

## CHAPTER 2

# The Constitution

### ▣ LEARNING OBJECTIVES

1. How has the challenge of political leadership changed since the republic's first decades?
2. What was wrong with the Articles of Confederation?
3. How did the authors of the Constitution view human nature?
4. How can a government be strong enough to govern without threatening freedom?
5. Did the authors of the Constitution understand liberty and equality the way that most Americans now do?

### ▣ SUMMARY OVERVIEW

America in 1787 was a small struggling nation sitting on the edge of the Atlantic seaboard inhabited by four million citizens whose primary occupation was farming. It had been settled primarily by immigrants who fled Northern Europe. It was a nation of limited cultural diversity. Leaders at the time faced issues that were far less complex than those faced by leaders in 2012. In 2012, America is a global power with over 300 million Americans who come from every nation in the world. Cultural diversity characterizes modern American politics. Today's leaders face an equally diverse array of challenges with few options to develop a consensus approach as a basis for problem solving.

The American political scene today is vastly different than the one faced by the Framers in 1787. Then, highly respected leaders could deliberate in secret and create a Constitution. Today's politics is conducted in the light of public scrutiny. The populace represents many diverse elements making the forging of a consensus very difficult. Regrettably, this public attention has undermined the esteem of political leadership so that there is very little public trust in current political leaders. Understanding our current framework of government requires us to understand the historic context in which it was formed.

This chapter is devoted to an exploration of that history. The American Revolution was a revolution about the basic elements that combined to constitute a basis for liberty. In drafting the Constitution, the Framers intended to create a written plan that would create a government to protect fundamental rights. The "real" revolution that drove the effort of the Framers in drafting a new constitution was to create a government that would reflect the teachings of John Locke. Locke argued that human liberties existed before government. Government reflected a social contract in which the ultimate sovereignty rested with the people. The ultimate source of legitimacy for any government was the consent of the people. Government is not based on divine right, but rather it is based on popular consent.

The American Revolution came about as the colonists sought to create a government based on popular consent. Their first attempt at forming such a government was not successful. Under the

Articles of Confederation, the national government was too weak to fulfill the fundamental responsibility of government. It could not protect liberty. Under the Articles of Confederation the national government lacked any capacity to raise money to support its activities. This forced the government to rely on state militias to raise an army. The United States military was very weak leaving the nation vulnerable to attack from other powers or internal rebellions. The currency lacked a taxable basis and was essentially worthless. There was no centralized currency to promote exchange of goods and services within or between the states. The national government could not regulate commerce between the states or trade with other nations, which created economic stagnation. There was no national judiciary to resolve disputes between states or citizens of different states, which created a fragmented and confusion legal system.

The Constitutional Convention was called in an effort to create a government that could protect liberty. At the Convention, the delegates contemplated competing goals. They needed to create a government strong enough to protect public order, while not so strong as to crush personal liberty. Two initial plans, the Virginia Plan and New Jersey Plan, were proposed. The Virginia Plan favored the states with larger populations. It divided government into three branches. The legislative branch would be divided into two parts. The executive and the national judiciary would be selected by the legislature. The national legislature would have supreme powers over the states. To preserve its democratic base, one chamber would be elected directly by the people. The New Jersey delegates feared the population advantage of the more populous states and sought to amend the Articles of Confederation. In this plan, states would be given equal representation in the legislature, which would negate the population advantage of the more populated states.

Eventually, the impasse was resolved by members of the Connecticut delegation. The bicameral legislature proposed in the Virginia Plan would have one branch representing the population. This would give the more populous states representation in the lower house. The upper house, Senate, would give equal representation to each state. The Great Compromise reconciled the interests of both the large and small states.

The challenge of how to protect liberty while maintaining a strong government led to the creation of a republic. Direct representation was impossible in a nation that spanned the eastern seaboard of the United States. The Framers did not trust the general populace who would be swayed by unrestrained, untutored, and unreasoned popular sentiment. Popular rule would be controlled by having the states elect the Senators, using an electoral college to select the president, and having two differing types of majorities to control the legislature. One of the legislative branches, the House, would be based on population of the state and the other would be allocated equally for each state.

The creation of an independent judicial branch with powers of judicial review would further control the power of the majority while simultaneously protecting minority rights. The entire Constitution was subject to amendment allowing it to be altered to meet future changes with the political and economic environment faced by the growing nation.

Two key principles were used by the Framers to protect liberty: separation of powers and federalism. Separation of powers allowed each branch of government to control its own sphere. The system created a capacity within each of the three branched to check and balance the powers of the other two branches. The system of checks and balances prevented any one branch from overpowering the other and seizing control of the entire government. Power within the system was further divided between the national and state governments. Federalism allowed the national government to exercise a check and balance over state actions that threatened liberty. Collective action by the states could be used to counterbalance the power of the national government.

The proposed Constitution was linked to the people, the recognized source of legitimate sovereignty. Each of the thirteen states would hold ratifying conventions to approve the Constitution. The method of ratification tied the new Constitution directly to the source of political legitimacy, popular consent. The Constitution was opposed by the Antifederalists who believed it would create a government that was too distant from the people and that too much power. The Antifederalists favored concentration of power at the state level. They favored more restrictions. The Federalists, led by James Madison and Alex Hamilton, favored the creation of a large extended republic. Madison and Hamilton believed that liberty was best protected by insulation it from local popular passions. Ultimately, both sides achieved a compromise through the addition of a Bill of Rights to the Constitution. The Antifederalists added restrictions to the Constitution to protect personal liberties. The Federalists achieved their goal of ratification of the Constitution.

The end of slavery was one of the elements that hindered rapid ratification of the Constitution. Northern delegates favored it abolition while many delegates from the South fought to keep the institution from being ended. Southern delegates wanted slaves to be counted as part of their population for the purpose of determining the number of representatives they would be allotted in Congress. Northern delegates opposed counting slaves as part of the population unless they were first freed. A Three-Fifths Compromise was reached to advance the process. Slaves would be partially counted toward the population of the state. Congress could abolish the slave trade after 1808. All escaped slaves from the South would have to be returned to their owners. The compromise enabled Southern delegates to support the proposed Constitution. However, it had a disastrous consequence. The issue of slavery was not resolved and continued to fester. Eventually, the nation was plunged into civil war over the issue.

Economic historians have argued that the Constitution was in truth a document designed to protect the interests of the wealthy. Charles Beard argued that the Constitution created a powerful government designed to control the power of the masses from revolting against a powerful class of property holders. Historic analysis of this claim does not support Beard's hypothesis. However, economic factors did play a role in state ratifying conventions. Merchants, those who lived in cities, holders of government IOU's, or those who owned western lands, favored the proposed government. Farmers, non-holders of government IOU's, and slave holders opposed the Constitution.

The Constitution was created to protect political liberty. The founders feared political inequality. They did not intend to protect against economic inequality. The Bill of Rights contains provisions to protect private property. Overtime a clear consensus has developed among the people that government should provide services to the public while regulating the market.

## CHAPTER OUTLINE

### I. THE CHALLENGE OF LEADERSHIP

- Today all government activity is subject to close public scrutiny.
- The Framers were able to conduct sensitive activities without intense public scrutiny.
- The Framers enjoyed great popular respect. Today, politicians are not favorably viewed by the public.

- The Framers worked under different conditions where there was far less social diversity. Today's leaders must attempt to forge consensus in a society which is far more diverse and contentious.

## II. THE PROBLEM OF LIBERTY

- Colonists were focused on traditional liberties:
  - The right to bring legal cases before independent judges
  - The right to not have to quarter troops in their homes
  - The right to trade without burdensome restrictions
  - The right to pay no taxes that had not been established without direct representation
- The colonists came to see independence as possible because they had lost confidence in the British constitution.

## III. HUMAN NATURE

- Believed that men seek power because they are ambitious, greedy, and easily corrupted
- Believed in a higher law embodying natural rights
- A war of ideology, not economics
- Declaration of Independence cited specific complaints against George III for violating unalienable rights.
- John Locke, seventeenth-century English philosopher and writer, had a profound influence on the Framers.

## IV. THE REAL REVOLUTION

- The “real” revolution was the radical change in belief about what made authority legitimate and liberties secure.
  - Government exists by consent of the governed, not by royal prerogative.
- Political power is exercised by direct grant of power in a written constitution.
- Human liberty exists prior to government, and government must respect liberty.

## V. THE ARTICLES OF CONFEDERATION

- Could not levy taxes or regulate commerce
- **Sovereignty**, independence retained by states
- One vote in Congress for each state
- Nine of thirteen votes in Congress required for any measure
- Delegates to Congress chosen and paid by state legislatures
- Little money coined by Congress
- Army small and dependent on independent state militias
- Territorial disputes between states led to open hostilities
- No national judicial system
- Consent of all thirteen states' necessary for any amendments

## VI. THE CONSTITUTIONAL CONVENTION

### A. The Lessons of Experience

- State constitutions
  - Pennsylvania—1776—**unicameral legislation**
  - Massachusetts—1780—less democratic

- **Shays's Rebellion** (Massachusetts) brought fear that states were about to collapse from internal dissension.

#### B. The Framers

- Fifty-five attending: men of practical affairs, including Continental army veterans and members of the Congress of the Confederation
- An entirely new constitution was written, although the gathering was authorized only to revise Articles.
- Primary concern was with defense of liberty as a natural right (based on Lockean reasoning).

#### C. The Challenge

- Doubt that popular consent alone could guarantee liberty: fear of tyranny of the majority
- “A delicate problem”: how could government be strong enough to preserve order, but not threaten liberty?

#### ★ Some Key Political Concepts

#### D. Large States versus Small States

- The Virginia Plan
  - Strong national government organized into three branches
  - Bicameral legislature
  - Executive and members of the national judiciary to be chosen by legislature
  - Council of revision (executive and some judiciary branch members) with veto power; legislature could override the veto
  - Two key features of the plan:
    - National legislature with supreme powers
    - At least one legislative house elected directly by the people
- The New Jersey Plan
  - Submitted as alternative to Virginia Plan
  - Generated from a fear that legislative representation would be based on population, allowing the more populous states always to outvote the less populous states
  - Sought to amend rather than replace the Articles of Confederation
  - Proposed one vote per state, so Congress would be the creature of the state governments
  - Protected small states' interests while enhancing power of national government

#### ★ The Structure of the National Government

#### E. The Compromise

- House of Representatives based on population and directly elected by people
- Senate composed of two members per state and elected by state legislatures
- The **Great Compromise** reconciled interests of large and small states—the former would dominate the House of Representatives; the latter would dominate the Senate.

### F. For Representative Democracy

- Founders did not intend to create direct democracy.
- Physical impossibility in a vast country
- Founders also mistrusted popular passions and were concerned to secure minority rights.
- Intended instead to create a **republic**, a government by representation
- Popular rule only one element of new government
  - State legislators to elect senators
  - Electors to choose president
  - Two kinds of majorities: voters (for example, the House of Representatives) and states (for example, the Senate)
  - **Judicial review** another limitation, though one not necessarily intended by Founders
  - Amendment process

### ★ Ways of Amending the Constitution

### G. Two key Principles: Separation of Powers and Federalism

- **Separation of powers:** among branches of the national government
- **Federalism:** power divided between national and state governments

### H. Government and Human Nature

- Founders' central belief: people would seek their own advantage, in and out of politics.
- Government based on popular consent was possible, but not inevitable.
- Factionalism could be harnessed to provide a source of unity and guarantee liberty.

### ★ Checks and Balances

## VII. THE CONSTITUTION AND LIBERTY

### A. The Antifederalist View

- Liberty could be secure only in small republics.
- Nation needed, at best, a loose confederation of states with most of the power wielded by the state legislatures.
- If there was a strong national government, there should be many more restrictions on it.
- Madison's response (*Federalist Papers* No. 10 and No. 51): personal liberty safest in large (extended) republics
- Reasons for the absence of a bill of rights
  - Several guarantees were already in the Constitution.
  - Most states had bills of rights.
  - Intent in writing the Constitution was to limit federal government to specific powers.

### ★ How We Compare: Does a Constitution Guarantee Freedom?

### ★ Constitutional Protections

### B. Need for a Bill of Rights

- Framers knew that unanimity was not possible—the North Carolina and Rhode Island conventions initially rejected the Constitution.
- Ratification impossible without one
- Promise by key leaders to obtain one

- Bitter struggle for ratification, narrowly successful
- Twelve amendments approved by Congress; 10 ratified by the states and went into effect in 1791

### VIII. THE CONSTITUTION AND SLAVERY

- Slavery was addressed in three provisions of the Constitution.
  - House of Representatives apportionment—the “three-fifths compromise”
  - Congress could not prohibit slave trade before 1808.
  - Fugitive slave clause
- Necessity of compromise: the Constitution would not have been ratified, and slavery would have continued under the **Articles of Confederation** with no prospective challenge possible.
- Great (or Connecticut) Compromise favored smaller (mostly) northern states by giving equal representation to each state in the Senate, but it also favored southern, slave-holding states.
- Legacy: civil war, social and political catastrophe
- ★ **The Bill of Rights**

### IX. POLITICAL IDEALS OR ECONOMIC INTERESTS?

- Economic interests of Framers varied widely.
  - Charles Beard: Those who supported the Constitution expected to benefit economically from it. However, the economic interests of the Framers themselves did not dominate the convention.
  - No clear division along class lines were found by historians in the 1950s.
  - More recent research (1980s) suggests state economic considerations outweighed personal considerations.
  - Excluding the grave and enormous exception of slave holders, most delegates who voted to ratify the Constitution were not motivated by economic interest.
- Economic factors played larger role in state-ratifying conventions.
  - More likely to vote in favor of ratification: merchants, urban, owners of western lands, holders of government IOUs, and non-slave owners.
  - Less likely to vote in favor of ratification: farmers, nonholders of government IOUs, and slave owners.

### X. LIBERTY AND EQUALITY

- Contemporary critics: government today is too weak.
- Framers were more concerned with political inequality—they wanted to guard against political privilege.
- Madison believed one object of the government was to protect private property while guarding against the creation of monopolies protected by government.
- Modern Americans expect their government to provide services and greater regulation of business activities.

### XI. A RECIPE FOR MODERATION

- Constitution does not allow bold action—requires broad coalitions to make change.
- ★ **Were Women Left Out of the Constitution?**

★ **What Would You Do? Proposal for a New Constitutional Convention**

▣ **CRITICAL THINKING QUESTIONS**

1. What was the fundamental change in thinking about the legitimate source of sovereignty advocated by the Framers? How did the thinking of Locke influence this change of mind? What was divine right?
2. How does the constitution empower government? What were the failings of the Articles of Confederation? What are the limits placed on the power of the national government? Why did we need a Bill of Rights?
3. How do modern political differences between liberals and conservatives reflect the earlier political difference between Federalists and Antifederalists?
4. How might we reform the Constitution to better address issues faced by our nation in 2012?

▣ **LECTURE LAUNCHERS**

1. Charles Beard argued that the Constitution was designed by the rich to favor the rich. Do we see that in the election of very wealthy candidates to the Presidency in recent years, for example? All Presidents and/or nominees for the presidency over the last 30 years with the exception of William Clinton were multi-millionaires. Does this prove the Beard thesis? Is the Romney candidacy another example of the theory advanced by Beard?
2. If your boss can fire you, does that mean that they have ultimate power in the relationship? Does the fact that the Congress can impeach the President or any federal judge mean that the legislative branch holds more power than any of the three branches?
3. Madison designed the Senate institution to serve as an executive counsel, much like a Board of Directors in a corporation, to oversee the executive branch. In what ways does the Senate have the power to serve as an Executive counsel?
4. In *Federalist 10*, Madison clearly fears the power of the people. He creates a republican form of government to curb and check the power of the people. He crafted a Senate institution to provide a check over the legislature, the executive, and the judicial branches. He placed the election of Senators under state legislatures, which prevented direct popular control of the Senate. The effect was to insulate this oversight group, who could check the power of all three branches from popular passion. Does the Seventeenth Amendment, which now provides direct popular election of the Senate, wreck his design?

▣ **IN-CLASS ACTIVITIES**

1. Have each student select and research one of the attendees to the Constitutional Convention. This should include:
  - Profile of the individual to include their economic interests and governmental ideas and their political background and affiliation
  - Profile of the individual's state



Students will present their findings to the class.

2. Have students make a list of their personal views about the appropriate role of government in their lives. This list must include at least five elements. Have the students place emphasis on what they believe to be the most important functions and why?
3. What are the greatest failings of our current system of governance? Why? What factors within our political system contribute to these failings? Have the students discuss this in class.
4. Have the students discuss the reaction of George Washington, James Madison, Alexander Hamilton and Patrick Henry to our current government. Would they be pleased or horrified? Explain how each founder would react to the question and explain why.

## ▣ KEY TERMS

**Antifederalists** Opponents of a strong central government who campaigned against ratification of the Constitution in favor of a confederation of largely independent states. Antifederalists successfully marshalled public support for a federal bill of rights. After ratification, they formed a political party to support states' rights.

**Articles of Confederation** A constitution drafted by the newly independent states in 1777 and ratified in 1781. It created a weak national government that could not levy taxes or regulate commerce. In 1789, it was replaced by our current constitution to create a stronger national government.

**checks and balances** The power of the legislative, executive, and judicial branches of government to block some acts by the other two branches.

**coalition** An alliance among different interest groups (factions) or parties to achieve some political goal. An example is the coalition sometimes formed between Republicans and conservative Democrats.

**faction** According to James Madison, a group of people who seek to influence public policy in ways contrary to the public good.

**federalism** A political system in which ultimate authority is shared between a central government and state or regional governments.

**Federalist Papers** A series of eighty-five essays written by Alexander Hamilton, James Madison, and John Jay (all using the name *Publius*) that were published in New York newspapers in 1787–1788 to convince New Yorkers to adopt the newly proposed Constitution. They are classics of American constitutional and political thought.

**federalists** Supporters of a stronger central government who advocated ratification of the Constitution. After ratification they founded a political party supporting a strong executive and Alexander Hamilton's economic policies.

**Great (or Connecticut) Compromise** A compromise at the Constitutional Convention in 1787 that reconciled the interests of small and large states by allowing the former to predominate in the Senate and the latter in the House. Under the agreement, each state received two representatives in the Senate, regardless of size, but was allotted representatives on the basis of population in the House.

**judicial review** The power of the courts to declare acts of the legislature and of the executive to be unconstitutional and, hence, null and void.

**republic** A form of democracy in which power is vested in representatives selected by means of popular competitive elections.

**separation of powers** A principle of American government whereby constitutional authority is shared by three separate branches of government—the legislative, the executive, and the judicial.

**Shays' rebellion** A rebellion in 1787 led by Daniel Shays and other ex–Revolutionary War soldiers and officers to prevent foreclosures of farms as a result of high interest rates and taxes. The revolt highlighted the weaknesses of the Confederation and bolstered support for a stronger national government.

**sovereignty** A governmental unit that has supreme authority and is accountable to no higher institution.

**unicameral legislature** A lawmaking body with only one chamber, as in Nebraska.

## ▣ WEB LINKS

Congress (<http://thomas.loc.gov/>). Historical and legal documents (choose More Historical Documents).

Economic theories

(<http://eh.net/encyclopedia/article/mcguire.constitution.us.economic.interests>). Review of Charles Beard's economic theory.

National Constitution Center ([www.constitutioncenter.org](http://www.constitutioncenter.org)). Historical and legal documents.

U. S. Constitution online (<http://www.usconstitution.net/const.html>).

The official U.S. Constitution (<http://www.archives.gov/exhibits/charters/constitution.html/>).

Video—Constitutional Convention in 10 minutes  
(<http://www.youtube.com/watch?v=dL9uEt5dXEw>).

Yale University Law School ([www.yale.edu/lawweb/avalon/avalon.htm](http://www.yale.edu/lawweb/avalon/avalon.htm)). Court cases about the Constitution.

## ▣ INSTRUCTOR RESOURCES

Bailyn, Bernard. *The Ideological Origins of the American Revolution*. Cambridge, MA: Harvard UP. 1967. Print.

A brilliant account of how the American colonists formed and justified the idea of independence.

Becker, Carl L. *The Declaration of Independence*. New York: Vintage. 1942. Print.

The classic account of the meaning of the Declaration.

Beeman, Richard. *Plain, Honest Men: The Making of the American Constitution*. New York: Random House. 2009. Print.

The best account of the constitutional convention yet written.

Farrand, Max. *The Framing of the Constitution of the United States*. New Haven, Conn.: Yale

UP. 1913. Print.

A good, brief account of the Philadelphia convention, by the editor of Madison's notes on the convention.

*Federalist Papers*. By Alexander Hamilton, James Madison, and John Jay.

The best edition was edited by Jacob E. Cooke. Middletown, Conn.: Wesleyan UP. 1961. Print.

Goldwin, Robert A., and William A. Schambra, eds. *How Capitalistic Is the Constitution?* Washington, DC: American Enterprise Institute, 1982.

Essays from different viewpoints discussing the relationship between the Constitution and the economic order.

———. *How Democratic Is the Constitution?* Washington, DC: American Enterprise Institute, 1980.

A collection of essays offering different interpretations of the political meaning of the Constitution.

Maier, Pauline. *Ratification: The People Debate the Constitution, 1787–1788*. New York: Simon and Shuster. 2010. Print.

This is the definitive account of how the Constitution supplanted the Articles of Confederation and gained popular support far beyond the ratifying conventions.

Sabato, Larry J. *A More Perfect Constitution*. New York: Walker and Company, 2007.

A proposal for constitutional reform.

Storing, Herbert J. *What the Anti-Federalists Were For*. Chicago: U of Chicago P. 1981. Print.

A close analysis of the political views of those opposed to the ratification of the Constitution.

Wood, Gordon S. *The Creation of the American Republic*. Chapel Hill: U of North Carolina P. 1969. Print.

A detailed study of American political thought before the Philadelphia convention.

———. *The Radicalism of the American Revolution*. New York: Knopf. 1992. Print.

A penetrating account of the nature and effects of the American Revolution, emphasizing the radical transformation that it produced.

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