuries. Despite the great diversity of the American population, the enormous size of the country, and the extraordinary changes that have taken place over the nation's history, the U.S. Constitution is still going strong.

Understanding the Constitution

As the body of rules that govern our nation, the Constitution has an impact on our everyday lives. A nation that prides itself on being “democratic” must evaluate the Constitution according to democratic standards. Our theme of the scope of government runs throughout this chapter, which focuses on what the national government can and cannot do. The following section will examine the Constitution in terms of democracy.

The Constitution and Democracy

Although the United States is often said to be one of the most democratic societies in the world, the Constitution itself is rarely described as democratic. This paradox is hardly surprising, considering the political philosophies of the men who wrote it. Among eighteenth-century upper-class society, democratic government was generally despised. If democracy was a way of permitting the majority's preference to become policy, the Constitution's authors wanted no part of it. The American government was to be a government of the “rich, well-born, and able,” as Hamilton said, a government where John Jay's wish that “the people who own the country ought to govern it” would be a reality. Few people today would consider these thoughts democratic.

The Constitution did not, however, create a monarchy or a feudal aristocracy. It created a republic, a representative form of democracy modeled after the Lockean tradition of limited government. Thus, the undemocratic—even antidemocratic—Constitution established a government that permitted substantial movement toward democracy.

One of the central themes of American history is the gradual democratization of the Constitution. What began as a document characterized by numerous restrictions on direct voter participation has slowly become much more democratic. Today, few people share the Founders' fear of democracy. The expansion of voting rights has

moved the American political system away from the elitist model of democracy and toward the pluralist model.

The Constitution itself offered no guidelines on voter eligibility, leaving it to each state to decide. As a result, only a small percentage of adults could vote; women and slaves were excluded entirely. Of the 17 constitutional amendments passed since the Bill of Rights, 5 have focused on the expansion of the electorate. The Fifteenth Amendment (1870) prohibited discrimination on the basis of race in determining voter eligibility (although it took the Voting Rights Act of 1965, discussed in Chapter 5, to make the amendment effective). The Nineteenth Amendment (1920) gave women the right to vote (although some states had already done so). The Twenty-third Amendment (1961) accorded the residents of Washington, D.C. the right to vote in presidential elections. Three years later, the Twenty-fourth Amendment prohibited poll taxes (which discriminated against the poor). Finally, the Twenty-sixth Amendment (1971) lowered the voter eligibility age to 18.

Not only are more people eligible to vote, but voters now have more officials to elect. The Seventeenth Amendment (1913) provided for direct election of senators. Presidential elections have been fundamentally altered by the development of political parties. By placing the same candidate on the ballot in all the states and requiring members of the electoral college to support the candidate who receives the most votes, parties have increased the probability that the candidate for whom most Americans vote will also receive a majority of the electoral college vote. According to the Constitution, the United States selects its president through an Electoral College, but in practice American citizens now directly elect the president. (For more on the Electoral College, see Chapter 10.) Nevertheless, it is possible for the candidate who receives the most popular votes to lose the election, as occurred in 1824, 1876, 1888, and 2000.

Technology has also diminished the separation of the people from those who exercise power. Officeholders communicate directly with the public through television, radio, and targeted mailings. Air travel makes it easy for members of Congress to commute regularly between Washington and their districts. Similarly, public opinion polls, the telephone, and e-mail enable officials to stay apprised of citizens' opinions on important issues. Even though the American population has grown from fewer than 4 million to 281 million people since the first census was taken in 1790, the national government has never been closer to those it serves.



The Constitution and the Scope of Government

The Constitution created political institutions and the rules for politics and policymaking. Many of these rules limit government action. This limiting function is what the Bill of Rights and related provisions in the Constitution are all about. No matter how large the majority, for example, it is unconstitutional to establish a state-supported church.

Most of these limitations are designed primarily to protect liberty and to open the system to a broad range of participants. The potential range of action for the government is actually quite wide. Thus it is constitutionally permissible, although highly unlikely, for the United States either to abolish Social Security payments to the elderly or to take over ownership of the oil industry or the nation's airlines.

Yet the system of government created by the Constitution has profound implications for what the government does. On the one hand, individualism is reinforced at every turn. The separation of powers and the checks and balances established by the Constitution allow almost all groups some place in the political system where their demands for public policy can be heard. Because many institutions share power, groups can usually find at least one sympathetic ear in government. Even if the president opposes the policies a particular group favors, Congress, the courts, or some other institution can help the group achieve its policy goals.

In the early days of the civil rights movement, for example, African Americans found Congress and the president unsympathetic, so they turned to the Supreme

Court. Getting their interests on the political agenda would have been much more difficult if the Court had not had important constitutional power.

On the other hand, the Constitution encourages hyperpluralism. By providing effective access for so many interests, the Founders created a system of policymaking in which it is difficult for the government to act. The separation of powers and the system of checks and balances promote the politics of bargaining, compromise, and playing one institution against another. The system of checks and balances implies that one institution is checking another. *Thwarting, blocking, and impeding* are synonyms for checking. But if I block you, and you block someone else, and that person blocks me, none of us is going to accomplish anything, and we have gridlock.

Some scholars suggest that so much checking was built into the American political system that effective government is almost impossible. The historian and political scientist James MacGregor Burns has argued that

We have been too much entranced by the Madisonian model of government . . . The system of checks and balances and interlocked gears of government . . . requires the consensus of many groups and leaders before the nation can act; . . . we underestimate the extent to which our system was designed for deadlock and inaction.²⁹

If the president, Congress, and the courts all pull in different directions on policy, the result may be either no policy at all (gridlock) or an inadequate, makeshift policy. The outcome may be nondecisions when hard decisions are needed. If government cannot respond effectively because its policymaking processes are too fragmented, then its performance will be inadequate. Perhaps the Madisonian model has reduced the ability of government to reach effective policy decisions. Certainly, radical departures from the status quo are atypical in American politics.

Summary

The year 1787 was crucial in building the American nation. The 55 men who met in Philadelphia created a policymaking system that responded to a complex policy agenda. Critical conflicts over equality led to key compromises in the New Jersey and Virginia Plans, the three-fifths compromise on slavery, and the decision to leave the issue of voting rights to the states. There was more consensus, however, about the economy. These merchants, lawyers, and large landowners believed that the American economy was in a shambles, and they intended to make the national government an economic stabilizer. The specificity of the powers assigned to Congress left no doubt that Congress was to forge national economic policy. The delegates knew, too, that the global posture of the fledgling nation was pitifully weak. A strong national government would be better able to ensure its own security and that of the nation.

Madison and his colleagues were less clear about the protection of individual rights. Because they believed that the limited government they had constructed would protect freedom, they said little about individual rights in the Constitution. However, the ratification struggle revealed that protection of personal freedoms was much on the public's mind. As a result, the Bill of Rights was proposed. These first 10 amendments to the Constitution, along with the Thirteenth and Fourteenth Amendments, provide Americans with protection from governmental restraints on individual freedoms.

It is important to remember that 1787 was not the only year of nation building. The nation's colonial and revolutionary heritage shaped the meetings in Philadelphia. Budding industrialism in a basically agrarian nation put economic issues on the Philadelphia agenda. What Madison was to call an "unequal division of property" made equality an issue, particularly after Shays' Rebellion. The greatest inequality of all, that between slavery and freedom, was so contentious an issue that it was simply avoided at Philadelphia.

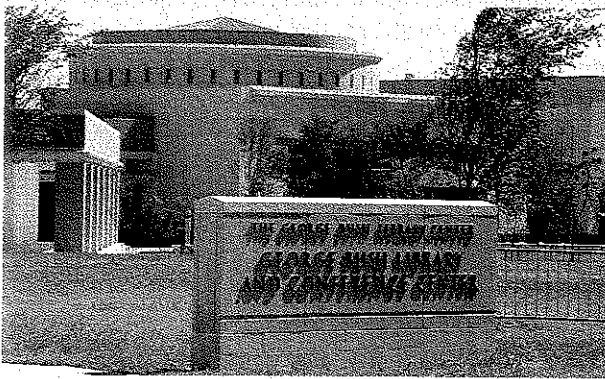
Career Profile

Position: Senior Archivist

Salary Range: \$41,952–\$54,538

Benefits: Health and life insurance and retirement benefits.

Qualifications: A bachelor's degree is required with a master's degree in history, political science, or library science preferred. Candidates should have a minimum of 18 units in history and/or political science as undergrads. An ability to communicate effectively in oral and written form is required.



Real People on the Job: Bob Holzweiss

Want a job that involves deciphering constitutional decisions, top-secret documents, and pivotal moments in the history of American government and politics? If so, consider becoming an archivist within the presidential library system and the National Archives. This is exactly what Bob Holzweiss does.

Bob is the senior archivist at the George Bush Presidential Library at Texas A&M University. Working

with other investigators, Bob searches for original documents and artifacts concerning the significant events of the Bush presidency. Events like the Gulf War, the Clarence Thomas hearings, U.S. involvement in Somalia and Panama, and the fall of the Berlin Wall come under Bob's purview. The job requires a great deal of detective work. After Bob and his team finally track down the documents they're looking for, they spend time carefully analyzing them. Some material contains top-secret information, confidential advice to the president, or other restricted data, so part of Bob's job is to decide whether or not the material can be released to the public. He relies upon criteria outlined by President Bush, the Presidential Records Act of 1986, and the Freedom of Information Act. Bob and his fellow archivists often know far more about the pivotal events in U.S. history than historians and political scientists do.

This job's wide range of activities and responsibilities ensure that a day at the office is never boring! Bob uses his computing skills to create interactive and informative websites. He plays a crucial role in designing exhibits at the museum by offering suggestions about which documents to include and writing detailed explanations of the content. Once every four weeks, Bob works directly with outside researchers and coordinates their efforts to use the library's resources. At times, his job involves meeting with current and former public officials ranging from former President George Bush and Supreme Court Justice Clarence Thomas to former directors of the CIA and foreign heads of state.

For further information about getting a job as an archivist, contact the National Archives and Records Administration that oversees 12 presidential libraries and museums, 35 regional NARA offices nationwide, and six national offices in the Washington, D.C. area. Call 1-800-NARA-NARA or see www.archives.gov for employment information.

Nor did ratification of the Constitution end the nation-building process. Constitutional change—both formal and informal—continues to shape and alter the letter and the spirit of the Madisonian system.

Because that system includes separate institutions sharing power, it results in many checks and balances. Today, some Americans complain that this system has created a government too responsive to too many interests and too fragmented to act. Others praise the way it protects minority views. In Chapter 3, we will look at yet another way in which the Constitution divides governmental power: between the national and the state governments.