



Tourists view an original copy of the U.S. Constitution at the National Archives in Washington, DC.

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THE FOUNDING AND THE CONSTITUTION

LEARNING OBJECTIVES

- 2.1 Discuss the causes of the American Revolution and the structure of the first national government under the Articles of Confederation, including its strengths, weaknesses, and struggles.
- 2.2 Compare and contrast the various plans for the new constitution and the obstacles to agreement among the different colonies.
- 2.3 Explain the principles incorporated in the new constitution, including popular sovereignty, the separation of powers, federalism, and limited government.
- 2.4 Discuss the reasons why ratification succeeded and the role that the Bill of Rights played in the process.
- 2.5 Describe the process of amending the Constitution as well as alternative means of achieving constitutional change.

THE ENDURING CAPACITY of the U.S. Constitution to govern for better than two centuries represents something of a miracle: by one estimate, the average life-span of other countries' national constitutions over this same period was just 17 years. How has the American constitutional experiment succeeded where so many others have failed? The secret lies in its capacity to serve two functions at the same time: it provides stability (just 17 amendments passed during the past 230 years) while at the same time offering the flexibility to adapt to changes in America's political culture. Woodrow Wilson addressed this when he wrote, "The Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age."

THEN & NOW

Stretching the Constitution to Serve Political Needs

Amendments to the Constitution provide the most visible form of change to our founding document, but they are exceedingly rare. There have been just 27 amendments ratified since the Bill of Rights first appeared in 1791. How can a republic adapt to changing times and realities when its written constitution is so impervious to formal change? In practice, less formal types of constitutional change (such as the decision by one of the three branches to offer its own newly formed interpretation of the document) can serve the needs of the nation as well. On the other hand, these forms of constitutional change can prove more controversial, as they can occur quickly and without the formal approval of a majority of the governed.

Then

As the United States sunk further into the Great Depression during the early 1930s, certain principles of intergovernmental relations remained unchanged from the earliest days of the republic. That included the "nondelegation doctrine," which prohibited Congress from passing its constitutionally prescribed law-making powers on to other branches. Yet, beginning in 1933, a forceful new chief executive, Franklin Delano Roosevelt, was prepared to offer innovative new solutions to the nation's economic woes. Because the unwieldy size of Congress had left it largely powerless to hold previously unregulated businesses accountable, FDR's administration planned to stretch the Constitution's limits to allow for executive action in the matter. Thus, on June 16, 1933, FDR signed into law the National Industrial Recovery Act (NIRA), by which Congress authorized the chief executive to approve codes generated by trade associations regarding maximum hours of labor, minimum rates of pay, and working conditions in business. The administration approved more than 700

industry codes in all before the Supreme Court invalidated portions of the NIRA in 1935. Still, even that legal setback could not stop the growth of the welfare state under Roosevelt and his successors. Between 1935 and 1980 the federal government grew exponentially on the backs of executive agencies issuing rules and regulations that clearly amounted to law-making. The Constitution's capacity to stretch eventually afforded the federal government more flexibility to offer innovative solutions for an increasingly complex society.



Now

Upon assuming office as president in January 2021, Joseph Biden was forced to address pressing crises at home, with the continuing pandemic and its impact on the economy front and center on his list of priorities. The worst public health crisis in a century had already taken 425,000 American lives, and the logistical challenges of manufacturing and distributing new vaccines remained immense. Millions of Americans had already lost their jobs during the pandemic; unemployment protections provided by the government (including stimulus checks) offered only a temporary fix to their problems. And while they had been relegated to the minority, Republicans retained the power to filibuster all legislation in the Senate. Given these obstacles, President Biden turned to the one unilateral tool that remained available to him and all modern presidents: the executive order. On just his first day in office, Biden reengaged with the World Health Organization to help coordinate multinational approaches to the pandemic; ordered agencies to extend eviction and foreclosure moratoriums that would impact laid-off workers; and extended the pause on student-loan payback requirements. All this was accomplished without federal legislation. Later, as vaccines became more widely available, the Biden administration rolled out vaccination requirements for most federal employees and contractors. Of course the use of executive orders is not an unlimited source of authority. Though many of the new president's unilateral actions survived, in January 2022, the U.S. Supreme Court blocked the government's vaccine mandates for workers not employed at hospitals or health care facilities; five months earlier, in August of 2021, the Court had declared eviction moratoriums unconstitutional. Still, while the court found that President Biden had exceeded his authority in those two instances, it did not stand in the way of hundreds of other executive orders related to the pandemic and the economy. Once again, the Constitution was reshaped by new interpretations of the same text that had been in place for over two centuries.



For Critical Thinking and Discussion

1. Since 1803, the U.S. Supreme Court has assumed for itself the right to say what the Constitution means, including what it forbids. Does the president and/or the Congress have the power to interpret the Constitution as well? If a political branch disagrees strongly with a Supreme Court decision, can it offer a contrary position?
2. Do you believe the Constitution should adapt and change according to the times, even when no amendment that spells out that change has been formally ratified? Why or why not?

THE BEGINNINGS OF A NEW NATION

Throughout the seventeenth and early eighteenth centuries, thousands of people migrated to North America. Many came in search of greater economic opportunities; others fled to escape religious persecution and sought freedom to worship as they pleased. Slowly, a culture dedicated to the protection of social and civil rights began to take shape in the colonies.

The political structures that governed the colonies up through the early 1760s roughly paralleled those of England during the same period: (1) Royal governors served as substitutes for the king in each individual colony; (2) a governor's council in each colony served as a mini House of Lords, with the most influential men in the colony serving effectively as a high court; and (3) the general assembly in each colony was elected directly by the qualified voters in each colony and served essentially as a House of Commons, passing ordinances and regulations that would govern the colony. Up until the middle of the eighteenth century, the colonies' diverse histories and economies had provided little incentive for them to join together to meet shared goals. In fact, those in Great Britain feared other European powers attempting to encroach on their American holdings far more than they feared any form of uprising on the part of the colonists.

The French and Indian War that was waged in the colonies from 1754 through 1763 was a significant turning point in British-colonial relations.¹ For nearly a decade, the French, from their base in Canada, fought the British in the colonies for control of the North American empire. Both nations were interested in rights to the territory that extended west of the colonial settlements along the Atlantic seaboard and over the Appalachian Mountains into the Ohio Valley. Britain defeated France, and under the terms of the Treaty of Paris (1763), which settled the war, all territory from the Arctic Ocean to

the Gulf of Mexico between the Atlantic Ocean and the Mississippi River (except for New Orleans, which was ceded to Spain, an ally of Britain during the war) was awarded to Britain. But along with the acquisition of all this new territory came a staggering debt of approximately 130 million pounds. Administering its huge new North American empire would be a costly undertaking for Britain.

British Actions

Following the war, Britain imposed upon its colonies a series of regulatory measures intended to make the colonists help pay the war debts and share the costs of governing the empire. To prevent colonists from ruining the prosperous British fur trade, the Proclamation of 1763 restricted them to the eastern side of the Appalachian chain, angering those interested in settling, cultivating, and trading in this new region. The Sugar Act of 1764 was the first law passed by Parliament for the specific purpose of raising money in the colonies for the Crown. (Other regulatory acts passed earlier had been enacted for the purpose of controlling trade.) The Sugar Act (1) increased the duties on sugar; (2) placed new import duties on textiles, coffee, indigo, wines, and other goods; and (3) doubled the duties on foreign goods shipped from England to the colonies. The Stamp Act (1765) required the payment of a tax on the purchase of all newspapers, pamphlets, almanacs, and commercial and legal documents in the colonies. Both acts drew outrage from colonists, who argued that Parliament could not tax those who were not formally represented in its chambers. Throughout late 1765 and early 1766, angry colonists protested the Stamp Act by attacking stamp agents who attempted to collect the tax, destroying the stamps, and boycotting British goods. When English merchants complained bitterly about the loss of revenue they were suffering as a result of these colonial protests, Parliament repealed the Stamp Act in March 1766.²

Colonial Responses

As a result of the Stamp Act fiasco, positions on the state of British rule were articulated both in the colonies and in Parliament. Following the lead of the Virginia assembly, which sponsored the Virginia Resolves that had declared the principle of “no taxation without representation,” an intercolonial Stamp Act Congress met in New York City in 1765. This first congressional body in America issued a Declaration of Rights and Grievances that acknowledged allegiance to the Crown but reiterated the right to not be taxed without consent. Meanwhile, the British Parliament—on the same day that it repealed the Stamp Act—passed into law the Declaratory Act, asserting that the king and Parliament had “full power and authority” to enact laws binding on the colonies “in all cases whatsoever.”

Despite the colonists’ protests, Parliament continued to pass legislation designed to raise revenue from the colonies. The Townshend Acts, passed in 1767, imposed duties on various items, including tea, imported into the colonies, and created a Board of Customs Commissioners to enforce the acts and collect the duties. When the colonists protested by boycotting British goods, in 1770 Parliament repealed all the duties except that on tea. The Tea Act, enacted in 1773, was passed to help the financially troubled British East India Company by relaxing export duties and allowing the company to sell its tea directly in the colonies. These advantages allowed the company to undersell colonial merchants. Angry colonists saw the act as a trick to lure them into buying the cheaper tea and thus ruining colonists’ tea sellers. On December 16, 1773, colonists disguised as Mohawk Indians boarded ships in Boston Harbor and threw overboard their cargoes of tea. Outraged by this defiant Boston Tea Party, Parliament in 1774 passed the Intolerable Acts (known in the colonies as the Coercive Acts), designed to punish the rebellious colonists. The acts closed the port of Boston, revised the Massachusetts colonial government, and required the colonists to provide food and housing for British troops stationed in the colonies.

The colonists had had enough. In September 1774, 56 leaders from 12 colonies (there were no delegates from Georgia) met in Philadelphia to plan a united response to Parliament’s actions. This First Continental Congress denounced British policy and organized a boycott of British goods. Although the Congress did not advocate outright independence from England, it did encourage the colonial militias to arm themselves and began to collect and store weapons in an arsenal in Concord, Massachusetts. The British governor general of Massachusetts ordered British troops to seize and destroy the weapons. On their way to Concord, the troops met a small force of colonial militia members at Lexington. Shots were exchanged, but the militia were soon routed and the British troops marched on to Concord. There

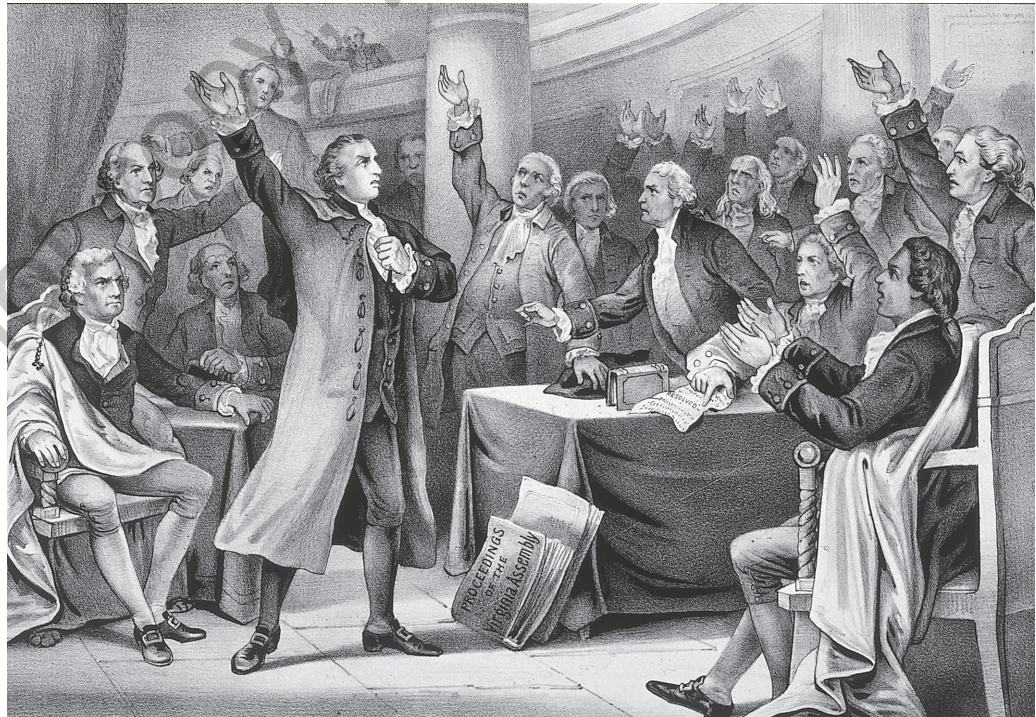
they encountered a much larger group of colonial militia. Shots again were fired, and this time the British retreated. The American Revolution had begun.

The Decision for Independence

Despite the events of the early 1770s, many leading colonists continued to hold out hope that some settlement could be reached between the colonies and Britain. The tide turned irrevocably in early 1776, when one of the most influential publications of this period, *Common Sense*, first appeared. In it, Thomas Paine attacked King George III as responsible for the provocations against the colonies and converted many wavering Americans to the cause of independence.³

On June 7, 1776, Richard Henry Lee, a delegate to the Second Continental Congress from Virginia, proposed a resolution stating that “these United Colonies are, and of right ought to be, free and independent States.” Of course, the Congress needed a formal document both to state the colonies’ list of grievances and to articulate their new intention to seek independence. The Congress thus appointed a committee to draft a document that would meet those objectives.

The committee, consisting of Thomas Jefferson, John Adams, Roger Sherman, Robert Livingston, and Benjamin Franklin, appointed Jefferson, a popular delegate from a more populous state, to compose the document. The committee eventually submitted its draft to Congress on July 2, 1776; after making some changes, Congress formally adopted the document on July 4. The **Declaration of Independence** restated John Locke’s theory of natural rights and the social contract between government and the governed.⁴ Locke had argued that although citizens sacrifice certain rights when they consent to be governed as part of a social contract, they retain other inalienable rights. In the Declaration, Jefferson reiterated this argument with the riveting sentence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.” Jefferson went on to state that whenever government fails in its duty to secure such rights, the people have the right to “alter” or “abolish” it and institute a new one. Through the centuries, America’s political leaders have consistently invoked the Declaration of Independence as perhaps the truest written embodiment of the American Revolution. Before independence could become a reality, however, the colonists had to fight and win a war with Great Britain.



Patrick Henry, a leading revolutionary who coined the phrase “Give me liberty or give me death,” speaking before the Virginia House of Burgesses in 1775.

MPI / Stringer / Getty Images

The First National Government: The Articles of Confederation

The colonies also needed some sort of plan of government to direct the war effort. The Second Continental Congress drew up the **Articles of Confederation**, a written statement of rules and principles to guide the first continent-wide government in the colonies during the war and beyond. Although the document was initially adopted by Congress in 1777, it was not formally ratified by all 13 states until 1781. The Articles of Confederation created a “league of friendship” among the states, but the states remained sovereign and independent, with the power and authority to rule the colonists’ daily lives. The sole body of the new national government was the Congress, in which each state had one vote. As shown in Table 2.1, the Congress enjoyed only limited authority to govern the colonies: It could wage war and make peace, coin money, make treaties and alliances with other nations, operate a postal service, and manage relations with the Native Americans.⁵ But Congress had no power to raise troops, regulate commerce, or levy taxes, which left it dependent on state legislatures to raise and support armies or provide other services. Congress’s inability to raise funds significantly hampered the efforts of George Washington and the Continental Army during the war against Britain. Although Congress employed a “requisition system” in the 1780s, which essentially asked that states voluntarily meet contribution quotas to the federal government, the system proved ineffective. New Jersey, for example, consistently refused to pay such requisitions. Reflecting the colonists’ distrust of a strong centralized government, the Articles made no provision for a chief executive who could enforce Congress’s laws.

TABLE 2.1 ■ The Articles of Confederation and the U.S. Constitution: Key Features

Articles of Confederation Provisions	Problems Generated	1787 Federal Constitution
Unicameral (one-house) Congress with each state having one vote, regardless of population	Gave smaller, less populated states disproportionate power in law-making	Bicameral (two-house) legislature with one house apportioned by population (House of Representatives) and second house (Senate) apportioned equally among states (two senators from each state)
Approval by 9 of 13 states required for most legislative matters	Restricted law-making by simple majorities, halting the legislative process in most cases	Approval of simple majority (one-half plus one) of both houses required for most legislation
No separate executive or judiciary	Legislative abuses went unchecked	Three separate branches of government: legislative, executive, and judicial
Congress did not have the power to regulate foreign or interstate commerce	States negotiated separately among themselves and with foreign powers on commercial matters, to the detriment of the overall economy	Congress given power to regulate interstate and foreign commerce
Congress did not have the power to levy or collect taxes	Suffering from the economic depression and saddled with their own war debts, states furnished only a small portion of the money sought by Congress	Congress given power to levy and collect taxes
Congress did not have the power to raise an army	Once the war with Britain had ended, states were reluctant to provide any support for an army	Congress given power to raise and support armies
Amendments to Articles required unanimous approval of state legislatures	Articles were practically immune from modification and thus inflexible to meet changing demands of a new nation	Amendments to Constitution require two-thirds vote of both houses of Congress, ratification by three-fourths of states

The limited powers of the central government posed many problems, but changing the Articles of Confederation to meet the needs of the new nation was no easy task. The Articles could be amended only by the assent of all 13 state legislatures, a provision that made change of any kind nearly impossible. Wealthy property owners and colonial merchants were frustrated with the Articles for various reasons. Because Congress lacked the power to regulate interstate and foreign commerce, it was exceedingly difficult to obtain commercial concessions from other nations. Quarrels among states disrupted interstate commerce and travel. Finally, a few state governments (most notably, that of Pennsylvania) had come to be dominated by radical movements that further threatened the property rights of many wealthy, land-owning colonists.

These difficulties did not disappear when the war ended with the Americans' victory in 1783. Instead, an economic depression, partially caused by the loss of trade with Great Britain and the West Indies, aggravated the problems facing the new nation. In January 1785, an alarmed Congress appointed a committee to consider amendments to the Articles. Although the committee called for expanded congressional powers to enter commercial treaties with other nations, no action was taken. Further proposals to revise the Articles by creating federal courts and strengthening the system of soliciting contributions from states were never even submitted to the states for approval; congressional leaders apparently despaired of ever winning the unanimous approval of the state legislatures needed to create such changes.

Then in September 1786, nine states accepted invitations to attend a convention in Annapolis, Maryland, to discuss interstate commerce. Yet, when the Annapolis Convention opened on September 11, delegates from only five states (New York, New Jersey, Delaware, Pennsylvania, and Virginia) attended. A committee led by Alexander Hamilton, a leading force at the Annapolis meeting, issued a report calling upon all 13 states to attend a convention in Philadelphia the following May to discuss all matters necessary "to render the constitution of the federal government adequate to the exigencies of the Union." At the time, few knew whether this proposal would attract more interest than had previous calls for a new government.

Events in Massachusetts in 1786–1787 proved a turning point in the creation of momentum for a new form of government. A Revolutionary War veteran, Daniel Shays was also one of many debt-ridden farmers in Massachusetts, where creditors controlled the state government. Shays and his men rebelled against the state courts' foreclosing on the farmers' mortgages for failure to pay debts and state taxes.⁶ When the state legislature failed to resolve the farmers' grievances, Shays's rebels stormed two courthouses and a federal arsenal.⁷ Eventually the state militia put down the insurrection, known as **Shays's Rebellion**, but the message was clear: A weak and unresponsive government carried with it the danger of disorder and violence. In February 1787, Congress endorsed the call for a convention to serve the purpose of drafting amendments to the Articles of Confederation, and by May 11, states had acted to name delegates to the convention to be held in Philadelphia.

THE CONSTITUTIONAL CONVENTION

The **Constitutional Convention** convened on May 25, 1787, with 29 delegates from nine states in attendance. Over the next four months, 55 delegates from 12 states would participate. Fiercely resistant to any centralized power, Rhode Island sent no delegates. Some heroes of the American Revolution, such as Patrick Henry, refused appointments because of their opposition to the feelings of nationalism that had spurred the convention to be held in the first place. Meanwhile, lending authority to the proceedings were such well-known American figures as George Washington, Alexander Hamilton, and Benjamin Franklin. (The 36-year-old James Madison of Virginia was only beginning to establish a reputation for himself when he arrived in Philadelphia; meanwhile, John Adams and Thomas Jefferson were both on diplomatic assignment in Europe.)

The delegates, who unanimously selected Washington to preside over the convention, were united by at least four common concerns: (1) The United States was being treated with contempt by other nations, and foreign trade had suffered as a consequence; (2) the economic radicalism of Shays's Rebellion might spread in the absence of a stronger central government; (3) Native Americans had

responded to encroachment on their lands by threatening early settlers including land speculators, and the national government was ill-equipped to provide citizens with protection; and (4) the postwar economic depression had worsened, and the national government was powerless to take any action to address it.⁸ Of course, on many other matters the delegates differed. Those from bigger, more heavily populated states such as Virginia and Pennsylvania wanted a central government that reflected their larger population bases, whereas those from smaller states like Georgia and Delaware hoped to maintain the one-state, one-vote principle of the Articles.

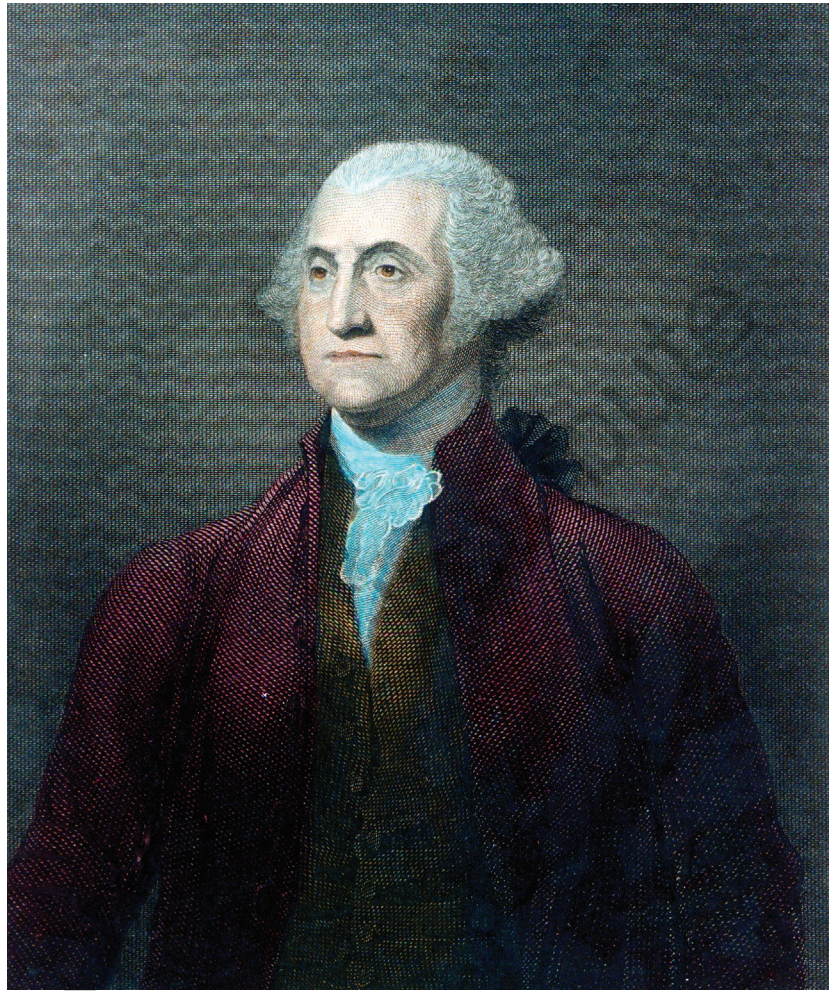
Plans and Compromises

It quickly became evident that a convention originally called to discuss amendments to the Articles of Confederation would be undertaking a more drastic overhaul of the American system of government. Members of the Virginia delegation got the ball rolling when they introduced the **Virginia Plan**, also known as the “large states plan,” which proposed a national government consisting of three branches—a legislature, an executive, and a judiciary. The legislature would consist of two houses, with membership in each house proportional to each state’s population. The people would elect members of one house, and the members of that house would then choose members of the second house. The legislature would have the power to choose a chief executive and members of the judiciary, as well as the authority to legislate in “all cases to which the states are incompetent” or when the “harmony of the United States” demands it. Finally, the legislature would have power to veto any state law. Under the plan, the only real check on the legislature would be a Council of Revision, consisting of the executive and several members of the judiciary, which could veto the legislature’s acts.

To counter the Virginia Plan, delegates from less populous states proposed the **New Jersey Plan**, which called for a one-house legislature in which each state, regardless of size, would have equal representation. The New Jersey Plan also provided for a national judiciary and an executive committee chosen by the legislature, expanded the powers of Congress to include the power to levy taxes and regulate foreign and interstate commerce, and asserted that the new constitution and national laws would become the “supreme law of the United States.” Both the Virginia and the New Jersey plans rejected a model of government in which the executive would be given extensive authority.

By July 2, 1787, disagreements over the design of the legislature and the issue of representation had brought the convention to a near dead end. The delegates then agreed to submit the matter to a smaller committee in the hope that it might craft some form of compromise.

The product of that committee’s deliberations was a set of compromises, termed the **Great Compromise** by historians. (Formally proposed by delegate Roger Sherman of Connecticut, the agreement is also known as the “Connecticut Compromise.”) As shown in Table 2.2, its critical features included (1) a bicameral (two-house) legislature with an upper house or “Senate,” in which the states



Portrait of George Washington. Washington was elected president of the Constitutional Convention in Philadelphia.

iStockphoto / picture

TABLE 2.2 ■ The Virginia Plan, the New Jersey Plan, and the Great Compromise

The Virginia Plan	The New Jersey Plan	The Great Compromise
Introduced on May 29, 1787, by Edmund Randolph of Virginia; favored initially by delegates from Virginia, Pennsylvania, and Massachusetts	Introduced on June 15, 1787, by William Paterson of New Jersey; favored initially by delegates from New Jersey, New York, Connecticut, Maryland, and Delaware	Introduced by Roger Sherman of Connecticut; approved at the convention by a narrow 5–4 vote on July 16, 1787
Bicameral legislature with one house elected by the people and second house chosen by the first	Unicameral legislature elected by the people	Bicameral legislature with one house elected by the people and second house chosen by state legislatures
All representatives and senators apportioned by population	Equal representation among states	Members of one house (representatives) apportioned by population (five enslaved people counted as three free men); members of second house (senators) apportioned equally among states
Singular executive chosen by the legislature	Plural executive chosen by the legislature	Singular executive chosen by the “electoral college” (electors appointed by state legislatures choose president; if no one receives majority, House chooses president)
Congress can legislate wherever “states are incompetent” or to preserve the “harmony of the United States”	Congress has the power to tax and regulate commerce	Congress has power to tax only in proportion to representation in the lower House; all appropriation bills must originate in lower House

would have equal power with two representatives from each state, and a lower House of Representatives, in which membership would be apportioned on the basis of population; and (2) the guarantee that all revenue bills would originate in the lower house. The convention delegates settled as well on granting Congress the authority to regulate interstate and foreign commerce by a simple majority vote but required that treaties be approved by a two-thirds vote of the upper house. The Great Compromise was eventually approved by a narrow 5–4 margin of the state delegations.

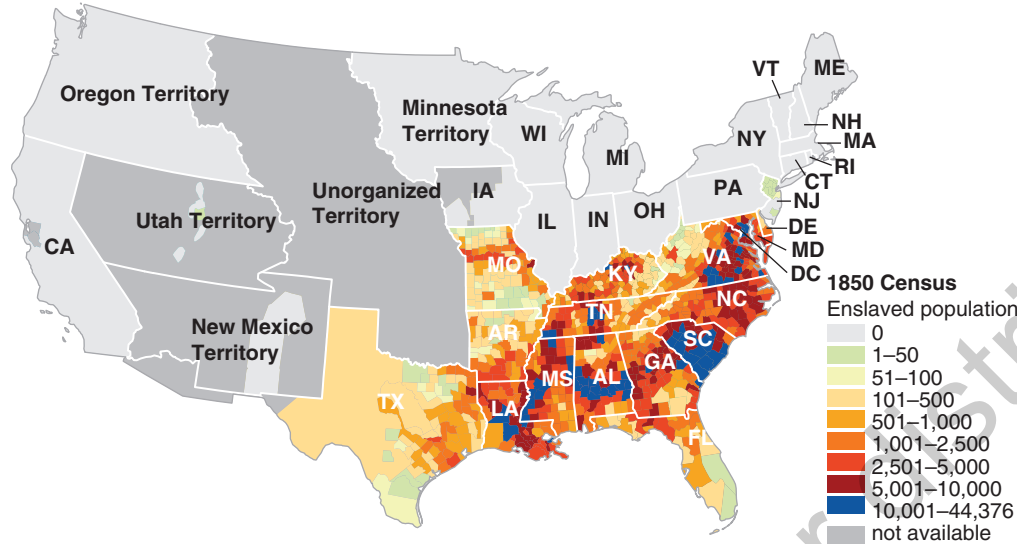
Compromise also resolved disagreement over the nature of the executive. Although rejecting the New Jersey Plan’s call for a plural executive—in which officials would have exercised executive power through a multiperson council—the delegates split on whether the executive should be elected by members of Congress or directly by the people. The agreement reached called for the president (and vice president) to be elected by an electoral college. Because the number of electors equaled the number of representatives and senators from each state, this system gave disproportionately greater influence to smaller states. As chief executive, the president would have the power to veto acts of Congress, make treaties and appointments with the consent of the Senate, and serve as commander in chief of the nation’s armed forces.

The Slavery Issue

The issue of representation collided with another thorny issue looming over the convention proceedings: the issue of slavery. Four Southern states (Maryland, Virginia, North Carolina, and South Carolina) had enslaved populations of more than a hundred thousand each, two New England states (Maine and Massachusetts) had already banned slavery, and another four Northern states (Vermont, New Hampshire, Rhode Island, and Connecticut) maintained extremely low concentrations of slavery within their borders. The steady march of abolition in the North was matched by a Southern enslaved

FIGURE 2.1 ■ The State of U.S. Slavery in 1850

At the time of the founding, Northern states still featured limited slavery within their borders. Yet, over the following half-century, the concentration of enslaved people would shift to the point that by 1850, slavery had become an exclusively Southern institution. Thus the delicate compromise over slavery that the founding fathers struck at the Constitutional Convention would be put to the test during this later period.



population that had been doubling every two decades. (As shown in Figure 2.1, slavery would continue to predominate in the Deep South up through the eve of the Civil War.) The convention delegates who advocated a new form of government were wary of the role slavery would play in this new nation, but they were even more wary of offending Southern sentiments to the point that consensus at the convention would be endangered.

Some delegates from the Northern states who had already voted in favor of banning slavery sought a similar emancipation of enslaved people in all of the colonies by constitutional edict. Southerners hoping to protect their slave-labor economy, which depended on forced labor, wanted to prevent future Congresses from interfering with the institution of slavery and the importation of enslaved individuals. Southern delegates also wanted enslaved people to be counted equally with free people in determining the apportionment of representatives; Northerners opposed such a scheme for representation because it would give the Southern states more power, but the North did want enslaved people counted equally for purposes of apportioning taxes among the states.

In an effort to forestall the convention's collapse, the delegates crafted a series of compromises that amounted to misdirection, and in some instances outright silence, on the issue of slavery.⁹ By the agreement known as the **Three-Fifths Compromise**, five enslaved people would be counted as the equivalent of three "free persons" for purposes of taxes *and* representation. Delegates from Southern states also feared that a Congress dominated by representatives from more populous Northern states might take action against the slave trade. Most Northerners continued to favor gradual emancipation. Once again, neither side got exactly what it wanted. The new constitution said nothing about either preserving or outlawing slavery. Indeed, the only specific provision about slavery was a time limit on legislation banning the importation of enslaved people: Congress was forbidden from doing so for at least 20 years. In 1807, however, with the population of enslaved people steadily outgrowing demand, many Southerners allied with opponents of the slave trade to ban the importation of enslaved people. Not until the Civil War decades later would the conflict over slavery finally be resolved.

On September 17, 1787, after four months of compromises and negotiations, the 12 state delegations present approved the final draft of the new constitution. By the terms of Article VII of the document, the new constitution was to become operative once ratified by 9 of the 13 states.

THE NEW CONSTITUTION

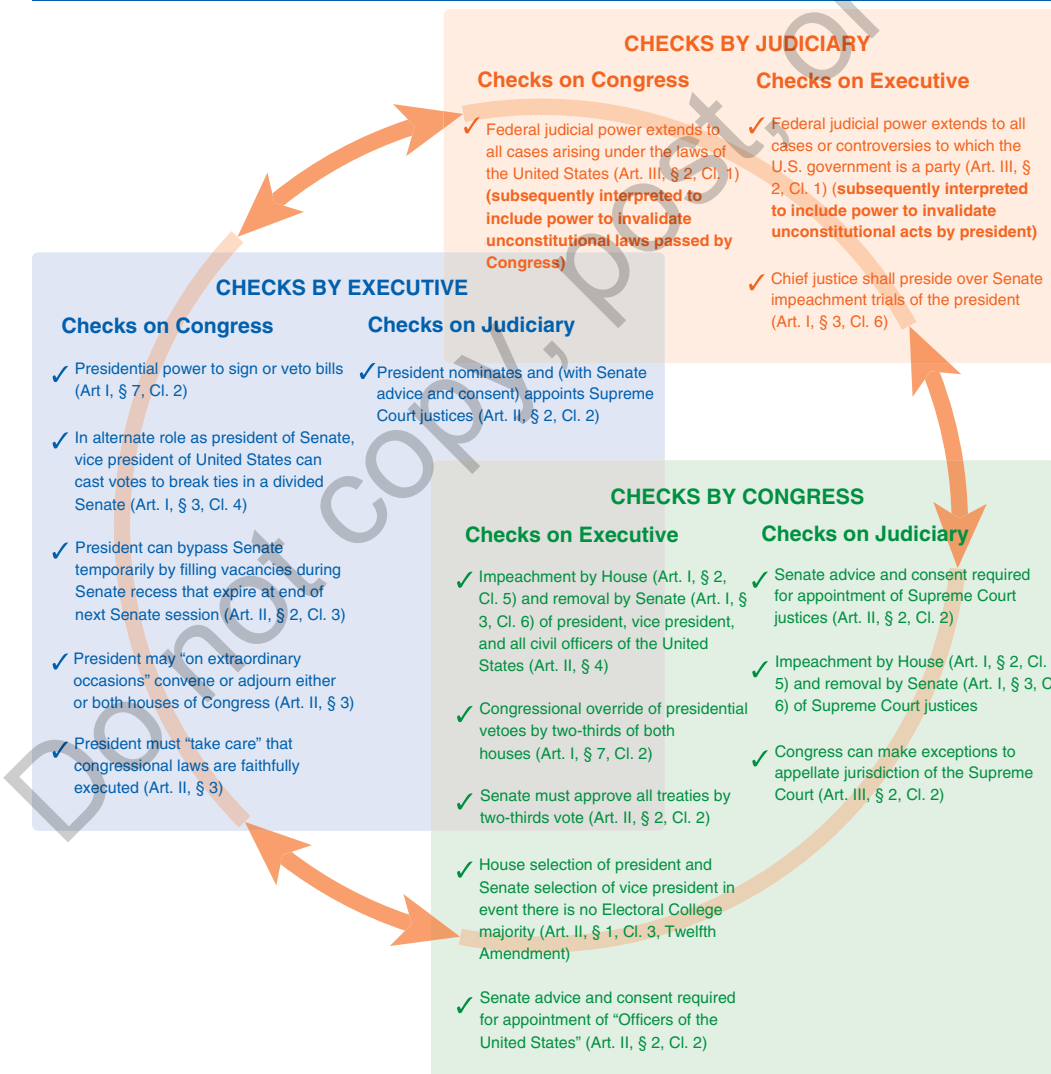
As a consequence of the many compromises in the draft constitution, few of the delegates were pleased with every aspect of the new document. Even James Madison, later heralded as the “Father of the Constitution” for his many contributions as a spokesperson at the convention, had furiously opposed the Great Compromise; he hinted at one point that a majority of the states might be willing to form a union outside the convention if the compromise were ever approved, and he convinced the Virginia delegation to vote “no” when it came up for a formal vote.

Nonetheless, the central desire of most of the delegates to craft a new government framework led them to consensus on a set of guiding principles evident throughout the document. The following principles continue to guide politicians, lawyers, and scholars today as they study the many ambiguous provisions of the U.S. Constitution:

- Recognizing that calls for fairer representation of colonists’ interests lay at the heart of the Declaration of Independence, popular sovereignty was a guiding principle behind the new constitution. The document’s preamble beginning with “We the People” signified the coming together of people, not states, for the purposes of creating a new government. Under the proposed constitution, no law could be passed without the approval of the House of Representatives, a “people’s house” composed of members apportioned by population and subject to direct election by the people every two years. Of even greater significance, the delegates agreed that all revenue measures must originate in the House, an explicit affirmation of the principle that there would be “no taxation without representation.”
- The delegates recognized the need for a **separation of powers**. The founders drew upon the ideas of the French political philosopher Baron de Montesquieu, who had argued that when legislative, executive, and judicial power are not exercised by the same institution, power cannot be so easily abused. Mindful of the British model in which Parliament combined legislative and executive authority, the drafters of the new constitution assigned specific responsibilities and powers to each branch of the government—Congress (the legislative power), the president (the executive power), and the Supreme Court (the judicial power). In the new government, individuals were generally prohibited from serving in more than one branch of government at the same time. The vice president’s role as president of the Senate was a notable exception to this rule.
- While establishing separate institutions, the drafters of the new constitution also created a system of **checks and balances** to require that the branches of government would have to work together to formulate policies (see Figure 2.2). This system of “separate institutions sharing power” helped ensure that no one interest or faction could easily dominate the government. Through the exercise of presidential vetoes, Senate advice and consent, and judicial interpretations and other tools, each institution would have an opportunity to contend for influence.
- Dividing sovereign powers between the states and the federal government—a system later termed *federalism* (discussed at greater length in Chapter 3)—is also a defining characteristic of the government framework established by the new constitution. Rather than entrusting all powers to a centralized government and essentially reducing the states to mere geographical subdivisions of the nation, the convention delegates divided powers between two levels of government: the states and the federal government. The distinction drawn between local concerns (controlled by state governments) and national concerns (controlled by the federal government) was nearly as confusing then as it is today. But the delegates determined that such a division was necessary to achieve a consensus.

- Although united by the belief that the national government needed to be strengthened, the framers of the new constitution were products of a revolutionary generation that had seen governmental power abused. Thus they were committed to a government of limited or **enumerated powers**. The new constitution spelled out the powers of the new federal government in detail, and it was assumed that the government’s authority did not extend beyond those powers. By rejecting a government of unlimited discretionary power, James Madison argued, individual rights, including those “inalienable rights” cited in the Declaration of Independence, would be protected from the arbitrary exercise of authority.
- Finally, some delegates believed that the new constitution should be a “living” document; that is, it should have some measure of flexibility in order to meet the changing demands placed on it over time. Perhaps the most frustrating aspect of the Articles of Confederation was the near impossibility of any sort of modification. Because any change to the Articles required the unanimous consent of the states, even the most popular reform proposals stood little chance of being implemented. Thus, the framers decided that the new constitution would go into effect when it had been ratified by 9 of the 13 states. Furthermore, once ratified, the constitution could be amended by a two-thirds vote of each house of Congress (subject to subsequent ratification by three-fourths of the state legislatures).

FIGURE 2.2 ■ Checks and Balances in the U.S. Constitution



THE RATIFICATION BATTLE

Federalists Versus Anti-Federalists

Once Congress submitted the new constitution to the states for approval, battle lines were formed between the **Federalists**, who supported ratification of the new document, and the **Anti-Federalists**, who opposed it. From the outset, the Federalists enjoyed a number of structural and tactical advantages in this conflict.

- **Nonunanimous consent.** The rules of ratification for the new constitution, requiring approval of just 9 of the 13 states, were meant to ease the process of adopting the new document. The delegates understood that once the constitution had been approved, it would be difficult for even the most stubborn of state holdouts to exist as an independent nation surrounded by this formidable new national entity.
- **Special “ratifying conventions.”** The delegates realized that whatever form the new constitution might take, state legislatures would have the most to lose from an abandonment of the Articles. Thus they decided that the constitution would be sent for ratification not to state legislatures but instead to special state ratifying conventions that would be more likely to approve it.
- **The rule of secrecy.** The Constitutional Convention’s agreed-upon rule of secrecy, which forbade publication or discussion of the day-to-day proceedings of the convention, followed the precedent established in colonial assemblies and the First Continental Congress, where it was thought that members might speak more freely and openly if their remarks were not subject to daily scrutiny by the public at large. In the fall of 1787, the rule of secrecy also gave the Federalists on the inside a distinct advantage over outside opponents, who had little knowledge of the new document’s provisions until publicized. As it turned out, five state ratifying conventions approved the new constitution within four months of the convention’s formal conclusion, just as Anti-Federalist forces were marshalling their strength for the battle ahead.
- **Conventions held in the winter limited rural participation.** Winter was approaching in late 1787 just as the fight over the new constitution was being launched. This timing gave the Federalists another advantage, especially in the critical ratification battlegrounds of Massachusetts, New Hampshire, and New York. It would be difficult for rural dwellers—mostly poor farmers resistant to a strong central government and thus opposed to the new constitution—to attend the ratification conventions if they were held in the dead of winter. Supporters of the new constitution successfully pressed for the ratifying conventions to be held as soon as possible. Of the six states that held such conventions over the winter, all voted to ratify by substantial margins.

The Federalist Papers

Between the fall of 1787 and the summer of 1788, the Federalists launched an aggressive media campaign that was unusually well organized for its time. James Madison, Alexander Hamilton, and John Jay wrote 77 essays explaining and defending the new constitution and urging its ratification. Signed under the name “Publius,” the essays were printed in New York newspapers and magazines. These essays—along with eight others by the same men—were then collected, printed, and published in book form under the title *The Federalist*.¹⁰ The essays allayed fears and extolled the benefits of the new constitution by emphasizing the inadequacy of the Articles of Confederation and the need for a strong government. Today these essays are considered classic works of political philosophy. The following are among the most frequently cited **Federalist Papers**:

- **Federalist No. 10.** In Madison’s first offering in the Federalist Papers, he analyzes the nature, causes, and effects of *factions*, by which he meant groups of people motivated by a common economic and/or political interest. Noting that such factions are both the product and price of

liberty, Madison argued that by extending the sphere in which they can act, “you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.” Political theorists often cite Federalist No. 10 as justification for pluralist theory—the idea that competition among groups for power produces the best approximation of overall public good.

- **Federalist No. 15.** Hamilton launched his attack on the Articles of Confederation in this essay. Specifically, he pointed to the practical impossibility of engaging in concerted action when each of the 13 states retained virtual power to govern.
- **Federalist No. 46.** In this essay, Madison defended the system of federalism set up by the new constitution. He contended that the system allowed the states sufficient capacity to resist the “ambitious encroachments of the federal government.”
- **Federalist No. 51.** In perhaps the most influential of the essays, Madison described how the new constitution would prevent the government from abusing its citizens. His argument is that the “multiplicity of interests” that influences so many different parts of the government would guarantee the security of individual rights. Because the federal system of government divides the government into so many parts (federal vs. state, legislative vs. executive vs. judicial branch, etc.), “the rights of the individual, or of the minority, will be in little danger from interested combinations of the majority.”
- **Federalist No. 69.** Hamilton in this essay defined the “real character of the executive,” which, unlike the king of Great Britain, is accountable to the other branches of government and to the people.
- **Federalist No. 70.** In this paper, Hamilton presented his views on executive power, which had tempered considerably since the convention, when he advocated an executive for life. Still, Hamilton argued for a unitary, one-person executive to play a critical role as a check on the legislative process (i.e., by exercising vetoes), as well as in the process of negotiating treaties and conducting war. According to Hamilton, “Energy in the executive is a leading character in the definition of good government”; by contrast, “the species of security” sought for by those who advocate a plural executive is “unattainable.”
- **Federalist No. 78.** In this essay—cited in several landmark Supreme Court opinions—Hamilton argues that the judiciary would be the weakest of the three branches because it has “neither FORCE nor WILL, but merely judgment.” Because the Court depends on the other branches to uphold that judgment, Hamilton called it “the least dangerous branch.”

In late 1787 and early 1788, Anti-Federalists countered the Federalist Papers with a media campaign of their own.¹¹ In letters written under the pseudonyms “Brutus” and “The Federal Farmer” and published by newspapers throughout the colonies, the Anti-Federalists claimed that they were invoking a cause more consistent with that of the revolution—the cause of freedom from government tyranny. For them, the new national government’s power to impose internal taxes on the states amounted to a revival of the British system of internal taxation. Perhaps the Anti-Federalists’ most effective criticism was that the new constitution lacked a bill of rights that explicitly protected citizens’ individual rights. They rejected Madison’s contention in Federalist No. 51 that limitations on the central government provided those protections.

Ratification ultimately succeeded but by a somewhat narrow margin (see Table 2.3). Of the first five states to ratify, four (Delaware, New Jersey, Georgia, and Connecticut) did so with little or no opposition, whereas Pennsylvania did so only after a bitter conflict at its ratifying convention. Massachusetts became the sixth state to ratify when proponents of the new constitution swung the convention narrowly in their favor only by promising to push for a bill of rights after ratification. By June, three more states (Maryland, South Carolina, and New Hampshire) had voted to ratify, providing the critical threshold of nine states required under the new constitution. Still, the Federalists worried that without ratification by the major states of New York and Virginia, the new union would not succeed.

TABLE 2.3 ■ Ratifying the Constitution

State	Vote	Date of Ratification
Delaware	30–0	December 7, 1787
Pennsylvania	43–23	December 12, 1787
New Jersey	38–0	December 18, 1787
Georgia	25–0	January 2, 1788
Connecticut	128–40	January 9, 1788
Massachusetts	187–168	February 16, 1788
Maryland	63–11	April 26, 1788
South Carolina	149–73	May 23, 1788
New Hampshire	57–46	June 21, 1788
Virginia	89–79	June 25, 1788
New York	30–27	June 26, 1788
North Carolina*	194–77	November 21, 1789
Rhode Island	34–32	May 29, 1790

* Despite strong Federalist sentiment at the convention, North Carolina withheld its vote in 1788 until a draft bill of rights was formally introduced. The submission by Congress of 12 proposed amendments to the states on September 25, 1789, led North Carolina to hold a second ratifying convention the following November.

Opposition in Virginia was formidable, with Patrick Henry leading the Anti-Federalist forces against James Madison and the Federalists.¹² Eventually Madison gained the upper hand with an assist from George Washington, whose eminent stature helped capture numerous votes for the Federalists. Madison also promised to support adding a bill of rights to the new constitution. Then, Alexander Hamilton and John Jay capitalized on the positive news from Virginia to secure victory at the New York ratifying convention. With more than the required nine states—including the crucial states of New York and Virginia—the Congress did not wait for the votes from North Carolina or Rhode Island; on July 2, 1788, it appointed a committee to prepare for the new government.

A Bill of Rights

Seven of the state constitutions created during the Revolutionary War featured a statement of individual rights in some form. The Virginia Declaration of Rights of 1776, for example, had borrowed (from John Locke) its grounding of individual rights in a conception of natural law and social contract: “All men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity.” Later, during the battle over ratification, five state ratifying conventions had stressed the need for amendments to the proposed constitution in the form of a bill of rights, which would expressly protect fundamental rights against encroachment by the national government.¹³

Still, not all Federalists saw the need for a federal bill of rights. Madison, for one, believed a bill of rights was unnecessary because the central government held only those powers enumerated in the Constitution. He explained, “The rights in question are reserved by the manner in which the federal powers are granted . . . the limited powers of the federal government and the jealousy of the subordinate governments afford a security which has not existed in the case of the state governments, and exists in no other.” Madison was also concerned about the dangers of trying to enumerate all important rights: “There is great reason to fear that a positive declaration of some of the most essential rights could not be obtained,” leaving some essential rights omitted for the future. Hamilton underscored this sentiment

in Federalist No. 84, arguing that such a list of rights might invite governmental attempts to exercise power over those rights not included in the list.

Among the most ardent supporters of adding a bill of rights to the Constitution was Thomas Jefferson, who warned about the dangers of abuses of power.¹⁴ From his distant vantage point in France, where he continued to serve as an American minister, Jefferson was in the dark about the new constitution until November 1787. Then, in a December 20, 1787, letter to his friend and political protegee from Virginia, James Madison, Jefferson wrote, “A bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.” Although recognizing Madison’s fears of omissions as legitimate, Jefferson continued to argue the point. In a subsequent letter dated March 15, 1789, Jefferson argued that “half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can.”

In the end, Jefferson’s arguments prevailed, and Madison (by this time a member of Congress from Virginia) became a principal sponsor of a bill of rights in the first Congress. Introducing the bill in the House of Representatives, he declared, “They will be an impenetrable bulwark against every assumption of power in the legislative or executive.” On September 9, 1789, the House of Representatives voted to submit a list of 12 **amendments** to the states; 10 of these were ratified by the required nine states by December 15, 1791, and compose today’s **Bill of Rights**.

Among the rights protected by the Bill of Rights are the rights of free religious exercise, free speech, free press, and assembly (First Amendment); rights against search and seizure without a warrant stating “probable cause” (Fourth Amendment); and rights of due process and no self-incrimination (Fifth Amendment). The two amendments not ratified in 1791 did not relate to individual rights at all. They were (1) a prohibition on salary increases for legislators taking effect prior to the next congressional election (in 1992—more than two hundred years later—this became the Twenty-Seventh Amendment) and (2) a provision defining the rules for determining the number of members of the House of Representatives.

CHANGING THE CONSTITUTION

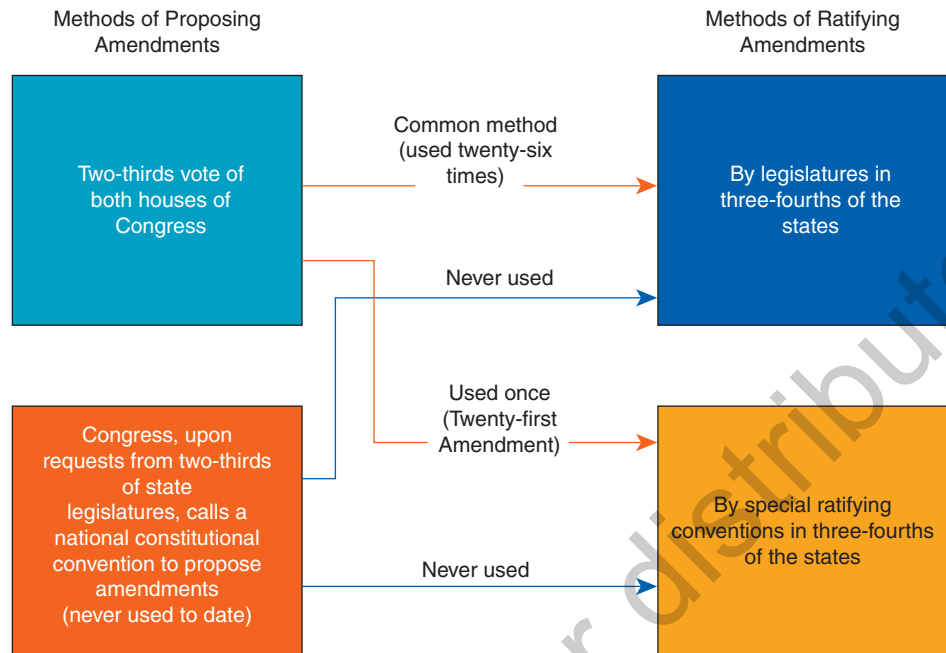
The Formal Amendment Process

Although political circumstances dictated that the Bill of Rights be passed quickly, future proposed amendments would not have it so easy. In crafting the rules for amending the new constitution, the framers sought to balance two competing interests: (1) the need to protect the Constitution from short-lived or temporary passions by making amendments exceedingly difficult to pass, and (2) sufficient flexibility to allow for amendments to be added when the needs of the nation demanded change. Their determination to strike such a balance was shaped by their experience in dealing with the Articles of Confederation, whose “unanimous consent of states” rule had left the document immune from even the most necessary of reforms.

As shown in Figure 2.3, Article V of the Constitution specifies two ways in which amendments can be proposed and two methods of ratification. Congress may propose an amendment by a two-thirds vote of both houses; alternatively, two-thirds of the state legislatures may apply to Congress to call a special national convention for proposing amendments. Amendments take effect when ratified either by a vote of three-fourths of the state legislatures or by special ratifying conventions held in three-fourths of the states. To date, all 27 amendments (including the Bill of Rights) have been proposed by Congress, and all but one (the Twenty-First Amendment) have been ratified by the state legislatures.

No national convention has ever been called for the purpose of proposing amendments. Indeed, the closest the states have ever come to applying to Congress for such an event occurred in 1967, when 33 states (just one short of the required number) petitioned Congress to call a convention that would propose an amendment reversing the 1964 Supreme Court ruling requiring that both houses of each state legislature be apportioned according to population. Given the ambiguity of Article V, numerous questions have been raised about the form such a convention would take.

How would delegates be chosen? When Congress proposed the Twenty-First Amendment, it left it to each state to determine the manner in which delegates to the ratifying conventions would be chosen.

FIGURE 2.3 ■ How an Amendment Gets Proposed and Ratified

How would the convention be run? Could a convention go beyond the limitations placed on it by Congress? What would happen if a convention went far afield and proposed an entirely new constitution, just as the convention in 1787 did? Congress has to date refused to pass laws dictating the terms of future conventions, in part because it has not wanted to encourage such an event.¹⁵

Critics of the amendment process charge that it is undemocratic, as today just 13 of the 50 states can block amendments desired by a large majority. Additionally, amendments, especially those ratified by special conventions, may be adopted even if they lack widespread popular support.

Although 27 amendments have been ratified since 1789, only 17 of those were ratified after 1791 (see Table 2.4). More than 11,000 amendments have been introduced in Congress since that time, but only 33 have been formally proposed by Congress. Today, different amendments sponsored by Congress garner varying levels of support. Among the proposed amendments that failed in the ratification process are the following:

- An amendment that would withdraw citizenship from any person who has accepted a title of nobility or who has received (without the consent of Congress) an office or salary from a foreign power (proposed in 1810)
- An amendment proposed on the eve of the Civil War in 1861 that would have prohibited further interference by the federal government with slavery in any state
- An amendment that would have prohibited labor by young children (proposed in 1924)

The Equal Rights Amendment (ERA) proposed by Congress in 1972 also came up short during the ratification process, after years of effort to secure its passage. Although the courts have consistently held that ratification of an amendment must take place within a “reasonable time,” it has been left up to Congress to determine what constitutes a reasonable time. When drafting the proposed Eighteenth Amendment in 1917, Congress placed into the text of the amendment a seven-year limit on ratification and continued to do so with subsequent amendments it proposed up until 1960. That year, when Congress proposed the Twenty-Third Amendment giving residents of the District of Columbia the right to vote in presidential elections, it began the practice of setting time limits in the resolution accompanying submission of the amendment to Congress, rather than in the formal part of the amendment. As a consequence, when it appeared that the ERA would not be ratified, proponents of

TABLE 2.4 ■ Amendments, Date of Ratification, and Length of Ratification Process

Amendment Bill of Rights	Subject of Amendment	Date Proposed	Date Ratified	Length
First	Free speech, press, religion, assembly	September 25, 1789	December 15, 1791	2+ years
Second	Right to bear arms			
Third	No quartering of troops in homes			
Fourth	No unreasonable searches/seizures			
Fifth	Right to due process, grand jury, no double jeopardy, self-incrimination			
Sixth	Right to speedy and public trial, counsel			
Seventh	Right to trial by jury in civil cases			
Eighth	No excessive bail, fines, cruel/unusual punishment			
Ninth	Rights not enumerated retained by people			
Tenth	Powers not delegated to Congress or prohibited to states belong to states or people			
Eleventh	No federal cases between state, citizen of other state	March 5, 1794	January 8, 1798	3+ years
Twelfth	Modification of Electoral College rules	December 12, 1803	September 25, 1804	9+ months
Thirteenth	Ban on slavery	February 1, 1865	December 18, 1865	10+ months
Fourteenth	States can't deprive right to due process, equal protection, privileges and immunities	June 16, 1866	July 28, 1868	2+ years
Fifteenth	Right to vote can't be denied by race	February 27, 1869	March 30, 1870	1+ years
Sixteenth	Congress can levy individual income taxes	July 12, 1909	February 25, 1913	3+ years
Seventeenth	Direct election of senators	May 16, 1912	May 31, 1913	1+ years
Eighteenth	Prohibition of liquors	December 18, 1917	January 29, 1919	1+ years
Nineteenth	Women's right to vote	June 4, 1919	August 26, 1920	1+ years
Twentieth	Dates for inauguration, Congress's session	March 2, 1932	February 6, 1933	1+ months
Twenty-First	Repeal of prohibition	February 20, 1933	December 5, 1933	9+ months
Twenty-Second	Presidential term limits	March 24, 1947	February 26, 1951	3+ years
Twenty-Third	DC residents' vote for president	June 16, 1960	March 29, 1961	9+ months
Twenty-Fourth	Ban on poll taxes	August 27, 1962	January 23, 1964	1+ years
Twenty-Fifth	Appointment of new vice president, presidential incompetence	July 6, 1965	February 10, 1967	1+ years
Twenty-Sixth	Eighteen-year-olds' right to vote	March 23, 1971	July 1, 1971	3+ months
Twenty-Seventh	Congressional pay raises effective only after election	September 25, 1789	May 7, 1992	202+ years

Based on Paul Murphy, *Background of the Bill of Rights* (New York: Taylor & Francis, 1990).

the amendment managed to get the ratification period extended to June 30, 1982 (an additional three years and three months beyond the original deadline); by a majority vote of both houses. Unfortunately for its proponents, the proposed amendment still failed to win the approval of more than 35 state legislatures by this new deadline. That said, the amendment process appears to be ongoing, as Nevada,

Illinois and Virginia each passed ratification resolutions during the past decade. Given all this uncertainty, Congress may have to once again determine whether the ERA somehow lost its “vitality” before being formally ratified by enough states.

The “reasonable time” requirement for ratification of an amendment reached an extreme with the Twenty-Seventh Amendment (forbidding congressional pay raises from taking effect until an intervening election in the House of Representatives has occurred). Originally proposed in 1789 as part of the Bill of Rights, it was finally ratified in 1992, just over 202 years later. (See the “from Your Perspective” box in this chapter for more detailed discussion of what occurred.)

Informal Processes of Change

After the Constitution and Bill of Rights were ratified, there remained the difficult task of interpreting those documents for use by the different branches of government. Among the framers, Alexander Hamilton was perhaps most attuned to the danger that Anti-Federalists and other opponents of the Constitution might attempt to overturn the convention’s carefully crafted compromises so many years later by judicial fiat. Certainly most of the Constitution’s provisions were vague enough that they allowed discretion for maneuvering by the generation that interprets them, but how much discretion was justified in the process of constitutional interpretation?

The Supreme Court under Chief Justice John Marshall was the first to put its lasting imprint on the Constitution. Marshall, who hailed from Virginia, served as the chief justice of the United States from 1801 until his death in 1835.¹⁶ Marshall believed in a **loose construction** (or interpretation) of the Constitution, meaning that under his leadership, many of the Constitution’s provisions enjoyed broad and quite open-ended meanings. Thus, for example, Article I, Section 8, Clause 18 empowered Congress “to make all laws which shall be necessary and proper for carrying into execution” any of the powers specifically listed in the Constitution. Marshall’s loose construction of that provision gave the federal government considerable implied powers (those not explicitly stated) to regulate the economy. Thus, in the 1819 case of *McCulloch v. Maryland*,¹⁷ the Marshall court ruled that Congress had the power to create a national bank, even though the Constitution said nothing explicitly about such a power. The Court determined that a national bank was “necessary and proper” to assist in regulating commerce or raising armies. This philosophy of loose constitutional interpretation underlies the concept of a “living Constitution,” one that is adaptable to changing times and conditions.

Thomas Jefferson, James Madison, and many others viewed the powers of the central government more narrowly. They favored a **strict construction**, arguing that the government possessed only those powers explicitly stated in the Constitution. Thus, although Article I, Section 8, Clause 3 gave Congress the power to regulate interstate commerce, it could not do so by creating a national bank or utilizing any other means not specifically mentioned in the Constitution. They supported a “fixed Constitution,” one that could be changed only by the formal amendment process, not by congressional action or judicial ruling.

The tension between advocates of strict and loose constructions of the Constitution continues to this day. The late Supreme Court justice Antonin Scalia rejected the notion of constitutional standards evolving over time; in 2008 he told one reporter that while change in a society can be reflected in legislation, “society doesn’t change through a Constitution.”¹⁸ In accordance with this philosophy, the more conservative Supreme Court of the late 1990s (which included Scalia) struck down federal statutes regulating guns in the schools and domestic violence, on the theory that such regulations were not grounded in any specifically enumerated power of Congress, such as the power to regulate interstate commerce.

This strict-construction approach contrasts markedly with the approach advocated by professors Lawrence Tribe¹⁹ and John Hart Ely,²⁰ as well as the late Supreme Court justice William Brennan, who argued for a loose or more flexible interpretation of the Constitution.

FROM YOUR PERSPECTIVE

One Student's Term Paper Proves That the Constitution Is Indeed a "Living Document"

College students may be forgiven for assuming that classroom assignments that invite them to propose constitutional amendments are strictly theoretical exercises. Yet, in the case of one University of Texas student, such an assignment on constitutional change became much more than theoretical. Gregory Watson chose as his research topic a long-forgotten amendment to forbid congressional pay raises from taking effect until an intervening election in the House of Representatives had occurred. Originally proposed in 1789 as part of the Bill of Rights, the amendment was finally ratified 202 years later, thanks largely to Watson. In 1982, the sophomore college student had discovered the amendment while doing research for a paper on American government. Watson's final paper—in which he argued that the amendment was still viable for ratification—garnered a mere C from his professor. But Watson continued his quest to secure ratification of the amendment. Tapping into the resentment of citizens over various instances in which members of Congress had quietly passed pay raises for themselves without calling attention to their actions, Watson joined forces with several state lawmakers to get the required number of states to ratify the provision. Their efforts succeeded, and the Twenty-Seventh Amendment was eventually ratified in May 1992. Although Watson's grade from a decade earlier remained unchanged, he at least had the satisfaction of knowing that he had made history—literally.

For Critical Thinking and Discussion

1. What amendments to the Constitution would you like to see implemented?
2. Would you be willing to sacrifice your own time, energy, and resources to organize interest-group activities on an amendment's behalf?

Advocates of a loose construction (like Brennan) view the document as evolving with the times. In the 1960s and 1970s, the Supreme Court utilized a loose-construction approach to interpret congressional power more broadly to include the power to create civil rights legislation and federal criminal laws. More recently, the Supreme Court *justices* have waged battles on the bench over whether to apply a strict or loose construction of the constitution to cases considering an individual's right to personal privacy more generally, and to sexual autonomy in particular. Debates over the scope of those rights has only intensified as society's notions of sexuality and sexual expression have quickly evolved. Certainly the U.S. Constitution as amended does not spell out any of these rights explicitly; it is left to the justices to decide whether the Court will seek to apply nonspecific Constitutional language to some of these uniquely modern issues.

In the landmark Supreme Court case of *Obergefell v. Hodges* (2015),²¹ the high court extended the fundamental right to marry to same-sex couples, even though no constitutional amendment was ratified on the subject. In his majority opinion, Supreme Court Justice Anthony Kennedy utilized a looser construction of the Fourteenth Amendment's equal protection clause. Writing for the majority, he noted that the framers of the Constitution "did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."

Of course, future challenges to the definition of these rights remain: Reformers continue to call for an amendment to the Constitution that would cement these gains into the law and force the actual language of the Constitution to reflect our nation's growing diversity on the nature of sexual autonomy, sexual expression, and sexuality more generally. At the same time, critics of the *Obergefell* decision hope that a more conservative Supreme Court might one day reverse, or at a minimum undermine, those same protections.



Vin Testa, a gay rights activist, waves a pride flag in front of the U.S. Supreme Court building in Washington, DC, in June 2013. The high court dismissed an appeal request on California's Proposition 8, which allowed for same-sex marriage to be reinstated in the state.

Win McNamee / Staff

With so few amendments proposed and ratified during the nation's history, students of American politics may wonder how a constitution written in 1787 has developed to meet the needs of a changing nation. In truth, an informal constitutional convention occurs on a frequent basis in the American political system. Congress, the president, and the courts engage in constitutional interpretation every day through their respective activities, both official and unofficial. Thus, the Constitution has not been a straitjacket at all—rather, its elegant vagueness has opened it up to a variety of interpretations.

Much of the rise in presidential power during the twentieth century occurred in the absence of any formal amendments conferring new powers on the chief executive. The president of the United States reacted to circumstances facing the executive office by assuming greater authority over foreign and domestic policy-making, and the other branches of government deferred to the president in many such matters. With its ruling in *Marbury v. Madison* (1803),²² the Supreme Court asserted its right of judicial review, that is, its authority to review acts of Congress for their constitutionality and void those that the Court determines are contrary to the Constitution. As part of its decision in *McCulloch v. Maryland*, the Court ruled that when state and federal powers collide, federal powers take precedence. With some notable exceptions, the other branches of the federal government and state courts have more or less acquiesced to such exercises of power.

When the states in 1791 ratified the Bill of Rights, citizens must have marveled at the flexibility of the new U.S. Constitution. After all, it had been amended 10 times in just two years! And yet the Constitution has proven remarkably resistant to change since then, incorporating only 17 additional amendments over the following two centuries. How has the federal Constitution survived so long and in nearly the same form as the original document? The demands of modern government, which manages an advanced welfare state that serves the needs of hundreds of millions of Americans, press the Constitution into service even when traditional rules of constitutional interpretation would seem to offer an insurmountable obstacle. Advocates of the New Deal were undaunted by the strictures of the “nondelegation doctrine,” and they stretched the Constitution's language to advance the modern welfare state; more than 80 years later, President Trump pressed ahead with his controversial travel ban, confident that his efforts would eventually be validated and his campaign promise duly fulfilled. The

so-called higher law found in the Constitution must ultimately defer to the same public that vests it with that supreme authority in the first place.

SUMMARY

2.1 The Beginnings of a New Nation

- The American Revolution arose a decade after Britain's victory in the French and Indian War; to pay off its significant war debts, Britain imposed numerous regulatory measures on the colonies, which generated outrage, protests, and eventually armed resistance from the colonists.
- The Articles of Confederation created a "league of friendship" among the 13 states by vesting them with equal authority in a weak government with only limited powers to raise revenue and regulate commerce. The weakness of the Articles hampered early American foreign policy and rendered Congress unable to stamp out political unrest throughout the states.

2.2 The Constitutional Convention

- In 1787 a Constitutional Convention of delegates from 12 states considered both the "Virginia Plan," which favored larger, more populous states, and a "New Jersey Plan" that gave equal representation to the states.
- The Convention ultimately accepted the "Great Compromise" and its bicameral legislature featuring a House of Representatives apportioned by population and a Senate allotting equal power to each state.
- The delegates sidestepped the slavery issue by settling on the "Three-Fifths Compromise" (counting five enslaved people as three people for purposes of taxes and representation) and by deferring a ban on the importation of enslaved people for at least 20 years.

2.3 The New Constitution

- The new constitution combined features of popular sovereignty, separation of powers, and checks and balances with a commitment to a system of "federalism" that divides sovereignty between state and federal governments.

2.4 The Ratification Battle

- The battle over ratification was waged between the Federalists, who supported the new constitution, and the Anti-Federalists, who opposed it. In advocating the merits of the document, Federalists benefited from the convention's rule of secrecy and the rule requiring the approval of just 9 of 13 state ratifying conventions for ratifications.
- Additionally, Federalists employed a well-crafted media campaign in support of ratification; this included the anonymous publication of the Federalist Papers in newspapers justifying various provisions of the new constitution. Several state ratifying conventions insisted that the new government add a bill of rights to the Constitution; James Madison, the "Father of the Constitution," was initially reluctant to propose such a bill for fear that it might omit important rights, but eventually he sponsored a new Bill of Rights in the first Congress.

2.5 Changing the Constitution

- Article V of the Constitution makes it exceedingly difficult to amend the document. Since the Bill of Rights was ratified in 1791, all but one of the 17 amendments that followed resulted from a two-step process: (1) two-thirds support of both houses of Congress, followed by (2) ratification by three-fourths of the state legislatures. (The Twenty-First Amendment was ratified by three-fourths of special state ratifying conventions). To date, a national constitutional convention (also authorized by Article V) has never been held.
- Informal constitutional change often occurs through U.S. Supreme Court interpretation of the document's text, as well as through bold actions from the president and Congress. The Supreme Court under Chief Justice Marshall favored a loose construction of several provisions, giving the federal government considerable implied powers; Thomas Jefferson

and Jeffersonian Republicans favored a stricter construction of the Constitution's provisions. Today, Supreme Court justices wage similar battles, disagreeing over whether to apply a loose or strict construction of the Constitution to claims for sexual privacy or the right to same-sex marriage.

KEY TERMS

amendments (p. 39)	Federalists (p. 36)
Anti-Federalists (p. 36)	Great Compromise (p. 31)
Articles of Confederation (p. 29)	loose construction (p. 42)
Bill of Rights (p. 39)	New Jersey Plan (p. 31)
checks and balances (p. 34)	separation of powers (p. 34)
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