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The Constitution

LOWERING THE VOTING AGE TO 18



Young Americans between the ages of 18 and 21 did not always have the right to vote. Today they do. The uniform adoption of an 18-year-old voting age across the United States was accomplished through the ratification of the Twenty-sixth Amendment to the U.S. Constitution in 1971. A handful of states had previously lowered their voting age, at least for some elections. Most states, however, still had 21 as the legal age for voting at the beginning of the 1970s. This was consistent with the societal consensus that 21 was the age of maturity.¹

The Vietnam War provided one key catalyst to changing thoughts about the age of maturity. Eighteen- to twenty-year-olds were dying in large numbers on the battlefield, but they did not have the right to vote for the leaders who sent them to war. Similar pressure had arisen following World War II and the Korean War, however, but amendments to change the voting age had gone nowhere. Many Americans saw young people of 18 to 20 as rebellious, uncertain, and susceptible to emotional appeals and rabble rousing rather than as sober and thoughtful citizens.

Vietnam changed everything. Unlike the previous conflicts, this one became tremendously controversial and highly unpopular among large segments of the population. It was especially unpopular among younger Americans, in part because of the military draft, and they protested in unconventional ways because they could not vote. States began to reconsider their laws, and support grew again at the national level for an amendment. In addition to the organizations that had supported the idea for decades, a number of youth organizations pressed for the 18-year-old vote, as did labor unions, some church groups, and organizations linked to the civil rights movement. The societal consensus for an 18-year-old voting age grew.

The path to an amendment accelerated in 1970, with the addition of a provision in the Senate's renewal of the Voting Rights Act (originally passed in 1965) that lowered the age for all elections

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Outline the problems the Framers of the Constitution attempted to resolve and the solutions they devised, p. 73.

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Explain the processes of constitutional change, p. 91.



FIT TO SERVE BUT NOT TO VOTE Young American soldiers of the Ninth Infantry along the South Vietnamese–Cambodian border in May 1970. The contrast between young adults ages 18–20 serving in combat but being unable to vote led to demands, as during previous wars, that the voting age be lowered. One reason the demand succeeded at this time was the controversy over the war itself. Not only were the troops unable to vote, but the young adults who marched in large numbers against and for the war were also shut out of the ballot box.

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3

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to 18. A challenge to the provision quickly reached the Supreme Court. In *Oregon v. Mitchell* (1970), a divided Court concluded that Congress could set the age for federal elections but not state elections. Therefore, the country was now faced with an 18-year-old voting age for federal elections (president, U.S. House, U.S. Senate) and whatever age each state set for its own elections.

This scenario promised a very difficult election in 1972. Many states would have to monitor different voting ages for different parts of the ballot. Even if they wanted to change their voting age to 18, in many states that change might require voter approval of a proposed state constitutional amendment at two subsequent elections. A national consensus now existed that lowering the voting age uniformly was right, whether on policy grounds or because of the difficulties facing election administration without a uniform age.

Spurred by the Court's action, Congress moved quickly. Within a month of the *Oregon v. Mitchell* decision, Randolph Jennings, who had proposed the first constitutional amendment on the issue in 1942, introduced another one to lower the voting age. The Senate approved the amendment unanimously, and the House approved the amendment with fewer than 20 dissenting votes, before it was sent to the states for ratification. The amendment needed quick passage to be in effect for 1972. A little over three months after being sent to the states, the Twenty-sixth Amendment had been ratified and added to the Constitution.

The quick response and ratification of this amendment across the states mark it as unusual. However, in terms of the importance of causal factors such as societal consensus; interest-group pressure; and politicians who believed in the proposal for reasons of good policy or electoral advantage, or both, the story of the Twenty-sixth Amendment resembles those of other successful amendments.²

In addition to establishing voting rights, the U.S. Constitution wrestles with many questions. What are the responsibilities of the different branches of government? How can the Constitution ensure that no one part of American government becomes too powerful or too unchecked in its exercise of power? How can it protect the liberties and rights of the people, and what are the limits to those liberties and rights? In this chapter, we explore how the Framers answered these questions as they wrote the Constitution. Based on their experience with Great Britain, as well as their experience in governing the new country after the Revolution in 1776, the Framers were deeply concerned with power—its use, abuse, extent, and proper exercise—as they designed a new system of government. Over the centuries since, public officials have worked within the Constitution's constraints but also, in turn, have sought to reshape and redefine those constraints.

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From Revolution to Constitution

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Trace the developments that led to the American Revolution and the country's first constitution.

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omentous in its impact, the American Revolution has been difficult for historians to classify. Unlike other revolutions, it was not a revolt of one social class against another or a replacement of one economic system by another. If it was not a revolution in these ways, then what was it?

The American Revolution Changed Ideas About Governance

One answer provided by political scientists and historians is that the American Revolution was an “ideological” revolution, which is to say a revolution most notably about ideas and philosophy of governing.³ To colonial leaders, human beings were inherently susceptible to being corrupted and to using the instruments of government power, whether legislation, rules, and regulations or criminal sanctions, to advantage

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themselves and harm others. Government was necessary, they believed, but government could also be used to impose its will over other individuals and groups. The victims of the abusive use of government power were individual liberty and freedom. To defend liberty and thwart excessive power required vigilance and virtue from ordinary people as well as political leaders. Voters needed to select their leaders with care and to be sure they were individuals of honesty and integrity. Leaders needed to exercise self-discipline and to use government power judiciously. Voters as well as leaders had to refrain from seeing government power as primarily a means to benefit themselves and harm others.

The colonists drew insights from their own experience and borrowed liberally from various political theorists and writers. British political theorist John Locke's ideas on limited government and social contracts were especially influential. The idea of the social contract was that the relationship between the governed and those people in power was equivalent to a business contract in which each side had obligations to fulfill or the contract would become void.⁴ The governed were not bound indefinitely to corrupt or dysfunctional political institutions. From this foundation, the colonists built a new understanding of politics based on the concepts of representation, constitutional rights, and sovereignty.

During the decade prior to the colonists' formal declaration of independence, the language of democratic representation was a key rallying cry to build enthusiasm for the prospect of a separation from Great Britain. The expression "no taxation without representation" highlights one of the most famous demands from the American Revolution and has been learned by every schoolchild since then as a key to what the revolution was about. British government officials attempted to convince the colonists they were "virtually represented"—that even though the colonists did not elect members of Parliament, members of Parliament in effect represented their interests because they tended to the interests of the British Empire in general, and these two sets of interests were the same. The colonists, instead, touted the concept of direct representation: the job of the representative was to reflect faithfully the opinions of the constituents who elected him. Citizens should send representatives to the legislature with specific instructions about how to vote.

In addition, the colonists believed that constitutions should mark the boundaries of legitimate government power. People had natural, inherent rights that preceded any government action, and written constitutions were needed to protect these rights. The belief in the importance of written language to constrain the use of power and to protect liberties had a long heritage in England, dating back to the Charter of Liberties in the twelfth century, which spelled out protections for church officials among others; and the Magna Carta in the thirteenth century, which delineated some of the limits on the sovereign's authority, detailed the rights of Parliament, and specified some liberties of individuals. During the seventeenth century, England adopted other documents such as the Bill of Rights, which further protected individual rights. Although England did not have a single written constitution, it did have foundational written documents that, taken together, served a similar role.

Lastly, the colonists challenged the dominant view of sovereignty. In Britain, the idea that there could be only one final, ultimate authority—sovereignty—was undisputed. The colonists, however, argued that sovereignty could be divided. Authority could be located in different geographical locations, for example at the local and national levels, as well as in different institutions, such as the executive and legislative branches.

The combination of these beliefs generated a radical view of the people as self-governing. The concept of "the people" as a positive, active force, rather than just passive subjects of government, became a touchstone for much of the oratory of the period.⁵ The people's role had been transformed from occasional watchdog to participant: the people were not only a check on government, they in effect were the government. In this new conceptual understanding of how politics should work, the active and continuous consent of the governed was necessary.⁶

The Colonists Rebelled Against Taxes Imposed Unilaterally by the British Government

The immediate impetus for the revolution was a series of economic and political events, many of which received prominent billing in the Declaration of Independence. The causal forces are difficult to disentangle. Would the events have had such resonance in the absence of new ideas about the right of the people to self-government? For decades, the colonists had been out of the practical reach of British rulers and had been allowed to operate with extensive freedom. This experience built their confidence in their ability to self-govern. So we can flip the question and ask: would those ideas about self-government have flourished as thoroughly in the absence of a set of provocative events? After all, the revolutionary leaders were not simply dreamily concocting new political ideas from the sidelines—they were practical and strategic politicians whose ideas about government were forged in the political battles within the colonies and with Britain.

The best resolution to these questions is to see the events and ideas as mutually reinforcing. When Britain began to clamp down on the colonies, the colonists believed the freedom they had already achieved was being threatened, and this threat reinforced the appeal of self-governance. To colonists, the revolution was needed to maintain their freedom, not to create it. As they saw it, a campaign was afoot to demolish American liberty. These causal factors—ideas and events—cannot be completely separated, as each furthered the other and both in turn fostered sentiment for revolution.

The two most influential economic groups of the day were New England merchants and southern planters. These two groups had long been fiercely loyal to the British government, and by controlling key positions of power in the colonies, they prevented more radical elements from pushing toward conflict with the mother country. However, they also became agitated by the changes in British policies, particularly the tax policies. Beginning in the 1650s, a sequence of actions by the British government sought to bring the colonies under control.

NAVIGATION ACTS The British government passed the Navigation Acts between 1651 and 1696. The Navigation Acts were a series of laws that set the rules for trade to and from the colonies. Economic growth in the American colonies benefited England, so although the Acts generally did not seek to depress trade, they did set rules about which products must be transported in English ships, which products had to be shipped to England prior to their final destination, which products were subject to a tax when unloaded or inspected in England, and so on.

MOLASSES AND SUGAR ACTS In 1733, the Molasses Act imposed a heavy tax on shipments of molasses from locations other than the British West Indies, which drove up the costs to producers (especially of rum) and merchants in America. The law was widely flouted through smuggling, and in 1764 the Sugar Act provided for a lower rate than the existing molasses tax but also promised much stricter enforcement and added new limits on the markets to which certain exports, such as lumber, could be sent.

CURRENCY ACT The Currency Act of 1764 established that the colonial governments could issue paper currency, but this currency could not be used as legal tender in the repayment of public or private debts (gold and silver, relatively scarce in the colonies, would need to be used instead). This act helped protect British creditors and merchants from being paid in paper currency of depreciated value.

STAMP ACT From 1754 to 1760 in North America, and from 1756 to 1763 in Europe, Britain engaged in the French and Indian War, which depleted the British treasury. In North America, the war resulted in France transferring land in what is now Canada and areas west of the British colonies to Great Britain and transferring the region known as Louisiana to Spain, while Spain transferred the region known as

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Florida to Great Britain (this region would return to Spanish control at the end of the American Revolutionary War in 1783). The French and Indian War was a major, expensive conflict. Believing that many of its costs were related to maintaining the safety of the American colonists and that the colonists had experienced a free ride for some time while British citizens subsidized the colonies extensively, the British government instituted new policies designed to extract some revenue from this



TAXATION WITHOUT REPRESENTATION

Taxes are rarely popular. They are even more unpopular when people believe they have been imposed without fair representation of their point of view. One of the chief debates between the colonists and the British government was over the nature of representation. Actions such as the Stamp Act convinced Americans that they had no genuine representation in the British political system.

growing part of its empire. The Stamp Act, passed by Parliament in 1765, required all legal documents, licenses, commercial contracts, newspapers, and pamphlets to obtain a tax stamp. The colonists immediately rebelled. Stamp agents were attacked by mobs, and many had their property destroyed. Protests erupted, and several colonial assemblies passed resolutions against the act. The Stamp Act Congress, also known as the First Congress of the American Colonies, marked the first time that a number of the colonies sent representatives to a meeting to discuss a response to British actions. The Congress, representing nine colonies, signed the Declaration of Rights and Grievances at its meetings in October 1765. The Declaration, although stating the colonies' affection for the king and respect for parliamentary authority, argued that Parliament could not impose the stamp tax because the colonies were not directly represented in Parliament. In addition to the widespread discontent in the colonies, a boycott of British goods finally led Parliament to repeal the tax. But Parliament then passed the Declaratory Act on the same day of the repeal in March 1766, stating it was the right of the British government to pass laws that would be binding on the colonists. The British government wanted to send a clear message that the colonies were indeed part of the British Empire and subject to its edicts.

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TOWNSHEND ACTS That message would soon be reinforced with the Townshend Acts, named after Charles Townshend, prime minister of Britain beginning in 1767, the year of the passage of the Acts. One of these acts suspended the New York legislature because that colony had not complied with a law requiring that British soldiers be quartered in (that is, reside in) housing owned by the colonists. The Revenue Act, the second of the Townshend Acts, imposed customs duties (taxes) on colonial imports of glass, lead, paint, paper, and tea. Generally, these fees were passed along to the colonists in the form of higher price tags on such products. Resistance to the Revenue Act was considerable. The British disbanded the Massachusetts Assembly in 1768 because of its unwillingness to enforce the law. Tensions rose during the next 18 months, culminating with the Boston Massacre in March 1770. British soldiers, enduring another day of taunting from a crowd gathered at the Customs House, killed five colonists. The event and the subsequent acquittals of the soldiers further agitated the colonists. Ultimately, boycotts and merchants' refusal to import goods led to the repeal of all the Townshend duties except that on tea.

TEA ACT In 1773, the British government enacted a particularly controversial new economic policy, the Tea Act. Tea was an extremely important industry in that era. Leaders of the economically advanced countries of the day believed that tea, much like high technology today or automobiles 40 years ago, stimulated the national economy. Nearly every country wanted a piece of this industry. Competition was brisk, but the profit potential was enormous. The Tea Act allowed the British-controlled East India Company to export its tea to America without paying the tea duty that had been imposed by the Townshend Acts. The Tea Act made the British tea cheaper than Dutch tea, which up to that point had dominated the American market and was sold by colonial merchants (in violation of the Navigation Acts). The East India Company used its own British agents to sell the tea or relied on merchants with political connections to colonial governors appointed by the king, thereby squeezing out many colonial merchants.

The colonists' response was the incident known as the Boston Tea Party. Inflammatory language unmistakably threatened death to anyone who assisted the East India Company in unloading its tea. In December 1773, protesters prevented the unloading of East India Company tea and threw the tea in the harbor. The British government viewed the Tea Party as an act of terrorism—random violence and property damage coupled with random threats designed to intimidate colonists and British officials alike, all to prevent a company from carrying out its legal activities. To Americans, however, the Tea Party became a symbol of reaction against powerful government, a symbol that every schoolchild for generations has learned. The Tea Party movement that emerged in 2009 is the latest in a long line of protests that use Boston Tea Party imagery to link back to this iconic event.

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Declaration of Independence

document announcing the intention of the colonies to separate from Great Britain based on shared grievances about the treatment of the colonists by the British government.

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INTOLERABLE ACTS When the Boston Town Meeting refused Parliament’s demand for compensation for the tea, the British government retaliated with what colonists referred to as the Intolerable Acts. These acts closed the port of Boston, restricted the power of the Massachusetts Assembly and local town meetings, quartered troops in private houses, and exempted British officials from trial in Massachusetts. In response, 12 of the 13 colonies banded together to establish the First Continental Congress in September and October 1774.⁷

Thomas Jefferson wrote “A Summary View of the Rights of British America” to guide the Virginia delegates who attended the Congress, and the document was later shared with delegates from the other colonies. In addition to specific complaints about the British laws discussed previously, Jefferson argued more theoretically that Parliament’s governing authority did not include the colonies, that the colonists had natural rights rather than rights granted to them by the king, and that whatever loyalty the colonists offered the king was voluntary and not obligatory. Although “A Summary View” did not call for the colonies to break from Great Britain, Jefferson’s strongly worded argument led some scholars to consider it his first draft of the Declaration of Independence.⁸ “A Summary View” also greatly increased Jefferson’s national visibility as a visionary and stirring writer. Ultimately, the Congress issued demands to the king in the form of a Declaration and Resolves. Although more mildly stated and less challenging to British authority than Jefferson’s words, the Declaration and Resolves made it clear that the conflict in America was reaching a boiling point. In addition to issuing this document, the delegates at the Congress developed plans for colonial resistance to what they deemed to be an overbearing imperial government.

□ The Declaration of Independence Aimed to Build a Nation

The Continental Congress met a second time from May 1775 through December 1776 in a charged atmosphere. In April 1775, skirmishes had broken out in Lexington and Concord, Massachusetts, representing the start of the Revolutionary War. Parliament had rejected the First Continental Congress’s Declaration and Resolves, which set out complaints about economic policies, lack of representation, British domination of the colonial judicial system, and disbanding of colonial legislatures. Communications within and between the colonies about the trouble with the British government were frequent and impassioned, with writers such as Thomas Paine using pamphlets and his 1776 book *Common Sense* to arouse opposition to the royal government.

Recognizing the drift of events and opinion, the Second Continental Congress began the process of building a new government by approving the issuance of currency, establishing diplomatic and trade relations with other countries, and creating an army. George Washington served as the general of the new Continental Army, and throughout the war he used a combination of troops from the Army and the state militias.

Influenced by experience, their reading of history, the lessons of the republics of antiquity in Greece and Rome, and the ideas of a range of writers, political leaders began building the intellectual framework necessary to justify revolution. On July 4, 1776, their efforts bore fruit, as the Second Continental Congress approved the **Declaration of Independence**, which was the product of a committee created by the Second Congress and largely drafted by Thomas Jefferson, borrowing many themes from his earlier “A Summary View of the Rights of British America.”

The Declaration asserted that rights of life, liberty, property, and the pursuit of happiness were “unalienable,” meaning they cannot be given away. Similarly, as expressed earlier by British philosopher John Locke, these rights were natural, present in people as an essential part of their being. Government did not provide these rights—the most it could do was restrict them. When it restricted them arbitrarily and unjustly, then revolution was an appropriate response. The Declaration of Independence was also an attempt to find common ground that would join the colonists



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THE DECLARATION OF INDEPENDENCE

The Second Continental Congress adopted the Declaration of Independence on July 4, 1776. The Declaration sought to build a sense of national unity. Creating a nation, and the shared goals and sacrifices that go with it, was one contributing factor in the success of the Revolutionary effort.

as “Americans.” Although “nation” is often used as synonymous with “country,” from a political science perspective a **nation** is a distinctive concept. It refers to a shared sense of understanding among a people that they are different and separate from other peoples; that basic principles, values, and outlooks unite them; and that they have a right to self-government. The Declaration attempted to inspire that sense of nationhood.

France, Spain, and the Dutch Republic supplemented the efforts of the Americans. All of these countries were long-time opponents of the British. France challenged Britain militarily in America, and the Spanish and Dutch engaged in conflicts with Britain in Europe, stretching British military resources thin. In October 1781, American and French troops combined for a decisive victory at the Battle of Yorktown (Virginia), which led to the surrender of the British Army. The Americans and the British negotiated the terms of peace in 1782 and signed the Treaty of Paris to end the war officially in September 1783.

nation

a shared sense of understanding and belonging among a people that they are different and separate from other peoples with particular characteristics and that they have a right to self-government over a defined territory.

The Articles of Confederation Aimed to Build a Government

The next step after declaring independence was to build a set of government institutions infused by fundamental principles, rules of operation, values, and beliefs.⁹ A government enhances a population’s sense of nationhood. Constructing a government that can rule effectively and is consistent with a population’s sense of nationhood was a significant challenge in 1776, just as it is in emerging democracies today. Rules and

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Articles of Confederation

the first constitution of the United States, which based most power in the states.

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procedures guide how governments operate, and rules laid down early can be difficult to change later. The stakes, therefore, are high.

The first attempt to devise governing principles and draft a national constitution was the **Articles of Confederation**. The move to draft the Articles began in June 1776 at the same time the Second Continental Congress began drafting the Declaration of Independence. John Dickinson, an attorney and politician from Pennsylvania, was appointed as the chair of the drafting committee. Dickinson was known nationally as the author of *Letters from a Farmer in Pennsylvania*, a collection of 12 essays published in 1767–1768 that challenged the Townshend Acts and specifically the authority of Parliament to levy taxes in the colonies to raise revenue for Great Britain.

After one month, the committee presented a first draft of the Articles to the Second Continental Congress. The Second Congress approved them in November 1777, and each of the 13 former colonies (now called states) had to ratify the document. Upon ratification in 1781, the Second Continental Congress became the Congress of the Confederation, more commonly called the Continental Congress, with the members of the Second Congress maintaining their seats in the new legislative body.

The Articles remained in effect until 1789 and were, in effect, the governing document of the United States during the Revolutionary War despite formal ratification not being completed until 1781.¹⁰ The challenge facing the authors of the Articles of Confederation was to create a government that embraced the sense of nationhood expressed in the Declaration of Independence, while also recognizing that Americans primarily identified themselves by the individual states in which they lived. The Articles of Confederation reflected a deep fear of centralized political power, born out of the Americans' experience with Parliament and British monarchs and expressed in the Declaration of Independence. It also provided a leading role for the states. For both these reasons, it seemed a reasonable fit for the new country.

Under the Articles, the national government was based in Congress. Members of Congress were selected by state legislatures, paid by the states, and able to be recalled and removed from office by the states. Laws were to be implemented by the individual states. There was neither an executive branch nor a judiciary. It was difficult for Congress to pass legislation. Although state legislatures typically sent three representatives to Congress, each state cast only one vote. For a bill to pass, a simple majority of 7 of the 13 states was not enough. Instead, a supermajority—a set amount that is more than a simple majority—of 9 states had to agree. Changing the Articles required the approval of all 13 states.

PROBLEMS WITH THE ARTICLES OF CONFEDERATION QUICKLY BECAME APPARENT Difficulties with the Articles set in almost immediately, in part because Congress's powers were limited. Although this was consistent with American ideas about limited government, the government also needed to perform basic functions. Congress could declare war—but there was no standing national army. It could regulate trade with Native Americans—but it could not regulate trade between the states. It could borrow or coin money—but it could not institute taxes. Effectively, the system of government built under the Articles of Confederation made the national government almost entirely dependent on the voluntary cooperation of the states. There was little this government controlled and little it could do to force action.

Action was sometimes needed internationally, but the United States had no coherent way to deal with other countries. Economic treaties were a free-for-all, with states making their own arrangements with foreign countries. Under the Articles, Congress would have had no way to enforce international treaties even if it had been able to negotiate them. Although Congress could declare war and could name senior army officers, any military action required pulling together the disparate state militias.

Given the control of portions of North America by European countries, and the ongoing interactions with Indian tribes, a more coordinated effort with national leadership was an appealing idea to many public officials.

Action was sometimes needed internally as well. The domestic upheaval during the 1780s shook many politicians, merchants, and creditors. In a number of states, legislatures passed laws extending the terms of repayments for debts and reducing penalties for nonpayment. Others provided paper currency not backed by guaranteed conversion into specific amounts of silver or gold, asking creditors and merchants to accept potentially worthless paper in exchange for the land, services, or goods they had provided. Rhode Island's legislature went the furthest, though, first issuing paper currency for debt repayment; next mandating that creditors and merchants accept the currency or face fines; and finally when its highest court declared the mandated currency to be in violation of the state constitution, dismissing several members of the

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COURTING TROUBLE

Shays's Rebellion, in which rebels in western Massachusetts took control of courthouses, as shown here, was a wake-up call to political and business leaders around the country.

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Shays's Rebellion

a protest by farmers in western Massachusetts in 1786–1787 to stop foreclosures on property by state courts; it convinced many political leaders that the Articles of Confederation were insufficient to govern the United States.

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court and appointing new members. To leaders in government and business, democracy had degenerated into rule by the mob, or “mobocracy.” In their view, all that was wrong under the Articles was illustrated in the incident known as **Shays's Rebellion**, a protest by farmers in western Massachusetts in 1786–1787 to stop foreclosures on property by state courts.

Daniel Shays was a former army officer angered by the growing number of people being thrown off their land in western Massachusetts, in large part for an inability to pay land taxes. In previous incidents in Massachusetts and other states, citizens physically challenged government officials seeking to collect property taxes. But no one had quite seen anything like what happened in Massachusetts. To prevent further foreclosures, from August 1786 through February 1787, Shays joined and then led like-minded men numbering anywhere from the high hundreds to several thousand and bearing firearms. They assembled outside courthouses to prevent the courts from opening. Shays's supporters also attempted to raid the federal arsenal in Springfield, where weapons were stockpiled. Massachusetts officials asked the Continental Congress for assistance, but the national government was ill equipped to pull together either financial resources or military personnel, and the state itself had no permanent militia. To displace Shays and his supporters, Boston businessmen raised private money to fund the state militia. Three thousand militiamen descended on western Massachusetts to confront the rebels over a period of about six months. Massachusetts successfully put down the rebellion, but the incident sent shockwaves around the country.

The political system created by the Articles of Confederation seemed unable to manage either international or domestic affairs. As a result, the political and economic leaders concluded that the new nation's first constitution had already failed.

Frustration with the Articles of Confederation Led to the Writing of a New Constitution

The 1780s unsettled political and economic leaders, with many worrying that the people's capacity for restrained self-government had failed. Schooled in the communitarian belief that concern for the public good should outweigh personal interests, these leaders believed that people were using power to advance certain groups at the expense of others and that a critical juncture had been reached. Not everyone agreed that the experience of the 1780s was so dire, but those who did shared a sense of worry over the country's direction and concluded that change was necessary.¹¹

The first attempt to repair the Articles had occurred before Shays's Rebellion. In the fall of 1786, accepting an invitation from the Virginia legislature, delegates from five states (Delaware, New Jersey, New York, Pennsylvania, and Virginia) met in Annapolis, Maryland, to discuss the problems facing the young national government. Delegates from four other states did not arrive in time for the meeting, and four other states did not respond to Virginia's invitation. With only five states present, the Annapolis Convention was not in a position to make specific proposals for changes in the Articles. Instead, the delegates approved a resolution drafted by Alexander Hamilton that called for possible revision of the Articles. Hamilton had been an assistant to George Washington in the Revolutionary War and would later play a large role in the ratification of the Constitution and as secretary of the Treasury in Washington's administration.¹² His resolution called for Congress to send delegates to Philadelphia at some future date to make the Articles more effective in managing domestic and international affairs.

Shocked by Shays's Rebellion, Congress called on each state to send delegates to Philadelphia in May 1787 to discuss revision of the articles. Every state participated except Rhode Island, which objected to the convention based on concerns that a strong national government was a threat to local self-government. Delegates met with a sense of crisis in the air: the national government appeared to be unable to handle

international disputes, establish civility and cooperation between the states, or react to domestic insurrection. The delegates quickly concluded that revision of the Articles was pointless. They decided to start over and establish a new set of ground rules for an effective American government.¹³ The delegates were politically experienced, with more than half having served in the Continental Congress. Eight had signed the Declaration of Independence; six had signed the Articles of Confederation. Several had served as governors of their respective states.

The efforts of the 55 delegates who met to work out the details of a new framework for American government would culminate in the Constitution, the young country's second attempt to build a government that would rule effectively and unify the new American nation. Although the delegates were still concerned about threats to personal liberty posed by the concentration of too much power in a national government, they now believed that too weak a national government was just as severe a threat. As they struggled to devise a new set of rules for the national government, the Framers would need to find a way to blend power with liberty, freedom with order, and national authority with state sovereignty.

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Crafting the Constitution

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Outline the problems the Framers of the Constitution attempted to resolve and the solutions they devised.

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Although they may often be skeptical about the individuals in power, in general Americans are proud of the Constitution and the system of government, liberties, and responsibilities it created. Indeed, for many of us, the American form of government essentially defines democracy. People may be critical of politicians, but they believe that the constitutional system works fairly and effectively. If a system of rules is legitimate, people will agree to challenge policies and actions through constitutionally established procedures. In its protection for liberty, property rights, religion, democracy, and equality, the Constitution adheres to beliefs deeply held by most Americans across many diverse groupings, which enhances the esteem in which it is held.

For the most part, this satisfaction is reasonable. The U.S. Constitution is now the oldest national written constitution in the world, and the vast majority of countries have followed the American model of a written constitution. In the United States and other countries with written constitutions, such as Canada, Mexico, France, and Germany, the interpretation of the text might change, but “the constitution” is a well-defined, explicit document. Similarly, the means to amend it are precisely stated, normally requiring a procedure that differs from the one used to pass legislation. In contrast, Great Britain provides the primary example of a country with an unwritten constitution. The British constitution might be thought of as “an understanding” that has emerged from statutes, traditions, and historical documents.

Fashioning a constitution is an exercise in problem solving that reflects the particular circumstances present at the document's creation. This was no less true for Americans in 1787 than it was for constitution writers in West Germany after World War II or those attempting to construct a constitution in Libya in 2011. In their problem solving, the Germans prohibited political parties based on Nazism. The drafters of Libya's constitution sought ways to give different ethnic and religious groups a stake in the broader sense of nationhood, and to determine the balance between central and regional authority that would be best for governing and most practical for the political task of ratifying the constitution. Throughout the Middle East in 2011 and 2012, people who had overthrown their governments as part of the Arab Spring confronted the question of what comes next. The powers of the new governments; the relationship among the executive, legislative, and judicial branches; the rights and liberties of the people; the role of civilian, military, and religious authorities; how to keep peace



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between different groups in the population; whether to enshrine specific public policy in the constitution—all of these questions faced the constitution builders in places such as Libya and Egypt.

Constitutions are complex. The resolution of one problem might well create new problems and unintended consequences. The more detailed and complicated the document, the higher the risk that it might institutionalize ideas that have only passing or temporary allegiance. This criticism has been lodged against state constitutions in the United States. Too thin a framework, however, runs the risk that the document will not be taken seriously as a guide to behavior or a limit on the abuse of power. As they worked on the draft, the Framers of the new American constitution were well aware of these considerations.¹⁴

The results of the deliberations of the Constitution Convention can be thought about and categorized in many ways. Table 3.1 lists the seven articles of the Constitution. Rather than review the Constitution article by article, however, we will discuss the crafting of the new constitution as an exercise in problem solving. In particular, the Framers had five major objectives:

- Resolve fundamental disputes over representation in the new government.
- Encourage public input while limiting both “excessive” democracy and concentrated power.
- Protect commerce and property.
- Create legitimacy for the new system.
- Provide a coordinated approach to international relations and national defense.

TABLE 3.1 THE CONSTITUTION

Article I: The Legislative Branch

Bicameral legislature

Nature of election

Powers and duties

Article II: The Executive Branch

Nature of election

Qualifications

Powers and duties

Article III: The Judicial Branch

Nature of appointment and tenure

Creation of Supreme Court

Types of cases

Article IV: National Unity

“Full faith and credit” to acts of other states

All “privileges and immunities” to be same whether or not a state’s citizen

Guarantee of republican government

Admitting new states

Article V: The Amending Process

Procedures to amend Constitution

Article VI: National Supremacy

Constitution to be “supreme law” of the land

No religious test for public office

Article VII: Ratification Process

Procedure to ratify Constitution

The Great Compromise and Three-Fifths Compromise Resolved Fundamental Splits Over Representation

Two issues facing the delegates absolutely had to be resolved if the convention were to succeed. Both involved the distribution of political power. The delegates' solutions did not guarantee success, but without them failure was assured.

More so than many of us can understand or appreciate today, the delegates were oriented toward their individual states. Political history, tradition, and loyalty, as they knew it, had much more to do with their colonies, now states, than with the American nation at large. In their view, the Union that was to be created was less a union of disparate individuals and more a union of sovereign states.

The name of the new country—the United States—is significant in that regard. Indeed, it was not until 80 years later, when Abraham Lincoln would try to rebuild the Union in the Civil War, that Americans would routinely refer to the “United States” in the singular rather than the plural—“the United States is” rather than “the United States are.” We see this plural conception reflected in the references to “them” and “their” in Article III of the Constitution: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies.”

THE LARGE STATE–SMALL STATE SPLIT Given this strong allegiance to the states, the relative influence of the various states in the new system rose immediately as a contentious issue. The first split was the division between large and small states. If the new system were to be based at least in part on a representative legislature, how would states be represented in that body? Should representation be based on a state's population or should each state have equal representation?

The battle lines were predictable. Large states gravitated around the **Virginia Plan** written by James Madison (the future U.S. president who was a frequent speaker at the convention and who played a key role in getting the Constitution approved in the Constitutional Convention) and offered by Virginia governor Edmund Randolph (later the first U.S. Attorney General and the second U.S. Secretary of State).¹⁵

The Virginia Plan called for state representation in the national legislature to be based on state population: the larger a state's population, the more representatives it would send to the legislature. The people would elect this so-called lower house, which, in turn, would select the members of the upper house, based on lists of candidates provided by state legislatures.

Delegates from small states saw this plan as an unacceptable push toward large-state domination of the new political system. Their response was the **New Jersey Plan**, introduced by William Paterson (the former attorney general of New Jersey, who would go on to become a U.S. senator, governor of New Jersey, and justice on the U.S. Supreme Court). Like the Virginia Plan, the New Jersey Plan addressed more than just the issue of representation, but it was on this issue that the two competing visions of the new government were especially divided.¹⁶ The New Jersey Plan called for equal state representation in a single-house legislature. Regardless of a state's population, it would send the same number of representatives to the legislature as any other state.

With the two plans on the table, each side staked out strong stances. If the small states wanted to destroy the Union, the large-state delegates opined, then so be it. If the large states wanted to throw their power around, declared the small states, any number of foreign countries would be more than happy to create a new government with the small states. The convention and the task of writing a new constitution faced a deep fracture, but returning to what nearly all the delegates concluded was a defunct and ineffective status quo was not a reassuring prospect for either side, so each was open to compromise.

Although sometimes in politics there is an obvious compromise or consensus position when developing rules, policies, or institutions, often this position is not reached

Virginia Plan

one of the rival plans at the Constitutional Convention, it argued for a two-house legislature, with representation based on a state's population; the lower house would be elected directly by the people, and that house would then select the members of the upper house.

New Jersey Plan

one of the rival plans at the Constitutional Convention, it called for, among other things, equal representation of the states in a single-house legislature.

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Great Compromise

the agreement between small states and large states that representation in the Senate would be equal for each state, as small states preferred, and representation in the House would be based on population, as large states preferred.

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Three-fifths Compromise

an agreement between slave states and free states that a state's slave population would be counted at 60 percent for purposes of determining a state's representation in the House of Representatives.

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until after many rounds of bargaining and negotiation. There may even be a solution no one offered at the outset. The solution to the big state–small state split came in the form of the Connecticut Plan, also known as the **Great Compromise**. Under this plan, representation in the House of Representatives would be based on population, as the large states preferred, and the people would elect the legislators. A second legislative body, the Senate, would have equal representation of all the states, as the small states preferred, and its members would be elected by the state legislatures. The idea of a bicameral, or two-house, legislature was not new: Great Britain had a House of Commons and House of Lords, and the existence of two legislative houses was the norm in the colonies and in the states.

The vote for the Great Compromise was close: five states voted in favor, four were opposed—the two largest population states (Virginia and Pennsylvania) and the two smallest states (South Carolina and Georgia)—and one state's vote was divided (Massachusetts, the third largest state) and thus did not count. Although the plan was not entirely satisfactory to either side, it did prevent either group of states from dominating the new system of government.

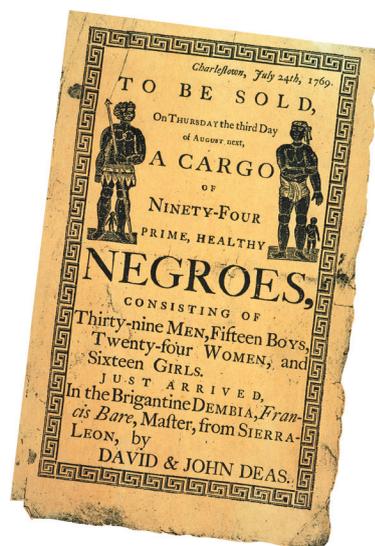
THE SLAVE STATE–FREE STATE SPLIT Similar calculations drove the other critical division between political leaders. This split was between states where slavery was forbidden and states where slavery was allowed, which geographically meant a split between northern and southern states, respectively. If representation in the House of Representatives were to be determined by a state's population, how would population be determined? In particular, would slaves count as part of the population? Southern states argued that slaves should count; the northern states said they should not. Delegates from northern states believed it was hypocritical for southern states to count slaves towards population while considering them to be property for all other legal purposes. Ironically, the positions of the North and South had been reversed in a 1783 debate over the Articles of Confederation. At that time, a proposed amendment would have changed the system of determining the taxes owed by each state from its land value to its population. The North argued that slaves should fully count in a state's population for tax purposes. The South argued that slaves, being property, should not count at all. Although they compromised on counting a portion of a state's slave population, the amendment to the Articles was ultimately defeated.

In the debate at the Constitutional Convention in 1787, both sides were concerned with the balance of power in the new legislature. There were more free states than slave states, so the South was disadvantaged in the Senate. And the population of the North exceeded that of the South, so the South faced the prospect of being outvoted in the House as well. Southern delegates made it clear that this was a make-or-break issue: either include slaves in the population count or the convention ends.

A resolution was reached through the **Three-fifths Compromise**. Under this plan, 60 percent of a state's slave population would be counted toward the state's overall population. Sixty percent was chosen not as a philosophical statement, but because this number would balance representation between the North and South in the House. Neither side could dominate the other.¹⁷

It is a popular misconception, hundreds of years after the convention, to say that the delegates ignored the issue of slavery and were uniformly uninterested in the plight of slaves. The evidence usually offered for this assertion is the lack of direct discussion of slavery in the Constitution. If the issue does not appear prominently in the Constitution, the logic goes, the cause must be lack of interest or concern about the issue.

But the critics' contention makes the analytical mistake of assuming that what we can see is a reliable indicator of what matters most to politicians. In politics, however, sometimes what is not visible is equally as important as what is visible. Rather than ignore slavery, the delegates returned frequently to the issue, which often lurked in the



PEOPLE AS PROPERTY

Delegates from slaveholding states wanted to count slaves toward their state population, to boost their representation in the House of Representatives. Delegates from other states saw this as inconsistent with the usual treatment of slaves as property, not people. Why, they asked, should these states now benefit from treating slaves as people for the purpose of gaining more representation in the House? The Three-fifths Compromise resolved the dispute.

background of their discussions.¹⁸ Some were ardent defenders of slavery. Others opposed the practice on economic or moral grounds. Individual states had wrestled with the issue in years prior to the convention, with 10 of the 13 states banning the importation of slaves by the time of the Constitutional Convention. Everyone recognized the explosive nature of the issue. It was ironically the importance of the issue, not the lack of interest in it, that led to its being given less visibility in the Constitution than critics today might wish.

Believing that politicians usually act strategically in important situations, political scientists would reject the analytical leap made by critics and reframe the question. If it was not due to lack of interest or concern, what would cause the Framers to avoid placing heavy emphasis on slavery in the Constitution? The answer is the immediate strategic imperative of crafting a constitution—this is the causal force contributing most heavily to slavery’s lack of prominence in the Constitution. The Framers had to address the issue of slavery in a way that would not undermine their interest in producing a new document. Would a constitution have been possible if opponents of slavery were determined to use the document to eliminate it? Most of the Framers thought not, and ultimately they were more determined to write a constitution. In the twenty-first century, our moral revulsion against slavery makes it deeply disturbing to even think about this kind of trade-off, but that was the real-world situation as the Framers perceived it.¹⁹

Although the terms *slave* and *slavery* do not appear in the Constitution, three provisions directly concerned slavery. The first is the Three-fifths Compromise, which boosted southern representation in the House of Representatives. Second, the Constitution forbade Congress from prohibiting the importation of slaves prior to 1808. And third, any slave escaping to a free state would have to be returned to his or her master. Those who opposed slavery and saw it as a violation of the tenets of the Declaration of Independence were frustrated by these provisions, but they also realized that no new government would be formed if they pressed the issue. Their hope was that the new government would, over time, devise a way to deal with the problem of slavery. Political bargains in the first half of the nineteenth century gradually confined slavery to the southern states, but the issue remained unresolved, exploding in the calamity of the Civil War.

The Framers Wanted Public Officials to Hear the Voice of the People While Also Preventing “Excessive” Democracy

The Framers believed that the people should have a voice in government. One option would have been to allow direct rule by the people—the classic definition of democracy. The Framers had experience with that kind of government, because many municipalities in America did much of their important business in town meetings during which citizens directly voted on matters of public policy. Despite that experience, or perhaps because of it, the Framers did not believe that the people’s voice should dictate the behavior of public officials. The people’s input should influence the decisions of government, they concluded, but there must be a buffer between the people’s demands and the government’s actions. They feared that a government that was too close to the people would get swept up in the people’s passions and impulsive desires. Such a government could threaten the rights of minority groups, including the minority that owned significant amounts of property.²⁰

To the Framers, those were the risks of democracy. The political system needed to be structured in a way that took account of the people’s views but also allowed for a cooling off of those views. At the same time, the people’s voice would be impotent if government were weak. Power and authority needed to be both encouraged and restrained.

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republic

a system in which people elect representatives to make policy and write laws, in contrast to direct democracy in which the people do these activities themselves.

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indirect election

an election in which voters select other individuals who directly vote for candidates for a particular office; U.S. Senate and presidential elections were of this type in the Constitution, but Senate elections are now direct elections.

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separation of powers

the principle that the executive, legislative, and judicial functions of government should be primarily performed by different institutions in government.

For these reasons, the Framers did not create a democracy in the technical sense, one in which the people themselves directly rule. Rather, they created a **republic**, in which the people select representatives who are entrusted to make the laws.²¹ Preventing excessive democracy meant not only protecting government from the people's passions, but also protecting citizens from each other—preventing groups from using government to oppress other groups. The Framers accomplished these goals in several ways.

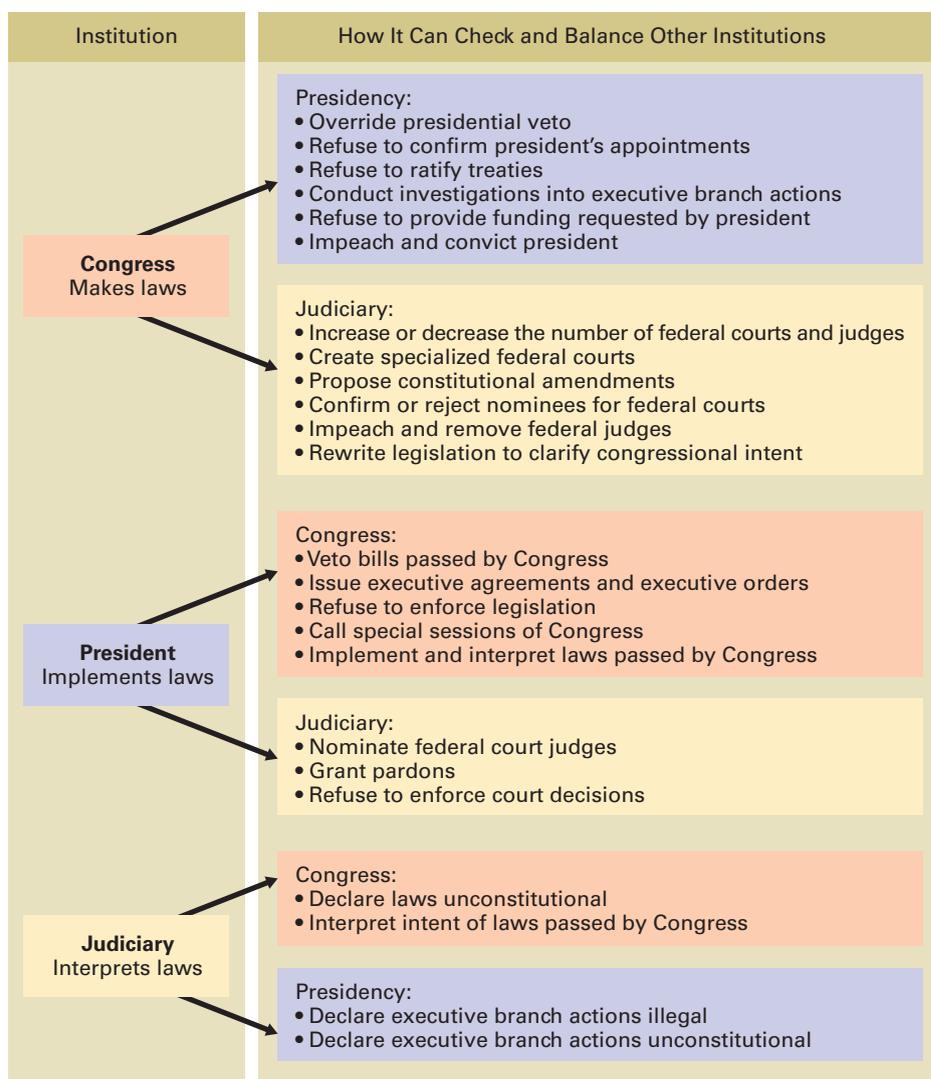
SELECTION OF PUBLIC OFFICIALS The Constitution provided for staggered terms of office for elected officials (Articles I and II). House members would serve two-year terms; senators would serve six-year terms, with one-third of the senators up for election in any given election year; and the president would serve a four-year term. This arrangement means that Americans can never dismiss all government officials at once because all officials are never up for election in the same year. Americans can “clean house” in government, but it is always only a partial cleaning: in any given election year, two-thirds of the senators will not be up for election, and the president will be up for election only every other election year. Regardless of the passions that may be stirring the public, it would take six years before all the elected officials in the national government could be replaced. And the public has no direct way to choose federal judges. Once nominated by the president and confirmed by the Senate, federal judges—unlike judges in many states—have lifetime tenure and do not face elections. This provision again provides a buffer between the people's voice and the government's actions.

Should the people try to change the system to make it more immediately responsive to their demands, they would have to work through the difficult process of amending the Constitution (Article V). The Framers did not want the people to be able to easily rewrite the rules. Such a process was not just for the Framers' benefit, however—it reduced the likelihood that one group would amend the Constitution in a manner to reject or restrict the rights of another group.

In the Constitution as ratified, the people directly elected only the members of the U.S. House of Representatives. The people also voted for state legislators, who then selected the state's U.S. senators, a process known as **indirect election**. Not until the passage of the Seventeenth Amendment in 1913 would the people directly elect their U.S. senators. Presidents were also elected indirectly. Voters in most states chose electors (in some states, the state legislature selected the electors), and these electors then met in their states in the Electoral College to cast ballots for president and vice president. The candidate who received a majority of the electoral vote would be the president. Even today, although ballots list the presidential candidates, voters are technically voting for a group of electors who have pledged to cast their electoral vote for the particular candidate. The logic was that the people could select the electors, but the electors, presumably individuals who were wise, knowledgeable, and distinguished, would evaluate the presidential candidates more carefully.

SEPARATION OF POWERS The Framers most famously attempted to protect against the effects of excessive democracy by balancing power. In the colonists' eyes, prior to 1763, this had been the defining achievement of British politics and a source of great pride. The colonies, too, relied on the idea of balancing power against power, with legislators checking the power of the governor, who served on behalf of Britain. The Framers drew heavily upon the ideas of political philosophers such as Charles de Montesquieu (1689–1755), a French political thinker who wrote at length about separation of powers.

Recall that in the Articles of Confederation, the legislature was the national government, albeit a weak one. By contrast, in the Constitution, the Framers provided for three independent centers of authority in a legislature, executive, and judiciary (in Articles I, II, and III, respectively). **Separation of powers** means that the major branches of government would have different primary functions and



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FIGURE 3.1 SEPARATION OF POWERS AND CHECKS AND BALANCES.

With separation of powers and checks and balances, each branch of government has distinct but overlapping responsibilities.

responsibilities—the legislature would make law, the executive would implement law, and the judiciary would interpret law (see Figure 3.1). The separation would be reinforced by alternative methods of selecting the leadership of each branch—legislators were directly and indirectly elected (House and Senate, respectively), the president was indirectly elected, and judges were appointed. In practice, the division in functions has not been quite this neat and tidy, so some observers suggest that a better description of separation of powers is “separated institutions sharing powers.”²² Rather than rigid demarcation between branches, this formulation suggests that each institution trespasses somewhat on the jurisdiction of the others. For a discussion about the separation of powers and the president’s role as commander in chief, see *Unresolved Debate: In Times of War or Emergency, Does the Constitution Limit the President’s Commander in Chief Authority?*

CHECKS AND BALANCES The system of checks and balances provides the main set of mechanisms through which the branches monitor one another. **Checks and balances** means that each branch of government has a way to affect and, in some instances, to stop the actions of the others. Many of the checks and balances techniques are likely familiar; they are listed in Figure 3.1. They reinforce the idea of separated institutions sharing power. Lawmaking, for example, is not the province of Congress alone. The president has to approve any bills before they

checks and balances

the principle that each branch of the federal government has the means to thwart or influence actions by other branches of government.

Unresolved Debate

3.1

In Times of War or Emergency, Does the Constitution Limit the President's Commander in Chief Authority?

3.2

In 2011, President Barack Obama involved the United States in military hostilities in Libya, and in 2012 he authorized drone strikes to target and kill terrorists overseas. Critics of the program argued it violated constitutional checks and balances and civil liberties, charging that the program proceeded with little congressional oversight of the deployment of the drones or of the specific individuals targeted for death, including some Americans living overseas. Supporters responded that the president's constitutional war powers give presidents wide latitude to use the available technology at hand to conduct war and that the drones had a number of tactical advantages and produced less incidental loss of life. MQ-1 Predators, such as the one pictured here, were used heavily in Afghanistan, Pakistan, Yemen, Somalia, and northern Iraq.

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YES

Louis Fisher, a political scientist who served at the Library of Congress, argues that the Framers were determined that the president would be the Commander in Chief of the armed forces, but Congress, would have the power to declare war and to make laws organizing, arming, and funding the military.^a The Framers viewed a president with complete discretion over the military to be inconsistent with the idea of a republic. To make his case, Fisher argues the following:

- The original understanding of the Constitution was that the president's powers in times of emergency are subject to limitations;
- Historically, presidents accepted these limitations and the nation successfully survived many security challenges. Only in recent administrations have presidents argued for their ability to act without congressional authorization;
- The claim that there are no limits on presidential power in times of war or emergency renders the Constitution meaningless precisely at the times its constraints are most needed. The Constitution is not an invitation to dictatorship.

CONTRIBUTING TO THE DEBATE

The basic disagreements expressed by Fisher and Yoo over the proper way to interpret the Constitution are unlikely to be resolved definitively. Nonetheless, the debate can be advanced through careful analysis that recognizes and specifies the advantages and risks that come with either of these competing perspectives.

WHAT DO YOU THINK?

1. Should we think about presidential war powers differently from way we think about other constitutional questions concerning government power? Why or why not?
2. Should we rely on the Framers' original understanding to answer some questions, but the conditions of modern life to answer others? Why or why not?

^aLouis Fisher, *Presidential War Power*, 2nd ed. (Lawrence: University Press of Kansas, 2004).

^bJohn Yoo, Office of Legal Counsel memorandum September 25, 2001, available at www.justice.gov/olc/warpowers925.htm.

^cJohn C. Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (Chicago: University of Chicago Press, 2006); John Yoo, *Crisis and Command: A History of Executive Power from George Washington to George W. Bush* (New York: Kaplan Publishing, 2010)

^d*Terminiello v. City of Chicago*. (1949).

NO

John Yoo, a legal scholar at the University of California, Berkeley, who was also a lawyer in the administration of President George W. Bush, argues that there can be no limits on the "inherent executive power" of the president in matters involving national security.^b When the country's security is threatened, a president is authorized to do what he thinks necessary to defend it, and these may involve new techniques over time unforeseen by the Framers.^c To make his case, Yoo argues that:

- When the Constitution was being written, it was a common perspective, that the sovereign had unlimited power to defend the state, so the president's authority in this area is independent of the Constitution;
- Provisions of the Constitution giving power over war and related matters to Congress should be interpreted flexibly so that the president can respond effectively to new challenges unforeseen by the Framers;
- Ultimately, accepting any constitutional limitation on the powers of the president in this crucial area could leave the nation defenseless against its enemies. The Constitution is not a "suicide pact."^d

can become law.²³ As a result of legislative bicameralism—Congress is divided into two houses, each of which must approve the same version of a bill before it can be sent to the president for approval—Congress has internal checks and balances. In some areas, notably approval of treaties and confirmation of judges, the Framers wanted the people involved, but only through their indirectly elected representatives in the Senate. Finally, although the judiciary’s power was only briefly described in the Constitution, this branch would early on, in the case of *Marbury v. Madison* (1803), assert the power of **judicial review**, meaning it would decide whether the laws and other actions of government officials were or were not constitutional. This meant the judiciary could strike down a federal or state law altogether and overturn non-legislative actions such as a policy or procedure implemented by an executive-branch agency. Thus, the judiciary has the power to determine what the text of the Constitution means. As for checks on this branch, Congress and the president can counteract the judiciary’s power through constitutional amendments, new appointments to the courts, and restructuring of the courts.²⁴

There were competing views early in the convention on how to check and balance power. In the Virginia Plan, the president and judiciary, to be selected by the legislature, would form a Council of Revision that could veto legislative acts. However, the legislature would have been able to override those vetoes and would also have had the authority to veto state laws. The New Jersey Plan called for a single-chamber Congress in which each state had one vote. Congress would appoint a multi-person executive, which would in turn appoint the judiciary. Both these plans gave the legislature the strongest position in American government, as Congress selected the members of the other branches. The Framers ultimately prioritized Congress—it is Article I in the Constitution and the institution with the most detailed list of responsibilities and duties—but they dispersed power and increased the independence of the other branches more than either the Virginia or New Jersey Plans.²⁵ The Framers wanted to make sure that any pressure from the people was heard by government, but that it was diffused across the three branches. If one branch reached too far in pushing a new policy demanded by the people, the other branches could slow it down or stop it altogether. Moreover, the Framers wanted a strong national government, but they also wanted to be sure that it would not become so powerful as to threaten liberty and property. The proposed government was designed to thwart the power-grabbing tendencies of human nature, according to James Madison. “If men were angels, no government would be necessary,” he wrote, “If angels were to govern men, neither external nor internal controls on government would be necessary.”²⁶

The checks and balances system was one aspect of the careful balancing act between government power and personal freedom. Each seemed necessary, yet each threatened to dominate the other. The task of the Framers was to keep the two in balance. As they saw it, dispersing power this way both protected against abuse of the people by government and made it more difficult for any one part of the public to capture all of the power centers in government. Madison referred to this system, in combination with federalism (described in the next section), as a “double security” against tyrannical government.²⁷

FEDERALISM Despite differences concerning the relative power and authority of the national and state governments, delegates agreed that federalism would be an underlying principle of the new system. **Federalism** is a governing arrangement that distributes power across a national government and subnational governments and guarantees the survival of these different levels of government. As noted, resolving the distribution of power between the states and the national government was a key practical concern. At the level of principle, however, federalism was a bulwark against the risk of concentrated power and excessive democracy. The states check the power of the national government, but the national government checks the power of the states.

judicial review

the power of the judiciary to interpret and overturn actions taken by the legislative and executive branches of government.

federalism

a form of government that distributes power across a national government and subnational governments and ensures the existence of the subnational governments.

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FIRST AMONG EQUALS

General George Washington’s reputation towered above all others of his generation. As commander in chief of the Revolutionary forces, his remarkable organizational, military, and political skills held the war effort together and led the American troops to victory. He came out of retirement to preside over the Constitutional Convention. There was no doubt among the delegates that he would be selected as the country’s first president.

3.1

parliamentary system

a political system in which the head of the executive branch is selected by members of the legislature rather than by popular vote.

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THE PARLIAMENTARY SYSTEM AS AN ALTERNATIVE DISTRIBUTION OF

POWER The choices made by the Constitutional Convention delegates differ significantly from the choices made in later years in other parts of the world. In Europe, especially, the **parliamentary system** was the structure of choice for those building governments. In a parliamentary system, the prime minister, who serves as the chief executive, is selected from the parliament (the legislature) by other members. Although voters are usually well aware of the candidates for prime minister, they do not vote on the position nationally or directly. The prime minister then selects department heads from among his or her fellow partisans in the legislature. Typically in a parliamentary system, the legislature ultimately interprets what the constitution means (even if the constitution is unwritten, as in Great Britain). In this system, the legislature is supreme, and the notions of checks and balances and separation of powers are not particularly relevant.

Opponents of the parliamentary system charge that it puts too much power in the hands of the majority party. Unlike in the American system, control of the executive branch and the legislature cannot be split between two parties, even if that would be the voters' preference. In the view of these critics, parliamentary systems leave voters who do not support the majority party powerless. Advocates of the parliamentary system respond that it is a government that is not at cross-purposes with itself. Rather than checking and balancing power, parceling power out to different parts of government, and having branches of government intentionally frustrate each other and the majority's will, the ideal behind the parliamentary system is to gather power

**CONFIRMING A JUSTICE**

Supreme Court justices are appointed and have lifetime terms, raising issues of democratic accountability. For this reason, both elected branches of government are involved in selecting Supreme Court justices. Elena Kagan, President Obama's nominee, appears here before the Senate Judiciary Committee for her confirmation hearing in 2010. What difference, if any, would it make if federal judges served fixed terms rather than lifetime tenure?

in the leading party or a coalition of parties in the legislature to enable swift action. The Framers of the American Constitution were wary of giving any entity, including the majority of the population, so much power.

The Framers Included Constitutional Provisions Designed to Protect Commerce and Property

Events in the states in the 1780s, such as Shays's Rebellion and the printing of currency of questionable worth, panicked New England merchants, southern planters, and the entire spectrum of businesspeople in between. Therefore, one chief concern of the Framers was to protect commerce and property from the designs of the national government, the state governments, and states pitted against states.

Delegates included many provisions in the Constitution to do this. First, they established that the national government would have primary regulatory control over commerce and finance. The national government would regulate commerce between the states and with other countries and be responsible for producing coinage and currency, establishing bankruptcy laws, and creating protections for copyrights and patents (Article I in the Constitution). This arrangement still allowed differences among the states—for example, states could have varying insurance or banking regulations—but it prevented states from creating alliances with each other or with another country that harmed the commercial or property interests of citizens in other states. It also prevented states from inflating their currency or devising other schemes to make it easy for their citizens to escape from debt obligations.

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REGULATING SAFETY

Firefighters rescue passengers trapped in a commuter train that collided head-on with a freight train near Los Angeles, leading to 25 deaths and 95 individuals seriously or critically injured. In accidents like this one, the Office of Railroad Safety of the Federal Railroad Administration will investigate, along with local and state officials. The federal government's constitutional power to regulate interstate commerce provide the legal authority for the agency to act and to establish railroad safety regulations.

83

3.1

supremacy clause

a clause in the Constitution that declares that national laws and treaties have supremacy over state laws and treaties.

3.2

equal privileges and immunities clause

a clause in the Constitution stating that states are to treat their citizens and the citizens of other states equally.

3.3

3.4

full faith and credit clause

a clause in the Constitution stating that states are to honor the official acts of other states.

Second, the Constitution's **supremacy clause** declared that national laws and treaties would take precedence over state laws and treaties (Article VI). State laws could differ from a national law, but they had to be consistent with it. For example, states can enact antipollution laws more stringent but not more relaxed than those the federal government requires. Federal law can, however, preempt the states from deviating from federal standards. For example, the Federal Cigarette Labeling and Advertising Act imposes national rules on cigarette advertising and prohibits state governments from imposing additional advertising regulations.²⁸

States were also to be nondiscriminatory toward each other (Article IV). Under the **equal privileges and immunities clause**, states are to treat their citizens and citizens of other states similarly. Through the **full faith and credit clause**, states are to honor the official acts of other states, such as public records and the results of judicial proceedings. However, Congress and the president will sometimes override this clause, arguing the Constitution gives them the authority to do so. Such an override happened in 1996 with the passage of the Defense of Marriage Act, which stipulated that states need not honor same-sex marriages performed in other states. Normally, the full faith and credit clause would dictate that a marriage that is legal in one state would be recognized as legal in the others, but states were given an exemption in this instance.

The Constitution included additional protections for commerce and property. Article VI stipulated that any contracts entered into before the Constitution must still be honored after the Constitution was ratified: the adoption of a new political system did not negate ongoing economic commitments. This provision was motivated chiefly by concern that debts incurred during the Revolutionary War would be paid, but it applied to debts incurred after the war as well. The national government also guaranteed each state a republican—that is, representative—form of government and pledged to protect the states against domestic violence, a reaction to Shays's Rebellion.

Lastly, the Framers provided for a president who would be a counterweight to Congress. As the Framers saw it, representatives would often allow the narrow interests of their districts to guide their decisions, whereas senators would have the somewhat broader but still biased self-interests of their states in mind. Only the president would represent the country as a whole and have an ongoing commitment to the national interest rather than to any special interest of a state or district.

The Framers Emphasized Certain Measures and Principles to Enhance the Proposed System's Legitimacy

Legitimacy is about trust. When you believe that an arrangement is legitimate, you believe it is fair and reasonable. You may not trust individual officials, but you trust the system. Americans had come to see the British government, or at least its control over the colonies, as illegitimate. The idea that the colonies were "virtually represented" but not directly represented in Parliament struck many Americans as foolish. Americans then placed their trust in the new governmental system of the Articles of Confederation, but many saw that, too, as a failure. To the Framers, establishing legitimacy for the new government was critical, and they addressed the challenge in three ways.

First, they emphasized the representativeness of the new government. In the House, Senate, and presidency, they noted, distinct parts of society were represented—parts of states, states, and the country, respectively. Direct popular election of the House of Representatives was another legitimacy-building feature. The House would be the "people's house." Its members would have shorter terms than in any other part of government, giving the people frequent input into its composition. And, because of the system of checks and balances, relatively little could be done that did not have to pass through the people's house.

Second, the Framers built the case for legitimacy around the notion that the new government would not be dominating. It would have more power than it did under the Articles, but with constraints. The checks-and-balances system would prevent government from acting recklessly. With its idea of federalism, the Constitution delegated specific powers to

the federal government and left others to the states. Public officials would take the Constitution seriously—Article VI required public officials to swear to uphold the Constitution, not the wishes of a monarch, church, or select group. The Constitution, the Framers noted, was a social contract between rulers and ruled. If the rulers violated this contract, the people had a right to remove them, and if the violations were extensive, the people had a right to scrap the contract and construct a new system of government. Further, the Framers promised that a bill of rights guaranteeing personal liberties would be added to the Constitution as the first order of business after ratification.

Third, they created an enduring but flexible framework for government. They wanted the people to believe that the Constitution had roots—that its meaning and content would have some stability—but they also wanted the people to believe that the system could be changed if necessary. By providing for amendments, the Framers created a document that would be flexible. By making the amending process difficult, they created a document that would be enduring. We discuss the amendment process in detail later.

Balancing stability and flexibility was also achieved by writing a Constitution that provided a basic framework for government and politics. The Constitution lays down the essential rules of how government will work and how officials will be selected. It also indicates the responsibilities of government officials. It presents a general outline for how public policy will be made, but it contains very little actual policy.

For example, it gives Congress the power to regulate interstate commerce, declare war, and establish currency, but it does not set in stone any particular policy about how interstate commerce should take place or when declarations of war should and should not occur. Nothing in the Constitution says how much should be spent on national defense, how many roads should be built, and so on. The Framers left that kind of detail to the branches of government to work out in the form of laws. They realized that preferences about particular issues would change over time, so enshrining them in the Constitution would be problematic in two respects. If the Constitution were difficult to change, citizens would be stuck with policies they no longer agreed with. If the Constitution were easy to change, it would lose the sense that it had permanency and was above competitive politics.

The Civil War provides the most glaring exception to the rule that Americans believe their political differences can be worked out through constitutional provisions. The Constitution could not contain the depth of division between North and South. And for much of American history, the Constitution was seen as compatible with discrimination of the worst sort against racial, ethnic, and religious minorities and women. Americans today, however, are more likely to fault the people and the politicians in power during those times rather than the Constitution itself, because the Constitution also provided the means to change these patterns.²⁹

The Framers Provided the Means for a Coordinated Approach to International Relations and National Defense

The foreign threats facing Americans in the 1780s were significant. Britain controlled the territory around the Great Lakes. Aside from Britain's own disagreements with the United States, the tension between Britain and France meant that Americans being caught in their crossfire was a distinct possibility. Spain controlled Florida and areas to the west. Skirmishes with Native American tribes were frequent. The Constitution provided the promise of executive and legislative leadership and coordination to respond to these challenges. The president would be the operational head of military actions and the representative of the United States to other countries. He would appoint ambassadors and negotiate treaties, but both of these would require the Senate's approval. Congress's control over military budgets and taxes and the declaration of war was intended to make foreign policy a cooperative venture. States would have to follow the national lead on military matters, including those with Native American tribes. They could not enter into treaties or alliances with other countries or tribes, arrange discriminatory tariffs, or enter into military conflict unless invaded or facing a similar immediate emergency.³⁰

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Federalists

individuals who supported the proposed Constitution and favored its ratification.

Anti-Federalists

individuals opposed to the proposed Constitution, fearing it concentrated too much power in the national government.

The Battle for Ratification

3.3

Compare and contrast the arguments of Anti-Federalists and Federalists.

Sending the Constitution to the states for ratification at state conventions was a risky gambit. The Framers could not look to other countries to see how a national ratification effort would fare, or what the risks and rewards were of giving the people this much influence. The experience of other countries in later years shows just how risky it was. In France, popular ratification failed in 1789, 1791, 1793, and 1830. Canadian leaders chose not to risk a popular ratification process for their constitution. Britain's unwritten constitution was similarly not subject to a ratification process. Among English-speaking countries, only Australia followed the U.S. ratification model, more than a century later.³¹ In the American context, however, supporters of the Constitution believed that ratification in the states was a political necessity. It was also, they realized, an opportunity for opponents to derail the document.

Battle lines over ratification of the Constitution were drawn between the **Federalists**, who supported ratification, and the **Anti-Federalists**, who opposed it.³² The central debate concerned not democracy, which might be the center-stage issue today, but liberty: what kind of governmental arrangement would best preserve liberty? See *How Do We Know? What Motivated the Framers of the Constitution?* for an analysis of how political scientists have examined the Framers' motivations.

Anti-Federalists Argued that the Constitution Threatened Liberty

Anti-Federalists argued that the proposed Constitution threatened the people's liberty. Distant from the people, this kind of government might begin to tax heavily, override state court decisions, have a permanent army at its disposal, or absorb functions performed by the states—fears that later history showed were not far-fetched. Legendary patriots such as Patrick Henry, a stalwart supporter of the Revolution, saw the proposed Constitution as a counterrevolution, pushing back toward more central authority, reducing democratic influence on government, and protecting the interests of political and economic leaders.

To the Anti-Federalists, a different kind of government was needed, one more along the lines of the government established by the Articles of Confederation. The loose union of states that characterized the Articles was the ideal arrangement to protect liberty—the central government's powers were so limited, it lacked the means to restrict liberty, even if public officials were so inclined.³³

Given the public's apparent preference for a stronger national government, the Anti-Federalists offered some principles to guide its development. They argued that such a government should have many restrictions on its power. For example, they suggested reducing the range of cases the Supreme Court could hear; creating a council to review all presidential decisions; leaving military affairs to state militias; enlarging the House of Representatives, which would mean creating smaller districts so that representatives would feel more closely bound to their constituents; and adding a "bill of rights" to protect individual freedoms.

Only on this last item were the Anti-Federalists successful. Supporters of the Constitution initially argued that a bill of rights was unnecessary—unless the Constitution gave Congress the specific authority, for example, to establish an official religion, government should not be presumed to have that authority. A listing of the rights or liberties of individuals could effectively become a limitation on rights and liberties if misinterpreted as comprehensive. In the climate of the ratification debate, however, a strong symbolic statement was needed, so the proponents of ratification agreed that after the Constitution was ratified, a bill of rights would be sent to the

How Do We Know?

3.1

What Motivated the Framers of the Constitution?

3.2

The Question

The men sent to the Constitutional Convention in Philadelphia in 1787 had risen to prominence in their respective states. Overall, however, the U.S. Constitution reduced the autonomy of the states. For political scientists, this outcome raises a research puzzle. Why would ambitious, intelligent political leaders agree to a system that might reduce the power of the states in which they had been politically influential? What motivated the Framers of the Constitution? How do we know?

3.3

Why It Matters

Why should any of us care what motivated the Framers of the Constitution so long ago? The reason is simple: If Americans wish to know whether contemporary American politics and government live up to founding values, they must know why the system was designed the way it was.

3.4

Investigating the Answer

One answer, offered by economist Charles Beard early in the twentieth century, is that the Constitution reflected the economic self-interest of those drafting and voting for it.^a Beard complained that previous accounts of the Constitution had been based on ideals and wishful thinking. He called for social scientists to conduct hardheaded, systematic analyses of the world as it was.

Assuming that political action is guided by self-interest, Beard hypothesized that delegates' financial self-interest determined how they voted on the Constitution. By analyzing the financial holdings and economic interests of the delegates, he concluded that the Framers protected their commercial interests, including currency, public securities, manufacturing, and trade and shipping. Knowing the economic interests of those who supported the document, he argued, reveals the motivations of the document's writers.^b

Beard's critics offer a different answer to the question about the Framers' motivations, and a different approach to political investigation. They took more interest in the convention delegates' ideas and rhetoric. They saw the Framers' actions as grounded more in their practical political assessment of what was necessary to keep the country united and afloat or in their sincere interest in the political ideals they were espousing.^c To the critics, Beard mistakenly assumed that correlation equals causation: The fact that delegates' financial self-interest and their votes in the convention were correlated did not prove that the interests caused the votes.^d But by assuming that the ideals of those who supported the Constitution were unified and that therefore their motives were the same, Beard's critics may also have erred. For example, James Madison and Alexander Hamilton wrote the bulk of the *Federalist Papers*, but within a few years, it was clear that their political ideologies were radically different.^e They may have both supported the Constitution, but their motivations were likely not identical.

Rather than looking at a political outcome and then assuming that the result reflects some group's motives, political scientists can look to the historical record—memoirs, journals, interviews, and other sources—to determine what drove individuals to take particular actions. In a study of the crafting of the Constitution, for example, one political scientist concluded that the final document was a defeat for some of its most ardent proponents, such as Madison.^f Throughout the convention, Madison unsuccessfully pushed for a more powerful national government than the one created in the final document. Careful analysis of the day-by-day proceedings shows Madison to be frequently on the defensive. Rather than his rhetoric in the *Federalist Papers* being a completely clear signal of his true preferences, he shaped his argument around the Constitution that was approved by the convention.

Such analysis highlights the importance of sequence and timing in explaining political outcomes. Early decisions, even small decisions, can have tremendous impact because they begin a process that influences future decisions. Once the delegates decided on an elected presidency, for example, that decision affected their votes on other aspects of the Constitution, and rethinking that decision would have been difficult, because everything else afterward depended on it.

The Bottom Line

The Framers of the Constitution were motivated by a number of factors, including political ideals and principles, a belief that the status quo was unacceptable, concerns about what would be politically palatable to the states, and likely some political and economic self-interest as well. But to correlate the convention votes with economic self-interest and then assume that self-interest was the primary causal motivation behind the Constitution is faulty social science. In political analysis, it is important to consider multiple causal factors and to realize that the sequence and timing of decisions, as well as the rules for making decisions, affect the outcome. These factors can even lead an individual to support something he or she believes falls short. Just as Madison vigorously supported a document that did not entirely reflect his preferences, a president must sometimes sign legislation that does not precisely reflect his or her leanings.

^aCharles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913); Jerry Fresia, *Toward an American Revolution: Exposing the Constitution and Other Illusions* (Boston: South End Press, 1988).

^bKaren Orren and Stephen Skowronek, *The Search for American Political Development* (New York: Cambridge University Press, 2004), 53–54.

^cJohn P. Roche, "The Founding Fathers: A Reform Caucus in Action," *American Political Science Review* 55, 4 (1961): 799–816; Calvin C. Jillson and Cecil L. Eubanks, "The Political Structure of Constitution Making: The Federal Convention of 1787," *American Journal of Political Science* 28, 3 (1984): 435–58.

^dRobert E. Brown, *Charles Beard and the Constitution: A Critical Analysis of "An Economic Interpretation of the Constitution"* (Princeton, NJ: Princeton University Press, 1956).

^eColleen A. Sheehan, "Madison v. Hamilton: The Battle Over Republicanism and the Role of Public Opinion," *American Political Science Review* 98, 3 (2004): 405–20.

^fDavid Brian Robertson, "Madison's Opponents and Constitutional Design," *American Political Science Review* 99, 2 (2005): 405–20.

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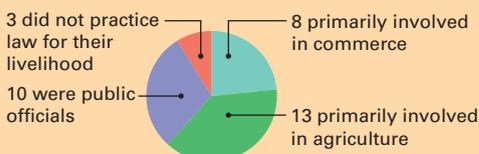
3.4

Financial Interests of the Delegates to the Constitutional Convention

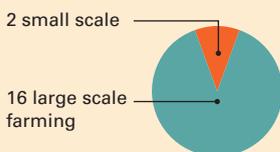
55 delegates:



34 lawyers:



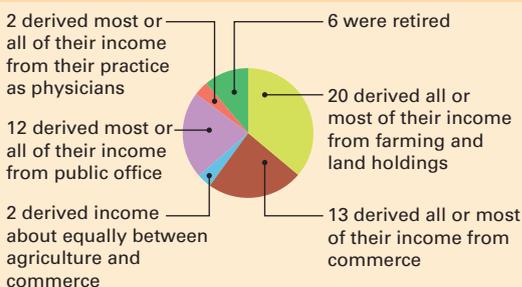
18 farmers:



15 engaged in commerce:



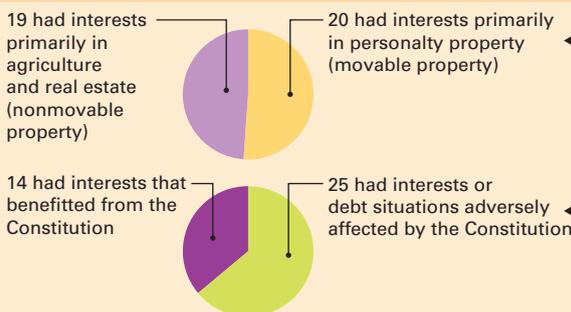
Source of income:



Investments and property holdings:

20 had investments in undeveloped land or town lots
 3 had investments in manufacturing property
 12 had significant investments in financial institutions
 30 held public securities (i.e., public debt, bond issues, etc.)
 31 owned lands used primarily for farming
 13 were debtors for significant amounts

The 39 signers:



Source: Forrest McDonald, *We the People: The Economic Origins of the Constitution*, Chicago: University of Chicago Press, 1958, pp. 86–110.

FINANCIAL INTERESTS OF THE DELEGATES TO THE CONSTITUTIONAL CONVENTION

Thinking Critically

- In what ways might you imagine the American political system would be different if the delegates had decided early in their deliberations to have a president elected for a single six-year term?
- When is it acceptable or unacceptable for a representative—for example, a delegate to a convention or a legislature in a legislative body—to vote in a manner consistent with his or her economic interests?

states for their approval. As ultimately ratified by the states, the **Bill of Rights** refers to the first 10 amendments to the Constitution, which focus primarily on preserving individual freedoms.

Madison Responded in the *Federalist Papers* that a Large Republic is the Best Defense for Liberty

The argument between Federalists and Anti-Federalists was fought out in speeches, handbills, and newspaper columns. The most famous of all these was a set of newspaper opinion columns penned under pseudonyms by James Madison, Alexander Hamilton, and John Jay (Secretary for Foreign Affairs under the Articles of Confederation, first Chief Justice of the U.S. Supreme Court, and a governor of New York). Collectively, these columns, which discussed the many nuances of the proposed government, would come to be called the *Federalist Papers*. They presented the theoretical basis of American government, covering such concepts as federalism, the separation of powers, and checks and balances. Although it is probably true that the columns were not widely read, those who did read them were likely to be opinion leaders—individuals who, because of their status, could shape the opinions of others.

The Anti-Federalist argument about the desirability of democracies and small republics was rejected in the most famous of the *Federalist Papers*, number 10. In *Federalist 10*, James Madison argues that liberty is actually most at risk in direct democracies and small republics. It is safest in precisely the kind of large republic being proposed in the Constitution.

Like politicians today, Madison made causal claims. The outcome to be explained was the preservation of liberty. Madison begins by stating that the most severe threat to liberty is the presence of factions. To Madison, factions are defined by having some self-interest or common passion that threatens the rights of other citizens, and they can be either a majority or minority of the population. Factions are natural, Madison argues, as people naturally cluster with like-minded individuals. Trying to prevent the emergence of factions would require authoritarian and conformist measures that would be a “cure worse than the disease.” The real question, therefore, was how to control factions and their effects—especially, for Madison, their effects on property rights. Could democracy cure the effects of factions? Madison said no. In a democracy, a majority faction has no check on its behavior. It would be quite easy for a majority of the population to deny rights or otherwise oppress a minority.

The proposed republic, on the other hand, could control excessive factional influence. This is Madison’s key causal link between the proposed Constitution and the protection of liberty. First, in Madison’s view, having a relatively small number of representatives increases the likelihood that voters are selecting individuals of honor, merit, and virtue for public office. Second, larger, more diverse districts will send mixed policy messages to representatives, encouraging them to sift out the bad ideas and keep the good. Representatives with large districts are less likely to be “captured” by any one interest, because they will try to represent a broader cross-section of their constituency. Third, in a geographically large political system, more opposing interests will vie for attention; as interest battles interest, a majority faction is less likely to form. Madison thought it unlikely that the same dangerous idea would arise in far-flung parts of the country, and if it did, it would be difficult logistically to organize a majority faction over a large area, which again protects liberty.

The bottom line of Madison’s argument is a remarkable rejection of the conventional causal wisdom of his day. Rather than holding onto communitarian hopes about civic virtue—selfless political participants concerned only for the common welfare—Madison suggests the country allow self-interest to serve public ends. Each individual’s self-interest, he reasons, gives that person an incentive to ensure that other individuals do not abuse power, thus producing precisely the best outcome for society. Madison takes this argument one step further in *Federalist 51*, where he notes that governmental power would be distributed across the national and state governments and across the three major branches of government, whose officials would challenge one another and thus prevent the monopolization of power. Their self-interest would protect liberty.³⁴

Bill of Rights

the first 10 amendments to the U.S. Constitution, intended to protect individual liberties from federal government intrusion.

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THE REACH OF MEDIA

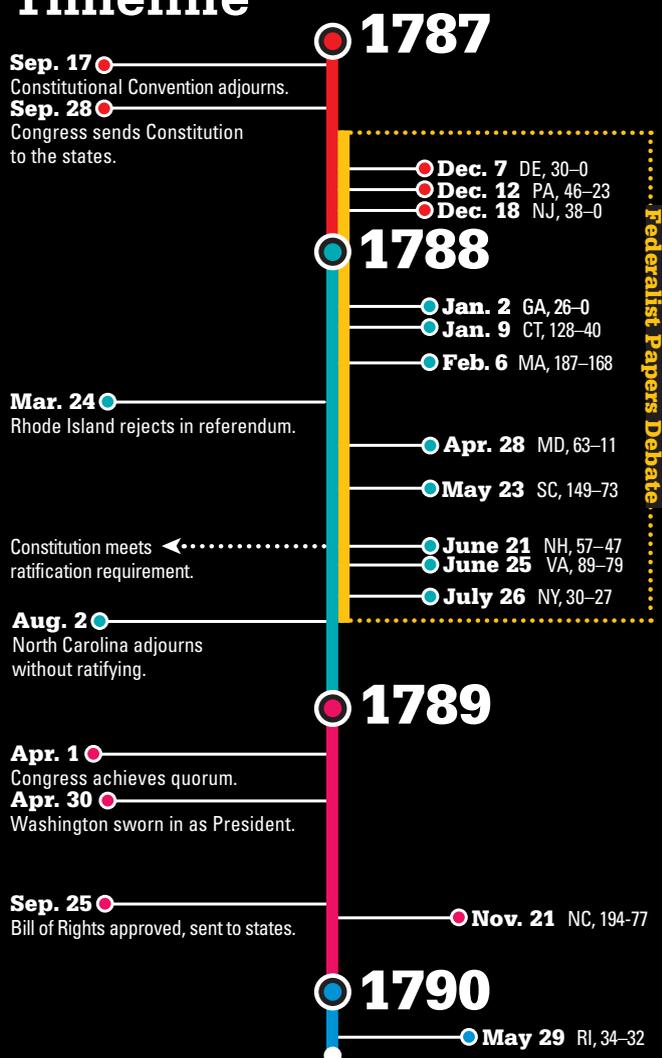
With portable electronic devices, the Internet, and social media, politicians are in real-time communications with constituents. Politicians are always under the watchful eye of the public, and the public has a number of means to express their views to public officials quickly and in sizable numbers. Does contemporary communication technology negate James Madison’s arguments about the advantages of a large republic?

89

How Long Did It Take to Ratify the Constitution?

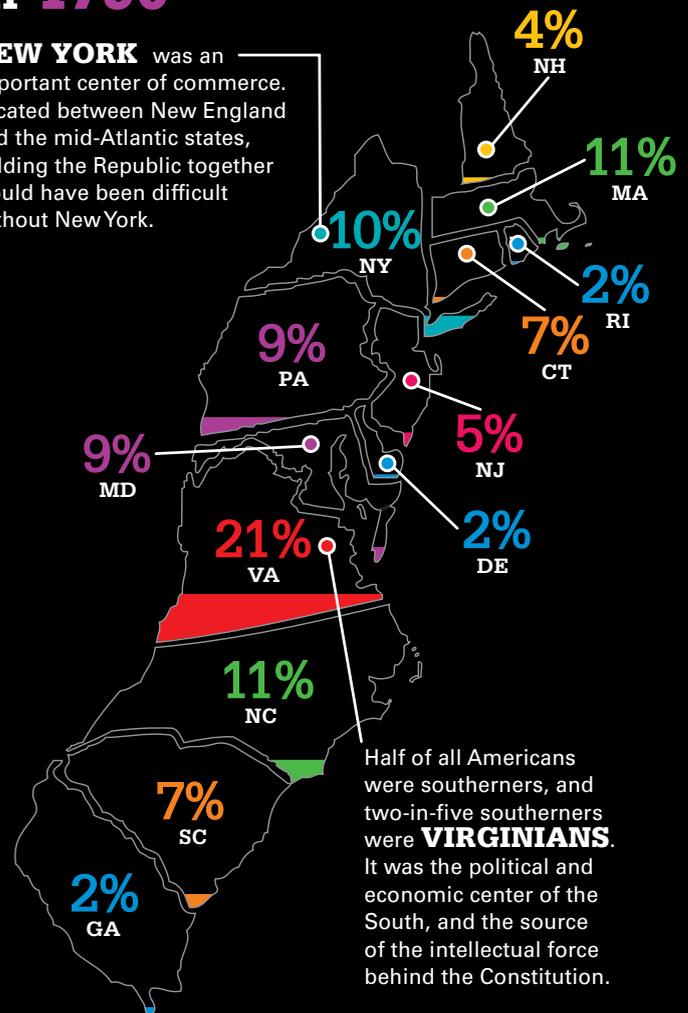
Americans today overwhelmingly support the principles of the Constitution, but after the Framers adjourned on September 17, 1787, three years passed before all thirteen states approved the document. The ensuing ratification debate was an inherently political game of multiple moves, in which the Constitution was kept alive by relatively narrow majorities, particularly in two strategically located states.

Ratification Timeline



The United States in 1790

NEW YORK was an important center of commerce. Located between New England and the mid-Atlantic states, holding the Republic together would have been difficult without New York.



Half of all Americans were southerners, and two-in-five southerners were **VIRGINIANS**. It was the political and economic center of the South, and the source of the intellectual force behind the Constitution.

* Percents indicate a state's percentage of the national population.

Investigate Further

Concept Why did it take three years to ratify the Constitution? The first states to ratify the Constitution did so with a strong majority of support for the document. But as those states signed on, opposition in remaining states grew, and the ratification debate intensified.

Connection Which states were most closely divided on ratification? The debate intensified in two strategic states: New York and Virginia. Ratification in those two holdout states was necessary in order to lend legitimacy to the new government.

Cause What were the issues of the debate? Written in support of the new government, *The Federalist Papers* addressed New Yorkers' concerns about federal power. For Virginians, the sticking point was a Bill of Rights, which James Madison promised to introduce in the new Congress.

One of the key underlying ideas in Madison's thinking is the difficulty factions that are widely dispersed would face in discovering that they had a common interest and then mobilizing around it. Are today's high-tech communications a threat to that aspect of the Madisonian model? Individuals anywhere in the United States can communicate with others instantaneously. Congressional members can be pressured very quickly. Political figures can build followings and organizations that are truly national in scope and that can be reached, mobilized, and spurred to action with great speed. On the other hand, as Madison notes, power remains dispersed across branches and levels of government, which may not be equally responsive to public desires or may be responsive to different groups if different political parties control them. As Madison also points out, the more interests that are brought into politics, the more likely it is that other interests will seek to participate, reducing the likelihood of any interest having a monopoly on what legislators hear. These features of American politics might offset a relationship between the people and government that is today much tighter and more immediate than Madison may have wanted.

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Belief that Change was Necessary Assisted the Federalists' Ratification Campaign

Citizens in the states voted for delegates to attend state ratifying conventions. Ratification was not a sure thing. The debate between the Federalists and Anti-Federalists was intense, and the opposition message voiced by the Anti-Federalists—that the Constitution went too far in the direction of a powerful national government and threatened the sovereignty of the states—was a powerful one for many Americans. Nine states needed to approve the Constitution for it to be in effect. The first state to ratify was Delaware, in December 1787. Seven months later, when New Hampshire became the ninth state to approve, the Constitution was ratified. In eight states, the Constitution received the support of at least 65 percent of the delegates. In the remaining five states, majorities were thin, with support for the Constitution running from about 51 to 55 percent. One state, North Carolina, had originally voted against the Constitution but voted to support it after it had been ratified.

In the end, the Federalists won the debate. In part, this victory appears due to the more convincing arguments of the Federalists. In part, it resulted from the absence of a comprehensive Anti-Federalist alternative. Many who voted for the Constitution might well have shared some of the Anti-Federalists' fears about a strong central government, but they also feared domestic disturbances and foreign threats. At bottom, the decision became whether to adopt the Constitution, stick with the Articles of Confederation, or start over again. Given the sense that the young country faced both foreign and domestic challenges, the appeal of continuing with the Articles or renewing the debate was limited. Change was needed, most people believed, and the Constitution provided that change. The Constitution was also politically attractive because it incorporated the beliefs of the American creed. Liberty, religious freedom, property rights, and democracy were the focus of many constitutional rules and principles. And underlying many of these constitutional principles was the belief in the notion of individual opportunity and the value of equality.

Amending the Constitution

3.4 Explain the processes of constitutional change.

The structure of the constitutional system sometimes frustrates Americans. Features usually thought of as strengths can sometimes be seen as negatives. The separation of powers and checks and balances protect liberty, but they can also slow government responses to important national problems. The American system is designed for the cautious use of power, consistent with

the American creed, but Americans often get upset when government does not act. Federalism allows for diversity and innovation, but it can frustrate those who believe that national standards in some areas are necessary. Thus, the structure of the Constitution can lead to some annoyance, but on the whole most Americans believe that the system works.

Part of the process of establishing legitimacy for the Constitution, however, was providing a procedure by which it could be revised. With the Constitution established as a broad framework for government, the Framers were free to create amending procedures that were difficult but not impossible. The underlying premise of the Constitution's amendment process is that any change in the Constitution has to have broad consensus throughout society. The consensus required is not as extensive as that in the Articles of Confederation, however, which required the congressional representatives of every state to agree to any proposed change.³⁵

□ Amendments Should have Broad Societal Acceptance

The introduction of amendments is essentially a national-level process, while the ratification of amendments is a state-level process (see Figure 3.2). Moreover, supermajorities are a requirement of all four paths to amendment. Amendments will not be added to the Constitution unless they receive supermajority support at two stages—three stages, if we consider that a proposed amendment must have supermajority support separately in the House and in the Senate. (The president has no formal role in the amending process.) The premise that amendments should have broad social acceptance is therefore built into the process, and the presence or absence of such acceptance is often a chief point of debate.³⁶

In the two paths used for the introduction of all amendments to date (paths A and C in Figure 3.2), it is not enough to get the support of just over half the members of Congress, a simple majority. Rather, two-thirds of the members of the House and two-thirds of the members of the Senate who are present and voting are needed to approve a proposed constitutional amendment. Echoing the Great Compromise, the process in paths A and C ensures that two-thirds of the representatives of the people—House members—must agree to the amendment, as well as two-thirds of the representatives of the states—U.S. senators.

The constitutional rules for the introduction of an amendment using paths B and D are less clear, as this method has never been used. The Constitution does not

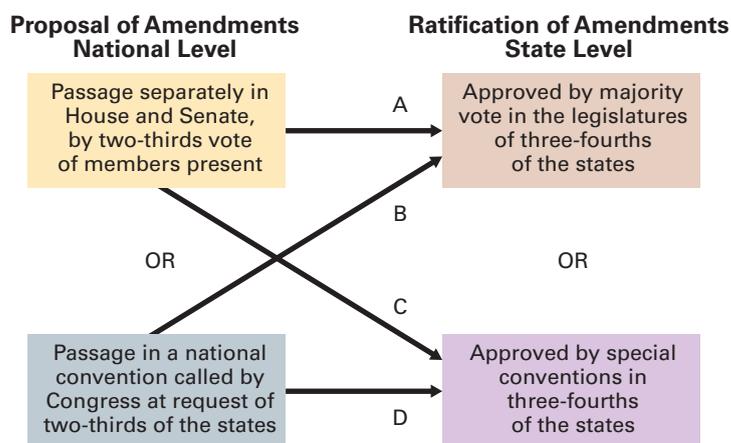


FIGURE 3.2 PATHS TO AMENDING THE CONSTITUTION

The amending process is based on supermajorities at both the proposal and ratification stages.

NOTE: Congress chooses which path is used. Path A: Used for 26 amendments. Path B: Never used. Path C: Used for one amendment (Twenty-first). Path D: Never used.

TABLE 3.2 FAILED ATTEMPTS TO AMEND THE CONSTITUTION SINCE 1980

Amendment	Year defeated
Equal Rights Amendment*	1982
No right to abortion	1983
School prayer allowable	1984
Grant District of Columbia residents full voting rights*	1985
Term limits for Congress	1995
Prohibit flag "desecration"	1995, 2006
Require supermajority to increase taxes	1996
Require balanced budget (multiple attempts)	1982–1997

*Amendment was rejected by the states. In all other cases, amendment passed one house of Congress only.
Note: Years indicate when these proposed amendments passed the second house of Congress.

indicate whether votes at a national convention would need to be supermajorities. Most likely, given that the Constitution gives Congress the power to call the convention if two-thirds of the states request it, Congress would set the rules for how the convention would be run. Some observers worry that it could become a "run-away convention," proposing amendments on any number of issues. The Constitution seems to imply that Congress could prevent this possibility by establishing ground rules for the convention.³⁷

At the ratification level, we again see the Framers' desire that constitutional changes have broad societal acceptance. Three-quarters of the states, or 38 today, either in the state legislature or specially convened state conventions, are needed to ratify an approved amendment. Table 3.2 lists potential amendments since 1980 that had supermajority support in at least one house of Congress but failed in the other house or in the states. Table 3.3 lists all the proposed constitutional amendments in U.S. history that were passed by both houses of Congress but did not receive the necessary support in the states. The short length of the list in Table 3.3 may seem surprising, but it makes short sense. Members of Congress have little incentive to approve a proposed amendment that seems to lack sufficient support in the states to be ratified. On some occasions, however, initial supportive conditions can deteriorate as opponents mobilize against the proposal. For instance, when members of Congress sent the Equal Rights Amendment (ERA) to the states in the 1970s, they had good reason to believe it would be ratified. The proposed amendment stated 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." After a rapid string of state ratifications, however, the ERA proved susceptible to the arguments of opponents in some states that its implications were vague and its interpretation so uncertain that extensive litigation would be a likely result.³⁸ Supporters were unable to build sufficient societal consensus in the wake of these critiques. What looked like a relatively easy victory at the outset turned into defeat.

TABLE 3.3 PROPOSED AMENDMENTS REJECTED BY THE STATES

Amendment	Year approved by Congress
Regulate size of House	1789
U.S. citizens cannot accept titles of nobility	1810
Prohibit any amendments that would interfere with slavery	1861
Give Congress power to limit child labor	1926
Equal Rights Amendment	1972
Grant District of Columbia residents full voting rights	1978

Congress has the responsibility to decide which ratification path a proposed amendment will take. Congress also determines whether proposed amendments have any time limits attached to their ratification. The most recent amendment, the Twenty-seventh, was actually introduced at the same time as the Bill of Rights but did not gather enough state support to be ratified—mostly because it had been forgotten—until 1992. This amendment states that a congressional pay raise cannot take effect until after the next election. On the other hand, the ERA fell just short of receiving the support of three-fourths of the states and died with the expiration of its 10-year time limit, which Congress had already extended from the original 7 years.

Twenty-Seven Amendments Have Been Added to the Constitution

The proof that the federal amending process is difficult is in the numbers. Since 1789, more than 11,000 proposals for constitutional amendments have been introduced in Congress. Of these, only 27 have been ratified. Ten were ratified almost immediately, as part of the Bill of Rights. Since 1791, only 17 amendments have been added to the Constitution, less than one per decade on average. The country can go long periods without any amendments—more than 60 years elapsed between the Twelfth and Thirteenth Amendments, and more than 40 between the Fifteenth and Sixteenth Amendments—and then have a number of amendments ratified over a short period. Between 1961 and 1971, four amendments were added to the Constitution.³⁹

As Table 3.4 shows, amendments have followed the logic of the articles of the Constitution, emphasizing the basic framework of government, the powers of government, the size of the electorate, and the relationship between people and government. The amendments have generally not dealt with matters of social or economic policy, with three exceptions: the elimination of slavery, the approval of a federal income tax, and the prohibition—and then repeal of the prohibition—of alcohol production and sales. Slavery and taxation were issues addressed in the Constitution, implicitly and explicitly, respectively, so these amendments did not address new areas. The failure of Prohibition is often considered a prime example of why specific social policy should not be included in the Constitution.⁴⁰

The Constitution Can Be “Amended” Through Judicial Interpretation and Other Less Formal Means

Although the amending process does provide some flexibility to that enhances the legitimacy of the constitutional system, it is, as we have seen, infrequently successful, and the country can go long periods without any formal change to the Constitution. Whether the Framers expected this degree of structural stability is difficult to say. After all, they saw the Constitution amended 10 times—the Bill of Rights—within two years. By 1804, another two amendments had been ratified, so that 12 of the 27 amendments, or nearly 45 percent, had been added to the Constitution within 15 years of its adoption.

The infrequent amendment of the Constitution since then therefore presents a puzzle. The easy answer, often given, is that the Framers disdained the idea of frequent revision of the document and provided a role model of appropriate behavior for later generations. From the view of political science, however, the empirical record is difficult to match up with this answer. Yes, the Framers were concerned conceptually about overly frequent revision to the document, but they also had to deal with practical political reality. Americans are sometimes so swept up with notions of wise, philosophical Framers that they neglect how astute and capable they were as politicians. In the world of practical politics, the Framers were not adamantly



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AN AMENDMENT DEFEATED

Senator Jesse Helms (R-NC) and Phyllis Schlafly celebrate the defeat of the Equal Rights Amendment in 1982. Schlafly, an attorney and political activist, was one of the chief organizers of the effort to block the Equal Rights Amendment by putting public pressure on state legislators to oppose the amendment. She began her efforts at a time when it appeared the ERA was virtually certain to be ratified by the 38 states needed to add it to the Constitution.

opposed to the idea of amending the document to achieve their goals. In addition to the 12 successful amendments noted earlier, they proposed two more as part of the set of Bill of Rights amendments—one, on the size of House districts, was unsuccessful, and the other, on congressional pay raises, was finally ratified as the Twenty-seventh Amendment in 1992. The bottom line is that if the Framers were setting an example for future generations to follow, it was not one of restraint in the amendment process.

If infrequent amendments cannot be attributed to the Framers as role models, what other factors might be important? One key factor noted by political scientists is that the supermajority processes involved in the proposal and ratification stages create a high barrier to adding new amendments. In addition, the formal amending process is not the only means of constitutional change: the Supreme Court's interpretation of the Constitution can change its meaning. Most likely, the causality runs both ways.

TABLE 3.4 AMENDMENTS TO THE CONSTITUTION

Amendment	Purpose	Year adopted
Relationship of People and Government		
1st	Freedom of religion, speech, press, assembly, petition	1791
2nd	Right of people to keep arms	1791
3rd	No housing of militia without due process	1791
4th	Restrictions on search and seizure	1791
5th–8th	Rights in judicial proceedings	1791
9th–10th	Nonenumerated rights reserved to the states or people	1791
13th	Slavery prohibited	1865
14th	Civil liberties and civil rights protections extended to states	1865
Government Structure		
12th	Changes in Electoral College process	1804
17th	Direct election of U.S. senators	1913
20th	Starting dates for terms; procedure when president-elect dies	1933
22nd	Presidents limited to two terms	1951
25th	Succession in cases of president's death or disability	1967
27th	Congressional pay raises require intervening election	1992
Size of the Electorate		
15th	Extend voting rights to all races	1870
19th	Extend voting rights to women	1920
23rd	Extend voting rights to residents of District of Columbia	1961
24th	Eliminate payment of "poll tax" as requirement to vote	1964
26th	Extend voting rights to citizens 18 years of age and older	1971
Powers of Government		
11th	Restricts federal courts' role in cases involving states	1795
16th	National income tax	1913
18th	Prohibition of sale, manufacture, and transportation of alcohol	1919
21st	Repeal of Eighteenth Amendment	1933

The difficulty of the formal amending process leads individuals to look to the Supreme Court for new interpretations of the Constitution, and because the Court engages in constitutional interpretation, individuals may see less need to engage in the lengthy formal amendment process.

Consider the Court's *Plessy v. Ferguson* decision of 1896. The Supreme Court declared that racial segregation was legally permissible under the Constitution. Nearly 60 years later, however, in the *Brown v. Board of Education* decision, the Court concluded precisely the opposite. The language of the Constitution had not changed in the meantime with regard to this issue, yet the Court, with different members, in a different time, read the meaning of the Constitution differently.

Think of the amending process detailed in the Constitution as producing formal amendments: they actually change the text of the document. Constitutional interpretation as performed by the courts produces what might be considered informal amendments: the constitutional text remains the same, but the meaning of that text is read differently. To some observers of American politics, this practice creates the risk of allowing judges to insert their policy preferences into the Constitution by decreeing that the Constitution requires or prohibits something that had previously been left to elected officials to decide. In this view, too much power is placed in the hands of unelected federal judges, rather than the elected officials who would have to pass constitutional amendments. On the other hand, informal amendments undeniably provide additional adaptability to the system, which was a goal of the Framers. Most likely, it

would have proved impossible to pass a formal constitutional amendment between 1896 and 1954 stating that segregation was unconstitutional, but through a change in interpretation, the Constitution was, in effect, amended.

Both formal and informal amendments have been involved in what some scholars refer to as “constitutional moments”—times of great debate on the fundamental principles of American government, politics, and the Constitution.⁴¹ The 1780s, with the creation of the Articles of Confederation and the Constitution, are often seen as one such period. The 1860s, with a new relationship between the national and state governments, as well as the social revolution brought by the end of slavery, are another. The 1930s and 1940s, with the rise of a federal government of larger and more extensive scope and power than that seen previously, are a third. Formal amendments and constitution writing dominated the first two moments, while informal amendments dominated the latter. Each significantly changed the nature of American government from what it had previously been.

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Review the Chapter



From Revolution to Constitution

3.1 Trace the developments that led to the American Revolution and the country's first constitution, p. 63.

Although scholars still debate the causes and effects of the American Revolution, we can safely say that ideas about liberty and democracy were prominent rallying cries of the colonists. After a series of acts by the British government led to support for independence, the Americans turned their attention to building a structure of governance. The first attempt at a constitution, the Articles of Confederation, proved to be insufficient in building a national government with sufficient power and authority over the states.

Crafting the Constitution

3.2 Outline the problems the Framers of the Constitution attempted to resolve and the solutions they devised, p. 73.

The Framers focused on resolving five problems: overcoming fundamental disputes on representation in the new government; allowing for public input while limiting “excessive” democracy and concentrated power through election procedures, separation of powers, checks and balances, and federalism; protecting commerce and property; creating legitimacy by constructing an adaptable but stable governing framework; and providing for national defense. As they wrote a new constitution, the Framers sought to meld power and liberty, freedom and order, and national authority and state sovereignty.

The Battle for Ratification

3.3 Compare and contrast the arguments of Anti-Federalists and Federalists, p. 86.

Federalists and Anti-Federalists debated the system of government set out in the Constitution. The Federalists argued that the best protection for liberty would be a stronger national government, a large republic rather than a small democracy, and a system with some distance between the people and government power, so that any “passions” that swept through the population would not immediately find their way into law. The Anti-Federalists favored a system closer to that provided by the Articles of Confederation—a loose union of the states in which the national government was clearly subordinate. At the very least, they wanted a national government that was close to the people and had many checks on its power.

Amending the Constitution

3.4 Explain the processes of constitutional change, p. 91.

The amending process includes the introduction or proposal of an amendment, which happens at the national level, and the ratification of a proposed amendment, which happens at the state level. Through this two-level process, and through the use of supermajorities in Congress and the states, the Framers hoped to ensure that only those amendments with broad societal approval would be added to the Constitution. To date, only 27 out of more than 10,000 amendments proposed have made it through both levels of the amending process. The Constitution does not change only when the text is changed, however. When judges interpret the Constitution, they give it specific meaning. When those interpretations change, the meaning of the Constitution changes also, even though the text remains unchanged.

Learn the Terms



Anti-Federalists, p. 86
Articles of Confederation, p. 70
Bill of Rights, p. 89
checks and balances, p. 79
Declaration of Independence, p. 68
equal privileges and immunities clause, p. 84
federalism, p. 81

Federalists, p. 86
full faith and credit clause, p. 84
Great Compromise, p. 76
indirect election, p. 78
judicial review, p. 81
nation, p. 69
New Jersey Plan, p. 75
parliamentary system, p. 82

republic, p. 78
separation of powers, p. 78
Shays's Rebellion, p. 72
supremacy clause, p. 84
Three-fifths Compromise, p. 76
Virginia Plan, p. 75

Test Yourself

 Study and Review the Practice Tests

3.1 Trace the developments that led to the American Revolution and the country's first constitution.

Shays's Rebellion in Massachusetts raised concerns because it seemed to indicate that

- Congress under the Articles of Confederation lacked the power to confront significant national emergencies.
- Congress under the Articles of Confederation was too powerful.
- the national government under the Articles of Confederation was equipped to meet only naval attacks.
- states such as Massachusetts were distributing land for free to radical farmer advocates such as Shays.
- individuals loyal to Great Britain were committing violent acts after the Americans had won the Revolutionary War.

3.2 Outline the problems the Framers of the Constitution attempted to resolve and the solutions they devised.

Which one of the following was NOT a goal of the Framers of the Constitution?

- Resolve divisions among elites
- Limit excessive democracy
- Eliminate the Great Compromise
- Establish legitimacy for the new government
- Protect commerce and property

3.3 Compare and contrast the arguments of Anti-Federalists and Federalists.

The Anti-Federalists argued all of the following EXCEPT

- The proposed Constitution threatened the people's liberty.
- The proposed Constitution would enable individuals' self-interest to protect liberty.
- The proposed Constitution would reduce the democratic influence on government.
- A government more like the one established by the Articles of Confederation was needed.
- A bill of rights was necessary to protect individual freedoms.

3.4 Explain the processes of constitutional change.

Which of the following is an informal constitutional amendment?

- An amendment that passes by only a simple majority in the both the House and Senate
- An amendment that is set to expire after a certain number of years
- An amendment that recommends rather than requires government action
- A president nominating judges who share his ideology
- A Court opinion that interprets the Constitution's meaning in a new way

Explore Further

SUGGESTED READINGS BY TOP SCHOLARS

- Richard Beeman. 2009. *Plain, Honest Men: The Making of the American Constitution*. New York: Random House. *Details the day-to-day debates and decisions at the Constitutional Convention.*
- Mark A. Graber. 2006. *Dred Scott and the Problem of Constitutional Evil*. New York: Cambridge University Press. *Provides a provocative examination, through the lens of the Dred Scott decision, of how constitutions, in their effort to make accommodations between rival factions, can also provide support for injustice.*
- Sanford Levinson. 2006. *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*. New York: Oxford University Press. *Argues that the Constitution thwarts the will of the people and promotes ineffective governance, and offers suggestions for reforming the document.*
- Pauline Maier. 2010. *Ratification: The People Debate the Constitution, 1787–1788*. New York: Simon & Schuster. *The first extensive history of the ratification process in the states; covers the people involved as well as the practical and philosophical battles in each state, focusing particularly on the conflict in Pennsylvania, Massachusetts, Virginia, and New York.*
- Keith E. Whittington. 2007. *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*. Princeton, NJ: Princeton University Press. *Contrary to the idea that the judiciary has claimed power rightfully belonging to the other branches, the book argues that the courts have had power pushed upon them by politicians who found judicial supremacy to serve their interests.*

SUGGESTED WEBSITES

- Library of Congress, Primary Documents in American History:** www.memory.loc.gov/ammem/help/constRedir.html
Site with links and discussion of the key documents in American political history, including draft versions. Includes key documents that preceded and contributed to the Declaration of Independence, Articles of Confederation, and U.S. Constitution.
- Congressional Research Service Annotated Constitution:** www.law.cornell.edu/constitution
A helpful guide that includes commentary, background, historical developments, and relevant court cases for each article, section, and amendment of the Constitution.
- Avalon Project: The U.S. Constitution:** www.yale.edu/lawweb/avalon/constpap.htm
An outstanding collection of documents related to the development of the Constitution. From the Avalon Project home page, you can access document collections on many other topics in American politics and law.
- Constitution Finder:** <http://confinder.richmond.edu>
Constitutions from around the world.
- Constitution of the Confederate States of America:** www.civilwarhome.com/csconstitution.htm
The Confederate Constitution used the U.S. Constitution as a framework. This site shows where the two constitutions matched and where they diverged.
- American Law Sources Online:** www.lawsource.com/also
Provides a gateway to state constitutions and other state legal documents and information. 99