

Chapter 2

Forging a New Government: The Constitution

LEARNING OBJECTIVES

After students have read and studied this chapter they should be able to:

- Explain the impact of events in the early settlements, including Jamestown (representative assembly) and Plymouth (Mayflower Compact), on later political developments in the colonies.
- Trace the events and circumstances that led to the Revolutionary War.
- Explain the reasons for British attempts to raise revenue from the colonies.
- Describe the colonial response to the Boston Tea Party, the First Continental Congress, the Second Continental Congress, and *Common Sense*.
- Explain the key ideas in the Declaration of Independence, including the concepts of natural rights, social contracts, and consent of the governed.
- Understand the rise of Republicanism in the newly independent colonies.
- Trace the development of the Articles of Confederation.
- Explain the structure of the government created under the Articles (including Congress) and other accomplishments (land issues and Northwest Ordinance).
- Explain the weaknesses of the Articles (dependence on goodwill of states, inability to tax or support a militia, and need for unanimous approval of amendments).
- Explain the impact of Shays' Rebellion.
- Summarize the events leading to the calling of the Constitutional Convention.
- Explain the factions among delegates and the problem of representation in the Congress (including the Virginia Plan and the New Jersey Plan).
- Describe the Great Compromise and the three-fifths compromise.
- Explain the Madisonian Model and its structures for the distribution of power (separation of powers, checks and balances, and the electoral college).

- Describe the historical context surrounding the drafting of the Constitution and its key concepts (popular sovereignty, republican government, limited government, and federal system).
- Understand the ratification of the Constitution, including the motivations of the Federalists and Anti-Federalists.
- Describe the Bill of Rights.
- Detail the formal ways in which the Constitution is altered, as constitutional amendments are proposed and ratified.
- Describe the informal ways in which Congress, the president, and the courts can interpret and change the Constitution.

TOPICS FOR DISCUSSION

Why did the British place restrictions on the colonies?

Does it matter how the term *people*, as used in the Declaration of Independence, is defined? Did the members of the Second Continental Congress mean *all* people? What about the rights of women? What about the rights of Native Americans? What about the rights of slaves?

What was one of the major deletions to Jefferson's first draft of the Declaration of Independence? (Answer: Slavery.) Why was this provision deleted? (Answer: To gain the support of pro-slavery states.) Does the deletion of the "condemnation of slavery" statement reduce the impact of the concept of "inalienable rights"? Remember that *inalienable* means incapable of being transferred to a new owner.

One of the most important powers of a government is to raise revenue. What actions can a government take without money? How does a government make money? (Answer: Taxes, selling assets, and borrowing.)

What was the major reason for the electoral college? (Answer: It makes the president independent of Congress.) Would it make a major difference if Congress selected the president, as some of the delegates advocated? How does the electoral college demonstrate the founders' suspicion of mass democracy?

The Constitution was not made public until September 17, 1787. The colonists had no input as to what the document would include. Furthermore, the Constitution violated the provisions in the Articles of Confederation for alterations to the government. What would be the public reaction today if Congress passed a major legislative proposal and the people had no forewarning? Would it be difficult for Congress to persuade citizens that such legislation was in the public interest? What would be the reaction of the media and political leaders at the state level to any decisions that violated the Constitution?

What would have occurred if one or more of the states had rejected the Constitution? If a large state like New York or Virginia had voted against it, would the United States have taken economic and/or political sanctions against such a state? Could a single state have managed to survive outside the union of states? (Rhode Island could be an example.)

How difficult is it to amend the Constitution? How difficult should it be to make alterations to the Constitution? What problems arise if a constitution is too easy to amend? What problems arise if a constitution is too difficult to amend? How can the Constitution take on new meanings without formal amendments?

What would have happened without the case of *Marbury v. Madison*? Would the concept of “judicial review” still have come about? Why is judicial review important?

Which amendments have served to make the Constitution more “democratic”?

What would the founders say about the ability of the president to use a line-item veto on legislation passed by Congress?

What would Madison think about interest groups in modern society?

Would Madison approve of the current two-party system that controls virtually all levels of government in the United States?

BEYOND THE BOOK

This chapter describes the Constitution in historical context, rather than examining the particular provisions of the document in detail. That is a choice that provides a body of insights, but it is not the only possible choice. If you wish, you can spend some time on a detailed analysis. The commentary imbedded in the text of the Constitution (provided in Appendix C) may be helpful in doing this.

Why did England leave the colonies alone during the century after the first colonial foundations? The answer is, in part, because England was distracted by its Civil War. Further, the winners of the Civil War were English puritans who were sympathetic to the religious beliefs of the colonists, and for that reason alone unlikely to revoke their practical autonomy. A final point is that initially, at least, the colonies had little economic importance, especially compared to the sugar-producing islands of the West Indies.

A *confederation* is a difficult concept for most modern Americans to grasp. We have come to think of the United States as a large political unit that has secondary levels of smaller political units (state and local governments). What exists today is a vastly different structure of government than what existed under the Articles of Confederation. A modern confederation might look something like the European Union (EU). You may want to provide some details about the EU as an example of a confederation.

The birth of our nation is linked to the date 1776. However, the government as provided by the Constitution did not begin until 1789. Many events occurred between the Revolution and the adoption of the Constitution over a thirteen-year time frame. One way to illustrate this point is to subtract the following:

$$\begin{array}{r} 1789 \quad 2011 \text{ (or the current year)} \\ - \underline{13} \quad - \underline{13} \\ 1776 \quad 1998 \end{array}$$

There have been dramatic changes in the world in the last thirteen years—changes that no one could have correctly predicted thirteen years ago. The same was true for the changes the people in the United States encountered in the thirteen years from 1776 to 1789.

One of the key questions asked by foreign observers is why the founders did not adopt a parliamentary system. After all, they had an example of it in front of them in the form of the British Parliament. To raise this topic for discussion, it would be necessary to describe to your students, at least briefly, what a parliamentary system is, because many of them may be unclear on the definition (unified government, executive chosen by Parliament). Given the definition, and given the revolutionary-era distrust of powerful governors and preference for the legislature, might it have been reasonable to establish a weak executive chosen by the legislature? Such a system does not seem to have commanded much thought, however. In the end, having the governor chosen by the people seemed a better way to control the aspirations of holders of that office.

A division of powers clearly was not just Madison's idea, but a concept with wide support. The text mentions Montesquieu as a source of these ideas. His idealized (and somewhat fallacious) vision of the British Constitution as representing the tripartite division doubtless had impact. You could, however, consider making Bernard Bailyn's point, from *The Ideological Origins of the American Revolution*, that the true conduit of republican ideas to the colonists was a host of minor Whiggish pamphleteers in England, none of whom are famous today.

Did most Americans support ratification of the Constitution? Most of the delegates to the Constitutional Convention were professionals (thirty-three were lawyers) who were well educated and represented various economic interests. (If we were to analyze the demographic backgrounds of the members of the current Congress and the state legislatures, we would find many of the same characteristics as those of the founders.) Was the Constitution truly favored by the "majority"? If we count all the people who participated, in comparison to the adult population, the answer would be no. However, if we ask today which politician is favored by a "majority" of the public, the answer would be none. Even a very popular senator who receives 70 percent of the vote cast in an election cannot claim to be favored by a majority of the public, because less than half of the adult population participates in general elections.

CHAPTER OUTLINE

The U.S. Constitution is a remarkable document. It is quite short, depicts broad principles, is difficult to amend, and has remained largely intact. Its context is important, as both the political culture and political experience of the framers are reflected in its provisions.

I. The Colonial Background

In 1607, the English government sent a group to establish a trading post, Jamestown (in what is now Virginia), which became its first colony. The king gave backers “full power and authority” to make laws. Colonists set up a *representative assembly*, a legislature made up of individuals representing the population.

A. Separatists, the *Mayflower*, and the Compact. The first New England colony was established in 1620, when people dissatisfied with the Church of England (Separatists) sailed on the *Mayflower*, seeking a place where they could practice their own religious beliefs and landing at Plymouth (now Massachusetts). Their “Mayflower Compact” acted as a form of public authority for those about to go ashore.

1. The Significance of the Compact. The compact was not a constitution, but a political statement setting forth the idea of “consent” of the affected individuals.
2. Pilgrim Beliefs. Although the Plymouth settlers (Pilgrims) committed themselves to self-government, their political ideals were different from those embraced today, or even when the Constitution was written. They had formed a religious colony, with no attempt to separate church and state.

B. More Colonies, More Government. By 1732, thirteen colonies had been established. Though technically governed by London, colonists made their own decisions and laws, developing a limited government. Legislation in the colonies (examples: Connecticut, Massachusetts, Pennsylvania) gave colonists political experience, and led to the quick establishments of their own state constitutions after 1776.

II. British Restrictions and Colonial Grievances

By the 1760s, the British Parliament began to pass tax laws that treated the colonies as a unit, largely to pay off the military debt from the French and Indian War (1756–1763). When Parliament passed the Sugar Act in 1764, many colonists protested its tax. When it passed the Stamp Act in 1765, they called it “taxation without representation,” boycotting English products and two years later staging the Boston Tea Party protest. When it passed the Coercive Acts in 1774, closing Boston Harbor and taking control over Massachusetts, they had had enough.

III. The Colonial Response: The Continental Congresses

The colonists decided to have a colonial gathering (or “congress”) in Philadelphia involving delegates from all colonies.

- A. The First Continental Congress. The focus of this 1774 gathering was not to claim independence, but to petition the king with a list of grievances, resolve to raise troops in each colony, and boycott British trade. The Crown condemned all actions as acts of rebellion.
- B. The Second Continental Congress. By the time of this 1775 gathering, fighting had already begun between the British and the colonists. A main focus was to establish an army and declare George Washington the commander in chief. Peace was still attempted with Britain, but the Revolutionary War was looming. Thomas Paine’s pamphlet, *Common Sense*, reflected popular opinion in plain language, rallying colonists to form their own government.

IV. Declaring Independence

In April 1776, the Second Continental Congress voted for trade policies that implied independence. In May, it directed colonies to establish independence by forming state governments. In July, colonists declared independence themselves.

- A. The Resolution of Independence. In June 1776, Thomas Jefferson began writing drafts of a brief precursor to the Declaration of Independence, and the *Resolution of Independence* was adopted on July 2.
- B. July 4, 1776—the Declaration of Independence. Jefferson’s version was amended to gain unanimous acceptance, and on July 4, the *Declaration of Independence* was passed. On July 19, a modified version was drafted, and on August 2 it was signed by all members.
 - 1. Universal Truths. The text clearly illustrates why this is one of the world’s most significant documents: “We hold these Truths to be self-evident, that all Men are created equal . . . “
 - 2. Natural Rights and Social Contracts. At the time, it was a revolutionary idea that people have *natural rights* (“unalienable Rights”), including rights to “Life, Liberty, and the Pursuit of Happiness” inherent in natural law and not dependent on government. Jefferson had reflected the arguments of English philosopher John Locke, who wrote that all people possess certain natural rights, including the rights to life, liberty, and property. Locke also argued for a *social contract*, a voluntary agreement among individuals to secure their rights and welfare by creating a government and abiding by its rules. Like the Mayflower Compact, the Declaration of Independence was based on the idea of “consent of the governed,” and that government had the responsibility to protect these rights. If the government failed to do so, the people had the right to revolt.

3. The Significance of the Declaration. Americans may recognize the opening words, but few question their link to independence. Abraham Lincoln admitted that they had had no practical value in separating from Britain, but were included for future reference. Still, the Declaration established the legitimacy of the new nation, and the legitimacy of the American Revolution.

V. The Rise of Republicanism

Though colonists had formally declared independence, the war continued until Cornwallis surrendered in 1781. And Britain waited until 1783 to acknowledge this independence in the Treaty of Paris. Meanwhile, “republicans” (not related to the Republican Party of today) became a major political force, opposing rule by any central authority. As each state adopted its own constitution, they pushed for increased power to state legislatures, essentially the politics of 1776. Two states—Georgia and Pennsylvania—adopted *unicameral legislatures*, unchecked by executive or judicial authority.

VI. The Articles of Confederation: Our First Form of Government

In June of 1776, fear of a too-powerful government led the Second Continental Congress to begin drafting the Articles of Confederation and Perpetual Union, or the *Articles of Confederation*. A *confederation* is a voluntary association of independent *states*, which retain ultimate authority except for limited power they deem to a central government. The Articles were implemented with the final draft in 1777, though not ratified until 1781.

- A. The Articles Establish a Government. The thirteen states established a government called the *Congress of the Confederation*. It was a unicameral assembly, with each state possessing one vote and Congress having the power to choose a president and appoint an executive committee. A number of additional powers—and lack of powers—became evident (see Table 2-1).
- B. Accomplishments under the Articles. Certain states gave up their land claims in the West. The Northwest Ordinance set up a pattern of government for new territories. For the first time, resources were pooled by the American states.
- C. Weaknesses of the Articles. Congress could not demand revenues from the states, and its actions required the consent of the states (only a “league of friendship” existed, relying on the goodwill of the states). There was no central authority and no national system of courts. Most important, there was no power to raise funds for a militia, crucial to the Constitutional Convention.
- D. Shays’ Rebellion and the Need for Revision of the Articles. “Shays’ Rebellion,” the uprising by a band of armed farmers, convinced political leaders that the central government under the Articles was incapable of maintaining order or providing for the public welfare. The solution appeared to be a stronger central government.

VII. Drafting the Constitution

A September 1786 meeting of all the states addressed multiple weaknesses and lapses in the central government related to its relationship to the states, its legislature, its executive leadership, and its economic policies. The result was a petition for a meeting in May of 1787, the “Constitutional Convention.”

- A. Factions among the Delegates. Most delegates favored a stronger government, but there was no agreement on its structure or strength. A majority of delegates—including George Washington and Benjamin Franklin—were strong “nationalists,” seeking a powerful central government. Hamilton went further, supporting a monarchy. Madison and Wilson favored a more democratic format based on popular support. But some delegates were totally against any national authority, and several from New York left.
- B. Politicking and Compromises. At the start of the convention, Edmund Randolph from James Madison’s Virginia delegation, was ready to present fifteen resolutions proposing fundamental changes in the nation’s government. This set the tone for the remainder of the convention.
 1. The Virginia Plan. Sponsored by Randolph, this plan was based on a *bicameral legislature*, with power concentrated in a lower chamber chosen by the people, which then chose the smaller upper chamber. The legislature would elect an unspecified national executive and appoint a national judiciary. But representation would be strictly by population, to the disadvantage of the small states.
 2. The New Jersey Plan. Sponsored by William Paterson, this plan maintained the one-state, one-vote structure already in place. Several people would comprise the executive office, to be elected by the Congress, and that office would appoint a Supreme Court. The New Jersey plan was simply an amendment of the Articles of Confederation. However, it featured the *supremacy doctrine*, which gives priority of national law over state laws—a doctrine which was later included in the Constitution.
 3. The “Great Compromise.” Roger Sherman of Connecticut proposed a compromise between more populous states, which wanted representation based on population (the Virginia Plan) and the small states, which wanted representation equal for each state (the New Jersey Plan). The *Great Compromise* (or the *Connecticut Compromise*) proposed a bicameral legislature, with one chamber based on population (the House of Representatives) and the other based on equal representation for each state (the Senate). This plan broke the deadlock between large and small states, though its equal representation in the Senate diluted the power of heavily populated states.

4. The Three-Fifths Compromise. Many delegates had serious doubts about slavery and wanted it banned entirely. Delegates from the South, led by Charles Pinckney of South Carolina, opposed a ban and wanted slaves to be counted in determining representation in Congress. Delegates from the North objected. The *three-fifths compromise*, suggested by Sherman to prevent southern delegates from abandoning the convention, provided that three-fifths of the slaves would be counted (or each slave would count as three-fifths of a person). The matter of slavery itself was to be put off until after 1808. Whether the framers should have banned slavery rather than accept the compromise has been debated by historians ever since.
 5. Other Issues. To the benefit of the agricultural South, export taxes were banned. The delegates mandated a Supreme Court, with both the president and the Senate choosing its members, and allowed Congress to establish lower courts.
- C. Working toward Final Agreement. A small Committee of Detail was appointed to finalize the work. Its draft suggested that the executive and judicial branches be subordinate to the legislative branch.
1. The Madisonian Model—Separation of Powers. The delegates were concerned with structuring the government to prevent the imposition of tyranny. So Madison suggested that the legislative, executive, and judicial powers focus on different tasks, equally but independently, referred to as *separation of powers*. The *Madisonian Model* offered a three-part structure in which no one branch could dominate the others.
 2. The Madisonian Model—Checks and Balances. The term *checks and balances* means that each of the three major powers can check and confront the other two (see Figure 2-1). Example: Congress can enact a law but the president can veto it. Over the years, this has system evolved into a complex give-and-take among the branches. Examples: Congress enacts the law, the president vetoes it, then Congress overrides the veto; the president appoints a judge, Congress refuses to confirm it, then the president makes a recess appointment without Senate approval.
 3. The Executive. Suggestions for a plural executive, or a congressionally appointed executive, were rejected. Instead an *electoral college* was created so the president would not be chosen by Congress, but not by a direct popular vote, either.

- D. The Final Document. A summary of the fundamental principles to be formally approved: popular sovereignty, a republican government, a limited government, separation of powers, checks and balances, and allowance for states' rights to avoid too much centralized control. The September 1787 signing by thirty-nine of the original fifty-five delegates began the *ratification* debate.

VIII. The Difficult Road to Ratification

The founders realized that some states were very resistant. The delegates agreed that as soon as nine (not thirteen) states approved the Constitution, it would take effect.

- A. The Federalists Push for Ratification. Two opposing forces battled over ratification. The *Federalists* were in favor of a strong central government. The *Anti-Federalists* wanted to prevent the newly drafted Constitution from being ratified.
1. The *Federalist Papers*. Hamilton, Madison, and Jay quickly wrote eighty-five essays that were widely published. The *Federalist Papers* attempted to persuade the public to support the new form of government and its Constitution, and today are considered perhaps the best example of political theorizing in U.S. history. *Federalist #10* (see Appendix C) features James Madison's classic political theory concerning the nature of groups, or "factions."
 2. The Anti-Federalist Response. The Anti-Federalists issued brilliant attacks on the Constitution, claiming it would lead to aristocratic tyranny and an overbearing central government. Such patriots as Patrick Henry and Samuel Adams argued the viewpoint of the French philosopher, Montesquieu, that a republic worked only in small societies or networks of small districts. *Federalist #10* and *Federalist #51* (see Appendix C) offered an exceptional view for those times.
- B. The March to the Finish. New Hampshire was the ninth state to approve, and the U.S. Constitution was ratified.

IX. The Bill of Rights

The Federalists had promised that amendments would be passed to protect individual liberties from a central government. Madison reviewed hundreds of state suggestions and drafted ten amendments, called the *Bill of Rights*. It was ratified in December 1791 and became part of the U.S. Constitution. It provided protection of fundamental rights, but it did not include equal protection under the law. Also, it did not limit state power. Only the national government was restricted until the Fourteenth Amendment was passed after the Civil War.

X. Altering the Constitution: The Formal Amendment Process

The founders intended the Constitution to be a framework for the new government, open to future interpretation, so it was kept to about 7,000 words. It remains brief because the amending procedure does not allow for easy change, designed to prevent tyrannical or oppressive additions. Amendments can be *proposed* by 1) two-thirds vote in each chamber of Congress, or by 2) a national convention (this method has never been used). Amendments can be *ratified* by 1) three-fourths vote in various state legislatures, or by 2) special conventions called in the states (used only once, to repeal Prohibition). Congress has considered more than eleven thousand amendments, only thirty-three have been submitted, and only twenty-seven have been ratified (see Table 2-2). To have any chance for success, recommendations must have wide support.

XI. Informal Methods of Constitutional Change

While it is very difficult to amend the Constitution, its meaning has changed through various interpretations based on growth in population and territory and on political and social realities. Congress, presidents, and courts have interpreted the Constitution over time.

- A. Congressional Legislation. Though it does not specifically define them, the Constitution gives Congress broad powers to regulate foreign and interstate commerce (Article I, Section 8, or the “commerce clause”) and to establish federal courts (Article III, Section 1).
- B. Presidential Actions. Though not specifically authorized in the Constitution, presidents have proposed bills, sent troops into combat, and conducted foreign affairs through *executive agreements* between chiefs of state.
- C. Judicial Review. Though not specifically mentioned in the Constitution, *judicial review*, the power of the courts to declare a law or action unconstitutional, was claimed by the Supreme Court in *Marbury v. Madison*. This allowed the Court to adapt the Constitution to changing situations. Example: electronic wiretapping. It can also reverse past rulings based on changing values. Example: reversal of its “separate-but-equal” decision. So the law is what the Supreme Court says it is, at any given time.

XII. Interpretation, Custom, and Usage. The Constitution is open to interpretation and change. Congress has delegated specific tasks to the president and the executive branch, eventually involving hundreds of entities and millions of employees. Political parties have great influence over the makeup of Congress and the election system.

XIII. Features

- A. At Issue: Just How Christian Were the Founders? Though Christianity permeated the world and the colonies at the time, and the overwhelming majority of colonists considered themselves Christians, there is no reference to Christ in the Declaration of Independence, and no use of the word *God* in the Constitution. While most of the founders were Christians, they also relied heavily on Enlightenment rationalism, and they opposed mixing church and state.

- B. Making a Difference: How Can You Affect the U.S. Constitution? What can one individual do to help rewrite the Constitution? What does its provisions have to do with the ordinary person, and how can one person make a difference? The most important issues in our society are often settled by the Constitution, as seen in a new movement to ratify the Equal Rights Amendment and a proposed amendment that recognizes the “personhood” of the unborn.