Enduring Questions
1. What view of human nature is embodied in the Constitution?
2. Is representative democracy possible without political compromise?
3. Has the system of separate institutions sharing powers protected liberty and promoted equality as the Framers envisioned it would?
The goal of the American Revolution was liberty. It was not the first revolution with that object; it may not have been the last; but it was perhaps the clearest case of a people altering the political order violently, simply in order to protect their liberties. Subsequent revolutions had more complicated, or utterly different, objectives. The French Revolution in 1789 sought not only liberty, but “equality and fraternity.” The Russian Revolution (1917) and the Chinese Revolution (culminating in 1949) chiefly sought equality and were little concerned with liberty as we understand it.

The Problem of Liberty

The American colonists sought to protect when they signed the Declaration of Independence in 1776 were the traditional liberties to which they thought they were entitled as British subjects. These liberties included the right to bring their legal cases before truly independent judges rather than ones subordinate to the king; to be free of the burden of having British troops quartered in their homes; to engage in
trade without burdensome restrictions; and, of course, to pay no taxes voted by a British Parliament in which they had no direct representation. During the ten years or more of agitation and argument leading up to the War of Independence, most colonists believed that their liberties could be protected while they remained a part of the British Empire.

Slowly but surely opinion shifted. By the time war broke out in 1775, a large number of colonists (though perhaps not a majority) had reached the conclusion that the colonies would have to become independent of Great Britain if their liberties were to be assured. The colonists had many reasons for regarding independence as the only solution, but one is especially important: they no longer had confidence in the English constitution. This constitution was not a single written document but rather a collection of laws, charters, and traditional understandings that proclaimed the liberties of British subjects. Yet these liberties, in the eyes of the colonists, were regularly violated despite their constitutional protection. Clearly, then, the English constitution was an inadequate check on the abuses of political power. The revolutionary leaders sought an explanation of the insufficiency of the constitution and found it in human nature.

The Colonial Mind

“A lust for domination is more or less natural to all parties,” one colonist wrote.1 Men will seek power, many colonists believed, because they are ambitious, greedy, and easily corrupted. John Adams denounced the “luxury, effeminacy, and venality” of English politics; Patrick Henry spoke scathingly of the “corrupt House of Commons”; and Alexander Hamilton described England as “an old, wrinkled, withered, worn-out hag.”2 This was in part flamboyant rhetoric designed to whip up enthusiasm for the conflict, but it was also deeply revealing of the colonial mind. Their belief that English politicians—and by implication, most politicians—tended to be corrupt was the colonists’ explanation of why the English constitution was not an adequate guarantee of the liberty of the citizens. This opinion was to persist and, as we shall see, profoundly affect the way the Americans went about designing their own governments.

The liberties the colonists fought to protect were, they thought, widely understood. They were based not on the generosity of the king or the language of statutes but on a “higher law” embodying “natural rights” that were ordained by God, discoverable in nature and history, and essential to human progress. These rights, John Dickinson wrote, “are born with us; exist with us; and cannot be taken away from us by any human power.”3 There was general agreement that the essential rights included life, liberty, and property long before Thomas Jefferson wrote them into the Declaration of Independence. (Jefferson changed “property” to “the pursuit of happiness,” but almost everybody else went on talking about property.)
This emphasis on property did not mean that the American Revolution was thought up by the rich and wellborn to protect their interests or that there was a struggle between property owners and the propertyless. In late-eighteenth-century America most people (except the black slaves) had property of some kind. The overwhelming majority of citizens were self-employed—as farmers or artisans—and rather few people benefited financially by gaining independence from England. Taxes were higher during and after the war than before, trade was disrupted by the conflict, and debts mounted perilously as various expedients were invented to pay for the struggle. There were, of course, war profiteers and those who tried to manipulate the currency to their own advantage, but most Americans at the time of the war saw the conflict clearly in terms of political rather than economic issues. It was a war of ideology.

Everyone recognizes the glowing language with which Jefferson set out the case for independence in the second paragraph of the Declaration:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed—that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, having its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

What almost no one recalls, but what are an essential part of the Declaration, are the next twenty-seven paragraphs, in which Jefferson listed, item by item, the specific complaints the colonists had against George III and his ministers. None of these items spoke of social or economic conditions in the colonies; all spoke instead of specific violations of political liberties. The Declaration was in essence a lawyer’s brief prefaced by a stirring philosophical claim that the rights being violated were unalienable—that is, based on nature and Providence, and not on the whims or preferences of people. Jefferson, in his original draft, added a
twenty-eighth complaint—that the king had allowed the slave trade to continue and was inciting slaves to revolt against their masters. Congress, faced with so contradictory a charge, decided to include a muted reference to slave insurrections and omit all reference to the slave trade.

The Real Revolution
The Revolution was more than the War of Independence. It began before the war, continued after it, and involved more than driving out the British army by force of arms. The real Revolution, as John Adams afterward explained in a letter to a friend, was the “radical change in the principles, opinions, and sentiments, and affections of the people.” This radical change had to do with a new vision of what could make political authority legitimate and personal liberties secure. Government by royal prerogative was rejected; instead legitimate government would require the consent of the governed. Political power could not be exercised on the basis of tradition but only as a result of a direct grant of power contained in a written constitution. Human liberty existed before government was organized, and government
must respect that liberty. The legislative branch of
government, in which the people were directly rep-
resented, should be superior to the executive branch.

These were indeed revolutionary ideas. No gov-
ernment at the time had been organized on the basis
of these principles. And to the colonists such notions
were not empty words but rules to be put into imme-
diate practice. In 1776 eight states adopted written
constitutions. Within a few years every former
colony had adopted one except Connecticut and
Rhode Island, two states that continued to rely on
their colonial charters. Most state constitutions had
detailed bills of rights defining personal liberties,
and most placed the highest political power in the
hands of elected representatives.

Written constitutions, representatives, and bills of
rights are so familiar to us now that we forget how
bold and unprecedented those innovations were in
1776. Indeed, many Americans did not think they
would succeed: such arrangements would be either
so strong that they would threaten liberty or so weak
that they would permit chaos.

The eleven years that elapsed between the Decla-
ration of Independence and the signing of the Con-
titution in 1787 were years of turmoil, uncertainty,
and fear. George Washington had to wage a bitter,
protracted war without anything resembling a
strong national government to support him. The
supply and financing of his army were based on a
series of hasty improvisations, most badly adminis-
tered and few adequately supported by the fiercely
independent states. When peace came, many parts
of the nation were a shambles. At least a quarter of
New York City was in ruins, and many other com-
munities were nearly devastated. Though the British
lost the war, they still were powerful on the North
American continent, with an army available in
Canada (where many Americans loyal to Britain had
fled) and a large navy at sea. Spain claimed the Mis-
sissippi River valley and occupied what are now
Florida and California. Men who had left their
farms to fight came back to discover themselves in
debt with no money and heavy taxes. The paper
money printed to finance the war was now virtually
worthless.

Weaknesses of the Confederation
The thirteen states had formed only a faint sem-
b lance of a national government with which to
bring order to the nation. The Articles of Confed-
eration, which went into effect in 1781, created lit-
tle more than a "league of friendship" that could not
levy taxes or regulate commerce. Each state retained
its sovereignty and independence, each state
(regardless of size) had one vote in Congress, nine (of
thirteen) votes were required to pass any measure,
and the delegates who cast these votes were picked
and paid for by the state legislatures. Congress did
have the power to make peace, and thus it was able
to ratify the treaty with England in 1783. It could
coin money, but there was precious little to coin; it
could appoint the key army officers, but the army
was small and dependent for support on independ-
ent state militias; it was allowed to run the post
office, then, as now, a thankless task that nobody
else wanted. John Hancock, who in 1785 was
elected to the meaningless office of "president"
under the Articles, never showed up to take the job.
Several states claimed the unsettled lands in the West, and they occasionally pressed those claims with guns. Pennsylvania and Virginia went to war near Pittsburgh, and Vermont threatened to become part of Canada. There was no national judicial system to settle these or other claims among the states. To amend the Articles of Confederation, all thirteen states had to agree.

Many of the leaders of the Revolution, such as George Washington and Alexander Hamilton, believed that a stronger national government was essential. They lamented the disruption of commerce and travel caused by the quarrelsome states and deeply feared the possibility of foreign military intervention, with England or France playing one state off against another. A small group of men, conferring at Washington’s home at Mount Vernon in 1785, decided to call a meeting to discuss trade regulation. That meeting, held at Annapolis, Maryland, in September 1786, was not well attended (no delegates arrived from New England), and so another meeting, this one in Philadelphia, was called for the following spring—in May 1787—to consider ways of remedying the defects of the Confederation.

### The Constitutional Convention

The delegates assembled at Philadelphia at the Constitutional Convention, for what was advertised (and authorized by Congress) as a meeting to revise the Articles; they adjourned four months later having written a wholly new constitution. When they met, they were keenly aware of the problems of the confederacy but far from agreeing as to what should be done about those problems. The protection of life, liberty, and property was their objective in 1787 as it had been in 1776, but they had no accepted political theory that would tell them what kind of national government, if any, would serve that goal.

### The Lessons of Experience

They had read ancient and modern political history, only to learn that nothing seemed to work. James Madison spent a good part of 1786 studying books sent to him by Thomas Jefferson, then in Paris, in hopes of finding some model for a workable American republic. He took careful notes on various confederacies in ancient Greece and on the more modern confederacy of the United Netherlands. He reviewed the history of Switzerland and Poland and the ups and downs of the Roman republic. He concluded that there was no model; as he later put it in one of the Federalist papers, history consists only of beacon lights “which give warning of the course to be shunned, without pointing out that which ought to be pursued.” The problem seemed to be that confederacies were too weak to govern and tended to collapse from internal dissension, while all stronger forms of government were so powerful as to trample the liberties of the citizens.

#### State Constitutions

Madison and the others did not need to consult history, or even the defects of the Articles of Confederation, for illustrations of the problem. These could be found in the government of the American states at the time. Pennsylvania and Massachusetts exemplified two aspects of the problem. The Pennsylvania constitution, adopted in 1776, created the most radically democratic of the new state regimes. All power was given to a one-house (unicameral) legislature, the Assembly, the members of which were elected annually for one-year terms. No legislator could serve more than four years. There was no governor or president, only an Executive Council that had few powers. Thomas
Paine, whose pamphlets had helped precipitate the break with England, thought the Pennsylvania constitution was the best in America, and in France philosophers hailed it as the very embodiment of the principle of rule by the people. Though popular in France, it was a good deal less popular in Philadelphia. The Assembly disfranchised the Quakers, persecuted conscientious objectors to the war, ignored the requirement of trial by juries, and manipulated the judiciary. To Madison and his friends the Pennsylvania constitution demonstrated how a government, though democratic, could be tyrannical as a result of concentrating all powers into one set of hands.

The Massachusetts constitution, adopted in 1780, was a good deal less democratic. There was a clear separation of powers among the various branches of government, the directly elected governor could veto acts of the legislature, and judges served for life. Both voters and elected officials had to be property owners; the governor, in fact, had to own at least £1,000 worth of property. The principal officeholders had to swear that they were Christians.

- **Shays’s Rebellion** But if the government of Pennsylvania was thought to be too strong, that of Massachusetts seemed too weak, despite its “conservative” features. In January 1787 a group of ex-Revolutionary War soldiers and officers, plagued by debts and high taxes and fearful of losing their property to creditors and tax collectors, forcibly prevented the courts in western Massachusetts from sitting. This became known as Shays’s Rebellion, after one of the officers, Daniel Shays. The governor of Massachusetts asked the Continental Congress to send troops to suppress the rebellion, but it could not raise the money or the manpower. Then he turned to his own state militia, but discovered he did not have one. In desperation private funds were collected to hire a volunteer army, which marched on Springfield and, with the firing of a few shots, dispersed the rebels, who fled into neighboring states.

Shays’s Rebellion, occurring between the aborted Annapolis and the coming Philadelphia conventions, had a powerful effect on opinion. Delegates who might have been reluctant to attend the Philadelphia meeting, especially those from New England, were galvanized by the fear that state governments were about to collapse from internal disension. George Washington wrote a friend despairingly: “For God’s sake, if they [the rebels] have real grievances, redress them; if they have not, employ the force of government against them at once.”

Thomas Jefferson, living in Paris, took a more detached view: “A little rebellion now and then is a good thing,” he wrote. “The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.” Though Jefferson’s detachment might be explained by the fact that he was in Paris and not in Springfield, there were others, like Governor George Clinton of New York, who shared the view that no strong central government was required. (Whether Clinton would have agreed about the virtues of spilled blood, especially his, is another matter.)

**The Framers**

The Philadelphia convention attracted fifty-five delegates, only about thirty of whom participated regularly in the proceedings. One state, Rhode Island, refused to send anyone. The convention met during a miserably hot Philadelphia summer, with the delegates pledged to keep their deliberations secret. The talkative and party-loving Benjamin Franklin was often accompanied by other delegates to make sure
that neither wine nor his delight in telling stories would lead him to divulge delicate secrets.

Those who attended were for the most part young (Hamilton was thirty; Madison thirty-six) but experienced. Eight delegates had signed the Declaration of Independence, seven had been governors, thirty-four were lawyers and reasonably well-to-do, a few were wealthy. They were not “intellectuals,” but men of practical affairs. Thirty-nine had served in the ineffectual Congress of the Confederation; a third were veterans of the Continental Army.

Some names made famous by the Revolution were conspicuously absent. Thomas Jefferson and John Adams were serving as ministers abroad; Samuel Adams was ill; Patrick Henry was chosen to attend but refused, commenting that he “smelled a rat in Philadelphia, tending toward monarchy.”

The convention produced not a revision of the Articles of Confederation, as it had been authorized to do, but instead a wholly new written constitution creating a true national government unlike any that had existed before. That document is today the world’s oldest written national constitution. Those who wrote it were neither saints nor schemers, and the deliberations were not always lofty or philosophical—much hard bargaining, not a little confusion, and the accidents of personality and time helped shape the final product. The delegates were split on many issues—what powers should be given to a central government, how the states should be represented, what was to be done about slavery, the role of the people—each of which was resolved by a compromise. The speeches of the delegates (known to us from the detailed notes kept by Madison) did not explicitly draw on political philosophy or quote from the writings of philosophers. Everybody present was quite familiar with the traditional arguments and, on the whole, well read in history. But though the leading political philosophers were only rarely mentioned, the debate was profoundly influenced by philosophical beliefs, some formed by the revolutionary experience and others by the eleven-year attempt at self-government.

From the debates leading up to the Revolution, the delegates had drawn a commitment to liberty,
which, despite the abuses sometimes committed in its name, they continued to share. Their defense of liberty as a natural right was derived from the writings of the English philosopher John Locke and based on his view that such rights are discoverable by reason. In a “state of nature,” Locke argued, all men cherish and seek to protect their life, liberty, and property. But in a state of nature—that is, a society without a government—the strong can use their liberty to deprive the weak of theirs. The instinct for self-preservation leads people to want a government that will prevent this exploitation. But if the government is not itself to deprive its subjects of their liberty, it must be limited. The chief limitation on it, he said, should derive from the fact that it is created, and governs, by the consent of the governed. People will not agree to be ruled by a government that threatens their liberty; therefore the government to which they freely choose to submit themselves will be a limited government designed to protect liberty.

The Pennsylvania experience as well as the history of British government led the Framers to doubt whether popular consent alone would be a sufficient guarantor of liberty. A popular government may prove too weak (as in Massachusetts) to prevent one faction from abusing another, or a popular majority can be tyrannical (as in Pennsylvania). In fact the tyranny of the majority can be an even graver threat than rule by the few. In the former case there may be no defenses for the individual—one lone person cannot count on the succor of public opinion or the possibility of popular revolt.

The problem, then, was a delicate one: how to devise a government strong enough to preserve order but not so strong that it would threaten liberty. The answer, the delegates believed, was not “democracy” as it was then understood. To many conservatives in the late eighteenth century, democracy meant mob rule—it meant, in short, Shays’s Rebellion (or, if they had been candid about it, the Boston Tea Party). On the other hand, aristocracy—the rule of the few—was no solution, since the few were likely to be self-seeking. Madison, writing later in the Federalist papers, put the problem this way:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. Striking this balance could not be done, Madison believed, simply by writing a constitution that set limits on what government could do. The example of British rule over the colonies proved that laws and customs were inadequate checks on political power. As he expressed it, “A mere demarcation on parchment of the constitutional limits [of government] is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”

The Challenge

The resolution of political issues, great and small, often depends crucially on how the central question is phrased. The delegates came to Philadelphia in general agreement that there were defects in the Articles of Confederation that ought to be remedied. Had they, after convening, decided to make their business that of listing these defects and debating alternative remedies for them, the document that emerged would in all likelihood have been very different from what in fact was adopted. But immediately after the convention had organized itself and chosen Washington to be its presiding officer, the Virginia delegation, led by Governor Edmund Randolph but relying heavily on the draftsmanship of James Madison, presented to the convention a comprehensive plan for a wholly new national government. The plan quickly became the major item of business of the meeting; it, and little else, was debated for the next two weeks.

The Virginia Plan

When the convention decided to make the Virginia Plan its agenda, it had fundamentally altered the nature of its task. The business at hand was not to be the Articles and their defects, but rather how one should go about designing a true national government. The Virginia Plan called for a strong national union organized into three governmental branches—the legislative, executive, and judicial. The legislature was to be composed of two houses,
the first elected directly by the people and the second chosen by the first house from among the people nominated by state legislatures. The executive was to be chosen by the national legislature, as were members of a national judiciary. The executive and some members of the judiciary were to constitute a “council of revision” that could veto acts of the legislature; that veto, in turn, could be overridden by the legislature. There were other interesting details, but the key features of the Virginia Plan were two: (1) a national legislature would have supreme powers on all matters on which the separate states were not competent to act, as well as the power to veto any and all state laws, and (2) at least one house of the legislature would be elected directly by the people.

**The New Jersey Plan**

As the debate went on, the representatives of New Jersey and other small states became increasingly worried that the convention was going to write a constitution in which the states would be represented in both houses of Congress on the basis of population. If this happened, the smaller states feared they would always be outvoted by the larger ones, and so, with William Paterson of New Jersey as their spokesman, they introduced a new plan. The New Jersey Plan proposed to amend, not replace, the old Articles of Confederation. It enhanced the power of the national government (though not as much as the Virginia Plan), but it did so in a way that left the states’ representation in Congress unchanged from the Articles—each state would have one vote. Thus not only would the interests of the small states be protected, but Congress itself would remain to a substantial degree the creature of state governments.

If the New Jersey resolutions had been presented first and taken up as the major item of business, it is quite possible that they would have become the framework for the document that finally emerged. But they were not. Offered after the convention had been discussing the Virginia Plan for two weeks, the resolutions encountered a reception very different from what they would have received if introduced earlier. The debate had the delegates already thinking in terms of a national government that was more independent of the states, and thus it had accustomed them to proposals that, under other circumstances, might have seemed quite radical. On June 19 the first decisive vote of the convention was taken: seven states preferred the Virginia Plan, three states the New Jersey Plan, and one state was split.

With the tide running in favor of a strong national government, the supporters of the small states had to shift their strategy. They now began to focus their efforts on ensuring that the small states could not be outvoted by the larger ones in Congress. One way was to have the members of the lower house elected by the state legislatures rather than the people, with each state getting the same number of seats rather than seats proportional to its population.

The debate was long and feelings ran high, so much so that Benjamin Franklin, at eighty-one the oldest delegate present, suggested that each day’s meeting begin with a prayer. It turned out that the
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convention could not even agree on this: Hamilton is supposed to have objected that the convention did not need "foreign aid," and others pointed out that the group had no funds with which to hire a minister. And so the argument continued.

The Compromise

Finally, a committee was appointed to meet during the Fourth of July holidays to work out a compromise, and the convention adjourned to await its report. Little is known of what went on in that committee's session, though some were later to say that Franklin played a key role in hammering out the plan that finally emerged. That compromise, the most important reached at the convention, and later called the Great Compromise (or sometimes the Connecticut Compromise), was submitted to the full convention on July 5 and debated for another week and a half. The debate might have gone on even longer, but suddenly the hot weather moderated, and Monday, July 16, dawned cool and fresh after a month of misery. On that day the plan was adopted: five states were in favor, four were opposed, and two did not vote.* Thus, by the narrowest of margins, the structure of the national legislature was set as follows:

• A House of Representatives consisting initially of sixty-five members apportioned among the states roughly on the basis of population and elected by the people
• A Senate consisting of two senators from each state to be chosen by the state legislatures

The Great Compromise reconciled the interests of small and large states by allowing the former to predominate in the Senate and the latter in the House. This reconciliation was necessary to ensure that there would be support for a strong national government from small as well as large states. It represented major concessions on the part of several groups. Madison, for one, was deeply opposed to the idea of having the states equally represented in the Senate. He saw in that way for the states to hamstring the national government and much preferred some measure of proportional representation in both houses. Delegates from other states worried that representation on the basis of population in the House of Representatives would enable the large states to dominate legislative affairs. Although the margin by which the compromise was accepted was razor-thin, it held firm. In time most of the delegates from the dissenting states accepted it.

After the Great Compromise many more issues had to be resolved, but by now a spirit of accommodation had developed. When one delegate proposed having Congress choose the president, another, James Wilson, proposed that he be elected directly by the people. When neither side of that argument prevailed, a committee invented a plan for an "electoral college" that would choose the president. When some delegates wanted the president chosen for a life term, others proposed a seven-year term, and still others wanted the term limited to three years without eligibility for reelection. The convention settled on a four-year term with no bar to reelection. Some states wanted the Supreme Court picked by the Senate; others wanted it chosen by the president. They finally agreed to let the justices be nominated by the president and then confirmed by the Senate.

Finally, on July 26, the proposals that were already accepted, together with a bundle of unresolved issues, were handed over to the Committee of Detail, consisting of five delegates. This committee included Madison and Gouverneur Morris, who was to be the chief draftsman of the document that finally emerged. The committee hardly contented itself with mere "details," however. It inserted some new proposals and made changes in old ones, drawing for inspiration on existing state constitutions and the members' beliefs as to what the other delegates might accept. On August 6 the report—the first complete draft of the Constitution—was submitted to the convention. There it was debated, item by item, revised, amended, and finally, on September 17, approved by all twelve states in attendance. (Not all delegates approved, however; three, including Edmund Randolph, who first submitted the Virginia Plan, refused to sign.)

*The states in favor were Connecticut, Delaware, Maryland, New Jersey, and North Carolina. Those opposed were Georgia, Pennsylvania, South Carolina, and Virginia. Massachusetts was split down the middle; the New York delegates had left the convention. New Hampshire and Rhode Island were absent.
The Constitution and Democracy

A debate continues to rage over whether the Constitution created, or was even intended to create, a democratic government. The answer is complex. The Framers did not intend to create a “pure democracy”—one in which the people rule directly. For one thing the size of the country and the distances between settlements would have made that physically impossible. But more important the Framers worried that a government in which all citizens directly participate, as in the New England town meeting, would be a government excessively subject to temporary popular passions and one in which minority rights would be insecure. They intended instead to create a republic, by which they meant a government in which a system of representation operates. In designing that system the Framers chose, not without argument, to have the members of the House of Representatives elected directly by the people. Some delegates did not want to go even that far. Elbridge Gerry of Massachusetts, who refused to sign the Constitution, argued that though “the people do not want [that is, lack] virtue,” they are often the “dupes of pretended patriots.” Roger Sherman of Connecticut agreed. But George Mason of Virginia and James Wilson of Pennsylvania carried the day when they argued that “no government could long subsist without the confidence of the people,” and this required “drawing the most numerous branch of the legislature directly from the people.” Popular elections for the House were approved: six states were in favor, two opposed.

But though popular rule was to be one element of the new government, it was not to be the only one. State legislatures, not the people, would choose the senators; electors, not the people directly, would choose the president. As we have seen, without these arrangements, there would have been no Constitution at all, for the small states adamantly opposed any proposal that would have given undue power to the large ones. And direct popular election of the president would clearly have made the populous states the dominant ones. In short the Framers wished to observe the principle of majority rule, but they felt that, on the most important questions, two kinds of majorities were essential—a majority of the voters and a majority of the states.

The power of the Supreme Court to declare an act of Congress unconstitutional—judicial review—is also a way of limiting the power of popular majorities. It is not clear whether the Framers intended that there be judicial review, but there is little doubt that in the Framers’ minds the fundamental law, the Constitution, had to be safeguarded against popular passions. They made the process for amending the Constitution easier than it had been under the Articles but still relatively difficult.

An amendment can be proposed either by a two-thirds vote of both houses of Congress or by a national convention called by Congress at the request of two-thirds of the states.* Once proposed, an amendment must be ratified by three-fourths of the states, either through their legislatures or through special ratifying conventions in each state. Twenty-seven amendments have survived this process, all of them proposed by Congress and all but one (the Twenty-first Amendment) ratified by state legislatures rather than state conventions.

In short the answer to the question of whether the Constitution brought into being a democratic government is yes, if by democracy one means a system of representative government based on popular consent. The degree of that consent has changed since 1787, and the institutions embodying that consent can take different forms. One form, rejected in 1787, gives all political authority to one set of representatives, directly elected by the people. (That is the case, for example, in most parliamentary regimes, such as Great Britain, and in some city governments in the United States.) The other form of democracy is one in which different sets of officials, chosen directly or indirectly by different groups of people, share political power. (That is the case with the United States and a few other nations where the separation of powers is intended to operate.)

Key Principles

The American version of representative democracy was based on two major principles, the separation of powers and federalism. In America political power was to be shared by three separate branches of gov-

*There have been many attempts to get a new constitutional convention. In the 1960s thirty-three states, one short of the required number, requested a convention to consider the reapportionment of state legislatures. In the 1980s efforts were made to call a convention to consider amendments to ban abortions and to require a balanced federal budget.
The Constitution and Democracy

Checks and Balances

The Constitution creates a system of separate institutions that share powers. Because the three branches of government share powers, each can (partially) check the powers of the others. This is the system of checks and balances. The major checks possessed by each branch are listed below.

Government and Human Nature

The desirability of separating powers and leaving the states equipped with a broad array of rights and responsibilities was not controversial at the Philadelphia convention because the Framers’ experiences with British rule and state government under the Articles had shaped their view of human nature. These experiences had taught most of the Framers that people would seek their own advantage in and out of politics; this pursuit of self-interest, unchecked, would lead some people to exploit others. Human nature was good enough to make it possible to have a decent government that was based on popular consent, but it was not good enough to make it inevitable. One solution to this problem would be to improve human nature. Ancient political philosophers such as Aristotle believed that the first task of any government was to cultivate virtue among the governed.

Many Americans were of the same mind. To them Americans would first have to become good...
people before they could have a good government. Samuel Adams, a leader of the Boston Tea Party, said that the new nation must become a “Christian Sparta.” Others spoke of the need to cultivate frugality, industry, temperance, and simplicity.

But to James Madison and the other architects of the Constitution, the deliberate cultivation of virtue would require a government too strong and thus too dangerous to liberty, at least at the national level. Self-interest, freely pursued within reasonable limits, was a more practical and durable solution to the problem of government than any effort to improve the virtue of the citizenry. He wanted, he said, to make republican government possible “even in the absence of political virtue.”

Madison argued that the very self-interest that leads people toward factionalism and tyranny might, if properly harnessed by appropriate constitutional arrangements, provide a source of unity and a guarantee of liberty. This harnessing was to be accomplished by dividing the offices of the new government among many people and giving to the holder of each office the “necessary means and personal motives to resist encroachments of the others.” In this way “ambition must be made to counteract ambition” so that “the private interest of every individual may be a sentinel over the public rights.” If men were angels, all this would be unnecessary. But Madison and the other delegates pragmatically insisted on taking human nature pretty much as it was, and therefore they adopted “this policy of supplying, by opposite and rival interests, the defect of better motives.” The separation of powers would work, not in spite of the imperfections of human nature, but because of them.

So also with federalism. By dividing power between the states and the national government, one level of government can serve as a check on the other. This should provide a “double security” to the rights of the people: “The different governments will control each other, at the same time that each will be controlled by itself.” This was especially likely to happen in America, Madison thought, because it was a large country filled with diverse interests—rich and poor, Protestant and Catholic, northerner and southerner, farmer and merchant, creditor and debtor. Each of these interests would constitute a faction that would seek its own advantage. One faction might come to dominate government, or a part of government, in one place, and a different and rival faction might dominate it in another. The pulling and hauling among these factions would prevent any single government—say, that of New York—from dominating all of government. The division of powers among several governments would give to virtually every faction an opportunity to gain some—but not full—power.

The Constitution and Liberty

A more difficult question is whether the Constitution created a system of government that would respect personal liberties. And that in fact is the question that was debated in the states when the document was presented for ratification. The proponents of the Constitution called themselves the Federalists (though they might more accurately have been called “nationalists”). The opponents came to be known as the Antifederalists (though they might more accurately have been called “states’ righters”). To be put into effect, the Constitution had to be approved at ratifying conventions in at least nine states. This was perhaps the most democratic feature of the Constitution: it had to be accepted, not by the existing Congress (still limping along under the Articles of Confederation), nor by the state legislatures, but by special conventions elected by the people.

Though democratic, the process established by the Framers for ratifying the Constitution was technically illegal. The Articles of Confederation, which still governed, could be amended only with the approval of all thirteen state legislatures. The Framers wanted to bypass these legislatures because they feared that, for reasons of ideology or out of a desire to retain their powers, the legislators would oppose the Constitution. The Framers wanted ratification with less than the consent of all thirteen states because they knew that such unanimity could not be attained. And indeed the conventions in North Carolina and Rhode Island did initially reject the Constitution.

*To the delegates a truly “federal” system was one, like the New Jersey Plan, that allowed for very strong states and a weak national government. When the New Jersey Plan lost, the delegates who defeated it began using the word federal to describe their plan even though it called for a stronger national government. Thus men who began as “Federalists” at the convention ultimately became known as “Antifederalists” during the struggle over ratification.
The Antifederalist View

The great issue before the state conventions was liberty, not democracy. The opponents of the new Constitution, the Antifederalists, had a variety of objections but were in general united by the belief that liberty could be secure only in a small republic in which the rulers were physically close to—and closely checked by—their leaders. Their central objection was stated by a group of Antifederalists at the ratifying convention in an essay published just after they had lost: “a very extensive territory cannot be governed on the principles of freedom, otherwise than by a confederation of republics.”

These dissenters argued that a strong national government would be distant from the people and would use its powers to annihilate or absorb the functions that properly belonged to the states. Congress would tax heavily, the Supreme Court would overrule state courts, and the president would come to head a large standing army. (Since all these things have occurred, we cannot dismiss the Antifederalists as cranky obstructionists who opposed without justification the plans of the Framers.) These critics argued that the nation needed, at best, a loose confederation of states, with most of the powers of government kept firmly in the hands of state legislatures and state courts.

But if a stronger national government was to be created, the Antifederalists argued, it should be hedged about with many more restrictions than those in the constitution then under consideration. They proposed several such limitations, including narrowing the jurisdiction of the Supreme Court, checking the president’s power by creating a council that would review his actions, leaving military affairs in the hands of the state militias, increasing the size of the House of Representatives so that it would reflect a greater variety of popular interests, and reducing or eliminating the power of Congress to levy taxes. And some of them insisted that a bill of rights be added to the Constitution.

James Madison gave his answer to these criticisms in Federalist No. 10 and No. 51 (reprinted in the Appendix). It was a bold answer, for it flew squarely in the face of widespread popular sentiment and much philosophical writing. Following the great French political philosopher Montesquieu, many Americans believed that liberty was safe only in small societies governed either by direct democracy or by large legislatures with small districts and frequent turnover among members.

Madison argued quite the opposite—that liberty is safest in large (or as he put it, “extended”) republics. In a small community, he said, there will be relatively few differences in opinion or interest; people will tend to see the world in much the same way. If anyone dissents or pursues an individual interest, he or she will be confronted by a massive majority and will have few, if any, allies. But in a large republic there will be many opinions and interests; as a result it will be hard for a tyrannical majority to form or organize, and anyone with an unpopular view will find it easier to acquire allies. If Madison’s argument seems strange or abstract, ask yourself the following...
In 1787, to help win ratification of the new Constitution in the New York state convention, Alexander Hamilton decided to publish a series of articles defending and explaining the document in the New York City newspapers. He recruited John Jay and James Madison to help him, and the three of them, under the pen name “Publius,” wrote eighty-five articles that appeared from late 1787 through 1788. The identity of the authors was kept secret at the time, but we now know that Hamilton wrote fifty-one of them, Madison twenty-six, and Jay five, and that Hamilton and Madison jointly authored three.

The Federalist papers probably played only a small role in securing ratification. Like most legislative battles, this one was not decisively influenced by philosophical writings. But these essays have had a lasting value as an authoritative and profound explanation of the Constitution. Though written for political purposes, the Federalist has become the single most important piece of American political philosophy ever produced. Ironically Hamilton and Madison were later to become political enemies; even at the Philadelphia convention they had different views of the kind of government that should be created. But in 1787–1788 they were united in the belief that the new constitution was the best that could have been obtained under the circumstances.

Although Hamilton wrote most of the Federalist papers, Madison wrote the two most famous articles—Nos. 10 and 51, reprinted here in the Appendix. After you have finished this chapter, turn to the Appendix and try to read them. On your first reading of the papers you may find Madison’s language difficult to understand and his ideas overly complex. The following pointers will help you decipher his meaning.

In Federalist No. 10 Madison begins by stating that “a well constructed Union” can “break and control the violence of faction.” He goes on to define a “faction” as any group of citizens who attempt to advance their ideas or economic interests at the expense of other citizens, or in ways that conflict with “the permanent and aggregate interests of the community” or “public good.” Thus what Madison terms “factions” are what we today call “special interests.”

One way to defeat factions, according to Madison, is to remove whatever causes them to arise in the first place. This can be attempted in two ways. First, government can deprive people of the liberty they need to organize: “Liberty is to faction what air is to fire.” But that is surely a cure “worse than the disease.” Second, measures can be taken to make all citizens share the same ideas, feelings, and economic interests. However, as Madison observes, some people are smarter or more hard working than others, and this “diversity in the faculties” of citizens is bound to result
in different economic interests as some people acquire more property than others. Consequently, protecting property rights, not equalizing property ownership, “is the first object of government.” Even if everyone shared the same basic economic interests, they would still find reasons “to vex and oppress each other” rather than cooperate “for their common good.” Religious differences, loyalties to different leaders, even “frivolous and fanciful distinctions” (not liking how other people dress or their taste in music) can be fertile soil for factions. In Madison’s view people are factious by nature; the “causes of faction” are “sown” into their very being.

Madison thus proposes a second and, he thinks, more practical and desirable way of defeating faction. The way to cure “the mischiefs of faction” is not by removing its causes but by “controlling its effects.” Factions will always exist, so the trick is to establish a form of government that is likely to serve the public good through the even-handed “regulation of these various and interfering interests.” Wise and public-spirited leaders can “adjust these clashing interests and render them all subservient to the public good,” but, he cautions, “enlightened statesmen will not always be at the helm.” (Madison implies that “enlightened statesmen”—such as himself, Washington, and Jefferson—were at the “helm” of government in 1787.)

Madison’s proposed cure for the evils of factions is in fact nothing other than a republican form of government. Use the following questions to guide your own analysis of Madison’s ideas. Why does Madison think the problem of a “minority” faction is easy to handle? Conversely, why is he so troubled by the potential of a majority faction? How does he distinguish direct democracy from republican government? What is he getting at when he terms elected representatives “proper guardians of the public weal,” and why does he think that “extensive republics” are more likely to produce such representatives than small ones?

When you are finished with Federalist No. 10, try your hand at Federalist No. 51. You will find that the ideas in the former paper anticipate many of those in the latter. And you will find many points on which you may or may not agree with Madison. For example, do you agree with his assumption that people—even your best friends or college roommates—are factious by nature? Likewise, do you agree with his view that government is “the greatest of all reflections on human nature”?

By attempting to meet the mind of James Madison, you can sharpen your own mind and deepen your understanding of American government.
question: if I have an unpopular opinion, an exotic lifestyle, or an unconventional interest, will I find greater security living in a small town or a big city?

By favoring a large republic Madison was not trying to stifle democracy. Rather he was attempting to show how democratic government really works, and what can make it work better. To rule, different interests must come together and form a coalition—that is, an alliance. In Federalist No. 51 he argued that the coalitions that formed in a large republic would be more moderate than those that formed in a small one because the bigger the republic, the greater the variety of interests, and thus the more a coalition of the majority would have to accommodate a diversity of interests and opinions if it hoped to succeed. He concluded that in a nation the size of the United States, with its enormous variety of interests, “a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good.” Whether he was right in that prediction is a matter to which we shall return repeatedly.

The implication of Madison’s arguments was daring, for he was suggesting that the national government should be at some distance from the people and insulated from their momentary passions, because the people did not always want to do the right thing. Liberty was threatened as much (or even more) by public passions and popularly based factions as by strong governments. Now the Antifederalists themselves had no very lofty view of human nature, as is evidenced by the deep suspicion with which they viewed “power-seeking” officeholders. What Madison did was take this view to its logical conclusion, arguing that if people could be corrupted by office, they could also be corrupted by factional self-interest. Thus the government had to be designed to prevent both the politicians and the people from using it for ill-considered or unjust purposes.

To argue in 1787 against the virtues of small democracies was like arguing against motherhood, but the argument prevailed, probably because many citizens were convinced that a reasonably strong national government was essential if the nation were to stand united against foreign enemies, facilitate commerce among the states, guard against domestic insurrections, and keep one faction from oppressing another. The political realities of the moment and the recent bitter experiences with the Articles probably counted for more in ratifying the Constitution than did Madison’s arguments. His cause was helped by the fact that, for all their legitimate concerns and their uncanny instinct for what the future might bring, the Antifederalists could offer no agreed-upon alternative to the new Constitution. In politics, then as now, you cannot beat something with nothing.

But this does not explain why the Framers failed to add a bill of rights to the Constitution. If they were so preoccupied with liberty, why didn’t they take this most obvious step toward protecting liberty, especially since the Antifederalists were demanding it? Some historians have suggested that this omission was evidence that liberty was not as important to the Framers as they claimed. In fact when one delegate suggested that a bill of rights be drawn up, the state delegations at the convention unanimously voted the idea down. There were several reasons for this.

First, the Constitution, as written, did contain a number of specific guarantees of individual liberty, including the right of trial by jury in criminal cases and the privilege of the writ of habeas corpus. The liberties guaranteed in the Constitution (before the Bill of Rights was added) are listed below:

- **Writ of habeas corpus** may not be suspended (except during invasion or rebellion).
- **No bill of attainder** may be passed by Congress or the states.
- **No ex post facto law** may be passed by Congress or the states.
- Right of trial by jury in criminal cases is guaranteed.
- The citizens of each state are entitled to the privileges and immunities of the citizens of every other state.
- No religious test or qualification for holding federal office is imposed.
- No law impairing the obligation of contracts may be passed by the states.

Second, most states in 1787 had bills of rights. When Elbridge Gerry proposed to the convention that a federal bill of rights be drafted, Roger Sherman rose to observe that it was unnecessary because the state bills of rights were sufficient.15

But third, and perhaps most important, the Framers thought they were creating a government

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*For a definition of this and the following terms used in connection with certain rights, see the Glossary.
The Constitution and Liberty

The Bill of Rights

The First Ten Amendments to the Constitution
Grouped by Topic and Purpose

Protections Afforded Citizens to Participate in the Political Process

Amendment 1: Freedom of religion, speech, press, and assembly; the right to petition the government.

Protections Against Arbitrary Police and Court Action

Amendment 4: No unreasonable searches or seizures.
Amendment 5: Grand jury indictment required to prosecute a person for a serious crime.
No “double jeopardy” (being tried twice for the same offense).
Forcing a person to testify against himself or herself prohibited.
No loss of life, liberty, or property without due process.
Amendment 6: Right to speedy, public, impartial trial with defense counsel and right to cross-examine witnesses.

Protections of States’ Rights and Unnamed Rights of People

Amendment 7: Jury trials in civil suits where value exceeds $20.
Amendment 8: No excessive bail or fines, no cruel and unusual punishments.

Other Amendments

Amendment 2: Right to bear arms.
Amendment 3: Troops may not be quartered in homes in peacetime.

Amendment 9: Unlisted rights are not necessarily denied.
Amendment 10: Powers not delegated to the United States or denied to states are reserved to the states.

Despite the bitterness of the ratification struggle, the new government that took office in 1789-1790, headed by President Washington, was greeted with specific, limited powers. It could do, they thought, only what the Constitution gave it the power to do, and nowhere in that document was there permission to infringe on freedom of speech or of the press or to impose cruel and unusual punishments. Some delegates probably feared that if any serious effort were made to list the rights that were guaranteed, later officials might assume that they had the power to do anything not explicitly forbidden.

Need for a Bill of Rights

Whatever their reasons, the Framers made at least a tactical and perhaps a fundamental mistake. It quickly became clear that without at least the promise of a bill of rights, the Constitution would not be ratified. Though the small states, pleased by their equal representation in the Senate, quickly ratified (in Delaware, New Jersey, and Georgia, the vote in the conventions was unanimous), the battle in the large states was intense and the outcome uncertain. In Pennsylvania Federalist supporters dragged boycotters to the legislature in order to ensure that a quorum was present so that a convention could be called. There were rumors of other rough tactics.

In Massachusetts the Constitution was approved by a narrow majority, but only after key leaders promised to obtain a bill of rights. In Virginia James Madison fought against the fiery Patrick Henry, whose climactic speech against ratification was dramatically punctuated by a noisy thunderstorm outside. The Federalists won by ten votes. In New York Alexander Hamilton argued the case for six weeks against the determined opposition of most of the state’s key political leaders; he carried the day, but only by three votes, and then only after New York City threatened to secede from the state if it did not ratify. By June 21, 1788, the ninth state—New Hampshire—had ratified, and the Constitution was law.

Despite the bitterness of the ratification struggle, the new government that took office in 1789-1790, headed by President Washington, was greeted...
enthusiastically. By the spring of 1790 all thirteen states had ratified. There remained, however, the task of fulfilling the promise of a bill of rights. To that end James Madison introduced into the first session of the First Congress a set of proposals, many based on the existing Virginia bill of rights. Twelve were approved by Congress; ten of these were ratified by the states and went into effect in 1791. These amendments did not limit the power of state governments over citizens, only the power of the federal government. Later the Fourteenth Amendment, as interpreted by the Supreme Court, extended many of the guarantees of the Bill of Rights to cover state governmental action.

The Constitution and Slavery
Though black slaves amounted to one-third of the population of the five southern states, nowhere in the Constitution can one find the word slave or slavery. There are three provisions bearing on the matter, all designed to placate the slaveowning states. The apportionment of seats in the House of Representatives was to be made by counting all free persons and three-fifths of all “other persons.” This meant giving a few extra seats in the House to those states that had a lot of “other persons”—that is, slaves. Congress was forbidden to prohibit the “importation” of “persons” (that is, slaves) before the year 1808. And if any “person held to service or labour” (that is, any slave) were to escape from a slaveowning state and get to a free state, that person would not become free but would have to be returned to his or her master.

To some the failure of the Constitution to address the question of slavery was a great betrayal of the promise of the Declaration of Independence that “all men are created equal.” For the Constitution to be silent on the subject of slavery, and thereby to allow that odious practice to continue, was to convert, by implication, the wording of the Declaration to “all white men are created equal.”

It is easy to accuse the signers of the Declaration and the Constitution of hypocrisy. They knew of slavery, many of them owned slaves, and yet they were silent. Indeed, British opponents of the independence movement took special delight in taunting the colonists about their complaints of being “enslaved” to the British Empire while ignoring the slavery in their very midst. Increasingly, revolutionary leaders during this period spoke to this issue. Thomas Jefferson had tried to get a clause opposing the slave trade put into the Declaration of Independence. James Otis of Boston had attacked slavery and argued that black as well as white men should be free. As revolutionary fervor mounted, so did northern criticism of slavery. The Massachusetts legislature and then the Continental Congress voted to end the slave trade; Delaware prohibited the importation of slaves; Pennsylvania voted to tax it out of existence; and Connecticut and Rhode Island decided that all slaves brought into those states would automatically become free.

Slavery continued unabated in the South, defended by some whites because they thought it right, by others because they found it useful. But even in the South there were opponents, though rarely conspicuous ones. George Mason, a large Virginia slaveholder and a delegate to the convention, warned prophetically that “by an inevitable chain of causes and effects, providence punishes national sins [slavery] by national calamities.”

The blunt fact, however, was that any effort to use the Constitution to end slavery would have meant the end of the Constitution. The southern states would never have signed a document that seriously interfered with slavery. Without the southern states there would have been a continuation of the Articles of Confederation, which would have left each state entirely sovereign and thus entirely free of any prospective challenge to slavery.
Thus the Framers compromised with slavery; political scientist Theodore Lowi calls this their Greatest Compromise.\(^{18}\) Slavery is dealt with in three places in the Constitution, though never by name. In determining the representation each state was to have in the House, “three-fifths of all other persons” (that is, of slaves) are to be added to “the whole number of free persons.”\(^{19}\) The South originally wanted slaves to count fully even though, of course, none would be elected to the House; they settled for counting 60 percent of them. The convention also agreed not to allow the new government by law or even constitutional amendment to prohibit the importation of slaves until the year 1808.\(^{20}\) The South thus had twenty years in which it could acquire more slaves from abroad; after that Congress was free (but not required) to end the importation. Finally, the Constitution guaranteed that if a slave were to escape his or her master and flee to a nonslave state, the slave would be returned by that state to “the party to whom . . . service or labour may be due.”\(^{21}\)

The unresolved issue of slavery was to prove the most explosive question of all. Allowing slavery to continue was a fateful decision, one that led to the worst social and political catastrophe in the nation’s history—the Civil War. The Framers chose to sidestep the issue in order to create a union that, they hoped, would eventually be strong enough to deal with the problem when it could no longer be postponed. The legacy of that choice continues to this day.

**The Motives of the Framers**

The Framers were not saints or demigods. They were men with political opinions who also had economic interests and human failings. It would be a mistake to conclude that everything they did in 1787 was motivated by a disinterested commitment to the public good. But it would be an equally great mistake to think that what they did was nothing but an effort to line their pockets by producing a government that would serve their own narrow interests. As in almost all human endeavors, the Framers acted out of a mixture of motives. What is truly astonishing is that economic interests played only a modest role in their deliberations.

**Economic Interests at the Convention**

Some of the Framers were wealthy; some were not. Some owned slaves; some had none. Some were creditors (having loaned money to the Continental Congress or to private parties); some were deeply in debt. For nearly a century scholars have argued over just how important these personal interests were in shaping the provisions of the Constitution.

In 1913 Charles Beard, a historian, published a book—An Economic Interpretation of the Constitution—arguing that the better-off urban and commercial classes, especially those members who held the IOUs issued by the government to pay for the
Revolutionary War, favored the new Constitution because they stood to benefit from it. But in the 1950s that view was challenged by historians who, after looking carefully at what the Framers owned or owed, concluded that one could not explain the Constitution exclusively or even largely in terms of the economic interests of those who wrote it. Some of the richest delegates, such as Elbridge Gerry of Massachusetts and George Mason of Virginia, refused to sign the document, while many of its key backers—James Madison and James Wilson, for example—were men of modest means or heavy debts.

In the 1980s a new group of scholars, primarily economists applying more advanced statistical techniques, found evidence that some economic considerations influenced how the Framers voted on some issues during the Philadelphia convention. Interestingly, however, the economic position of the states from which they came had a greater effect on their votes than did their own monetary condition.

We have already seen how delegates from small states fought to reduce the power of large states and how those from slaveowning states made certain that the Constitution would contain no provision that would threaten slavery. But contrary to what Beard asserted, the individual interests of the Framers themselves did not dominate the convention except in a few cases where a constitutional provision would have affected them directly. As you might expect, all slaveowning delegates, even those who did not live in states where slavery was commonplace (and several northern delegates owned slaves), tended to vote for provisions that would have kept the national government’s power over slavery as weak as possible. However, the effects of other personal business interests were surprisingly weak. Some delegates owned a lot of public debt that they had purchased for low prices. A strong national government of the sort envisaged by the Constitution was more likely than the weak Continental Congress to pay off this debt at face value, thus making the delegates who owned it much richer. Despite this, the ownership of public debt had no significant effect on how the Framers voted in Philadelphia. For example, five men who among them owned one-third of all the public securities
The Motives of the Framers

It is too weak. In particular the national government is too weak to resist the pressures of special interests that reflect and perpetuate social inequality.

This criticism reveals how our understanding of the relationship between liberty and equality has changed since the Founding. To Jefferson and Madison citizens naturally differed in their talents and qualities. What had to be guarded against was the use of governmental power to create unnatural and undesirable inequalities. This might happen, for example, if political power was concentrated in the hands of a few people (who could use that power to give themselves special privileges) or if it was used in ways that allowed some private parties to acquire exclusive charters and monopolies. To prevent the inequality that might result from having too strong a government, its powers must be kept strictly limited.

Today some people think of inequality quite differently. To them it is the natural social order—the marketplace and the acquisitive talents of people operating in that marketplace—that leads to undesirable inequalities, especially in economic power. The government should be powerful enough to restrain these natural tendencies and produce, by law, a greater degree of equality than society allows when left alone.

To the Framers liberty and (political) equality were not in conflict; to some people today these two principles are deeply in conflict. To the Framers the task was to keep government so limited as to prevent it from creating the worst inequality—political privilege. To some modern observers the task is to make government strong enough to reduce what they believe is the worst inequality—differences in wealth.

Constitutional Reform: Modern Views

Almost from the day it was ratified, the Constitution has been the object of debate over ways in which it might be improved. These debates have rarely involved the average citizen, who tends to revere the document even if he or she cannot recall all its details. Because of this deep and broad popular support, scholars and politicians have been wary of attacking the Constitution or suggesting many wholesale changes. But such attacks have occurred. During the 1980s—the decade...
Were Women Left Out of the Constitution?

In one sense, yes: Women were nowhere mentioned in the Constitution when it was written in 1787. Moreover, Article I, which set forth the provisions for electing members of the House of Representatives, granted the vote to those people who were allowed to vote for members of the lower house of the legislature in the states in which they resided. In no state at the time could women participate in those elections. In no state could they vote in any elections or hold any offices. Furthermore, wherever the Constitution uses a pronoun, it uses the masculine form—he or him.

In another sense, no: Wherever the Constitution or the Bill of Rights defines a right that people are to have, it either grants that right to “persons” or “citizens,” not to “men,” or it makes no mention at all of people or gender. For example:

- “The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.” [Art. I, sec. 9]
- “No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.” [Art. III, sec. 3]
- “No bill of attainder or ex post facto law shall be passed.” [Art. I, sec. 9]
- “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” [Amend. IV]
- “No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law.” [Amend. V]
- “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” [Amend. VI]

Moreover, when the qualifications for elective office are stated, the word person, not man, is used.

- “No person shall be a Representative who shall not have attained to the age of twenty-five years.” [Art. I, sec. 2]
- “No person shall be a Senator who shall not have attained to the age of thirty years.” [Art. I, sec. 3]
- “No person except a natural born citizen . . . shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years.” [Art. II, sec. 1]

In places the Constitution and the Bill of Rights used the pronoun he, but always in the context of referring back to a person or citizen. At the time, and until quite recently, the male pronoun was often used in legal documents to refer generically to both men and women.

Thus, though the Constitution did not give women the right to vote until the Nineteenth Amendment was ratified in 1920, it did use language that extended fundamental rights, and access to office, to women and men equally.

Of course what the Constitution permitted did not necessarily occur. State and local laws denied to women rights that in principle they ought to have enjoyed. Except for a brief period in New Jersey, no women voted in statewide elections until, in 1869, they were given the right to cast ballots in territorial elections in Wyoming.

When women were first elected to Congress, there was no need to change the Constitution; nothing in it restricted officeholding to men.

When women were given the right to vote by constitutional amendment, it was not necessary to amend any existing language in the Constitution, because nothing in the Constitution itself denied women the right to vote; the amendment simply added a new right:

- “The right of citizens of the United States to vote shall not be denied or abridged by the United States or any state on account of sex.” [Amend. XIX]

Constitutional Reform: Modern Views

in which we celebrated the bicentennial of its adoption— we heard a variety of suggestions for improving the Constitution, ranging from particular amendments to wholesale revisions. In general there are today, as in the eighteenth century, two kinds of critics: those who think the federal government is too weak and those who think it is too strong.

Reducing the Separation of Powers

To the first kind of critic the chief difficulty with the Constitution is the separation of powers. By making every decision the uncertain outcome of the pulling and hauling between the president and Congress, the Constitution precludes the emergence— except perhaps in times of crisis— of the kind of effective national leadership the country needs. In this view our nation today faces a number of challenges that require prompt, decisive, and comprehensive action. Our problem is gridlock. Our position of international leadership, the dangerous and unprecedented proliferation of nuclear weapons among the nations of the globe, and the need to find ways of stimulating economic growth while reducing our deficit and conserving our environment—all these situations require that the president be able to formulate and carry out policies free of some of the pressures and delays from interest groups and members of Congress tied to local interests.

Not only would this increase in presidential authority make for better policies, these critics argue, it would also help the voters hold the president and his party accountable for their actions. As matters now stand, nobody in government can be held responsible for policies: everybody takes the credit for successes and nobody takes the blame for failures. Typically the president, who tends to be the major source of new programs, cannot get his policies adopted by Congress without long delays and much bargaining, the result of which often is some watered-down compromise that neither the president nor Congress really likes but that each must settle for if anything is to be done at all.

Finally, critics of the separation of powers complain that the government agencies responsible for implementing a program are exposed to undue interference from legislators and special interests. In this view the president is supposed to be in charge of the bureaucracy but in fact must share this authority with countless members of Congress and congressional committees.

**Ways of Amending the Constitution**

Under Article V there are two ways to propose amendments to the Constitution and two ways to ratify them.

**To Propose an Amendment**

1. Two-thirds of both houses of Congress vote to propose an amendment, or
2. Two-thirds of the state legislatures ask Congress to call a national convention to propose amendments.

**To Ratify an Amendment**

1. Three-fourths of the state legislatures approve it, or
2. Ratifying conventions in three-fourths of the states approve it.

**Some Key Facts**

- Only the first method of proposing an amendment has been used.
- The second method of ratification has been used only once, to ratify the Twenty-first Amendment (repealing Prohibition).
- Congress may limit the time within which a proposed amendment must be ratified. The usual limitation has been seven years.
- Thousands of proposals have been made, but only thirty-three have obtained the necessary two-thirds vote in Congress.
- Twenty-seven amendments have been ratified.
- The first ten amendments, ratified on December 15, 1791, are known as the Bill of Rights.
Not all critics of the separation of powers agree with all these points, nor do they all agree on what should be done about the problems. But they all have in common a fear that the separation of powers makes the president too weak and insufficiently accountable. Their proposals for reducing the separation of powers include the following:

- Allow the president to appoint members of Congress to serve in the cabinet (the Constitution forbids members of Congress from holding any federal appointive office while in Congress).
- Allow the president to dissolve Congress and call for a special election (elections now can be held only on the schedule determined by the calendar).
- Allow Congress to require a president who has lost its confidence to face the country in a special election before his term would normally end.
- Require the presidential and congressional candidates to run as a team in each congressional district; thus a presidential candidate who carries a given district could be sure that the congressional candidate of his party would also win in that district.
- Have the president serve a single six-year term instead of being eligible for up to two four-year terms; this would presumably free the president to lead without having to worry about reelection.
- Lengthen the terms of members of the House of Representatives from two to four years so that the entire House would stand for reelection at the same time as the president.27

Some of these proposals are offered by critics out of a desire to make the American system of government work more like the British parliamentary system, in which, as we shall see in Chapters 11 and 12, the prime minister is the undisputed leader of the majority in the British Parliament. The parliamentary system is the major alternative in the world today to the American separation-of-powers system.

Both the diagnosis and the remedies proposed by these critics of the separation of powers have been challenged. Many defenders of our present constitutional system believe that nations, such as Great Britain, with a different, more unified political system have done no better than the United States in dealing with the problems of economic growth, national security, and environmental protection. Moreover, they argue, close congressional scrutiny of presidential proposals has improved these policies more often than it has weakened them. Finally, congressional “interference” in the work of government agencies is a good way of ensuring that the average citizen can fight back against the bureaucracy; without that so-called interference, citizens and interest groups might be helpless before big and powerful agencies.

Each of the specific proposals, defenders of the present constitutional system argue, would either make matters worse or have, at best, uncertain effects. Adding a few members of Congress to the president’s cabinet would not provide much help in getting his program through Congress; there are 535 senators and representatives, and probably only about half a dozen would be in the cabinet. Giving either the president or Congress the power to call a special election in between the regular elections (every two or four years) would cause needless confusion and great expense; the country would live under the threat of being in a perpetual political campaign with even weaker political parties. Linking the fate of the president and congressional candidates by having them run as a team in each district would reduce the stabilizing and moderating effect of having them elected separately. A Republican presidential candidate who wins in the new system would have a Republican majority in the House; a Democratic candidate winner would have a Democratic majority. We might as a result expect dramatic changes in policy as the political pendulum swung back and forth. Giving presidents a single six-year term would indeed free them from the need to worry about reelection, but it is precisely that worry that keeps presidents reasonably concerned about what the American people want.

Making the System Less Democratic

The second kind of critic of the Constitution thinks the government does too much, not too little. Though the separation of powers at one time may have slowed the growth of government and moderated the policies it adopted, in the last few decades government has grown helter-skelter. The problem, these critics argue, is not that democracy is a bad idea but that democracy can produce bad, or at least unintended, results if the government caters to the special-interest claims of the citizens rather than to their long-term values.

To see how these unintended results might occur, imagine a situation in which every citizen thinks the
government grows too big, taxes too heavily, and spends too much. Each citizen wants the government made smaller by reducing the benefits other people get—but not by reducing the benefits he or she gets. In fact such citizens may even be willing to see their own benefits cut, provided everybody else’s are cut as well, and by a like amount.

But the political system attends to individual wants, not general preferences. It gives aid to farmers, contracts to industry, grants to professors, pensions to the elderly, and loans to students. As someone once said, the government is like an adding machine: during elections candidates campaign by promising to do more for whatever group is dissatisfied with what the incumbents are doing for it. As a result most elections bring to office men and women who are committed to doing more for somebody. The grand total of all these additions is more for everybody. Few politicians have an incentive to do less for anybody.

To remedy this state of affairs, these critics suggest various mechanisms, but principally a constitutional amendment that would either set a limit on the amount of money the government could collect in taxes each year or require that each year the government have a balanced budget (that is, not spend more than it takes in in taxes), or both. In some versions of these plans an extraordinary majority (say, 60 percent) of Congress could override these limits, and the limits would not apply in wartime.

The effect of such amendments, the proponents claim, would be to force Congress and the president to look at the big picture—the grand total of what they are spending—rather than just to operate the adding machine by pushing the “add” button over and over again. If they could spend only so much during a given year, they would have to allocate what they spend among all rival claimants. For example, if more money were to be spent on the poor, less could then be spent on the military, or vice versa.

Some critics of an overly powerful federal government think these amendments will not be passed or may prove unworkable; instead they favor enhancing the president’s power to block spending by giving him a line-item veto. Most state governors can veto a particular part of a bill and approve the rest using a line-item veto. The theory is that such a veto would better equip the president to stop unwarranted spending without vetoing the other provisions of a bill. In 1996 President Clinton signed the Line Item Veto Act, passed by the 104th Congress. But despite its name, the new law did not give the president full line-item veto power (only a change in the Constitution could confer that power). Instead the law gave the president authority to selectively eliminate individual items in large appropriations bills, expansions in certain income-transfer programs, and tax breaks (giving the president what budget experts call enhanced rescission authority). But it also left Congress free to craft bills in ways that would give the president few opportunities to veto (or rescind) favored items. For example, Congress could still force the president to accept or reject an entire appropriations bill simply by tagging on this sentence: “Appropriations provided under this act (or title or section) shall not be subject to the provisions of the Line Item Veto Act.” In Clinton et al. v. New York et al. (1998), the Supreme Court struck down the 1996 law, holding 6 to 3 that the Constitution does not allow the president to cancel specific items in tax and spending legislation.

Finally, some of these critics of a powerful government feel that the real problem arises not from an excess of “adding-machine” democracy but from the growth in the power of the federal courts, as described in Chapter 14. What these critics would like to do is devise a set of laws or constitutional amendments that would narrow the authority of federal courts.

The opponents of these suggestions argue that constitutional amendments to restrict the level of taxes or to require a balanced budget are unworkable, even assuming—which they do not—that a smaller government is desirable. There is no precise, agreed-upon way to measure how much the government spends or to predict in advance how much it will receive in taxes during the year; thus defining and enforcing a “balanced budget” is no easy matter. Since the government can always borrow money, it might easily evade any spending limits. It has also shown great ingenuity in spending money in ways that never appear as part of the regular budget.

The line-item veto may or may not be a good idea. Unless the Constitution is amended to permit it, future presidents will have to do without it. The states, where some governors have long had the
MEMORANDUM
To: Senator Marty Lieb
From: Joseph Miceli, general counsel
Subject: Line-Item Veto Amendment

In 1996 you voted in favor of the Line Item Veto Act, which authorized the president to selectively eliminate items in certain appropriations bills subject to such exemptions as Congress might make. Despite its narrow application, the Supreme Court has declared the law unconstitutional. The amendment being debated next week would confer full line-item veto power on the president.

Arguments for:
1. Forty-three state constitutions, most of them explicitly modeled on the U.S. Constitution, confer line-item veto power on governors.
2. The line-item veto has equipped many governors to stop unwarranted spending without stopping the sensible provisions of a bill.
3. Most people favor giving the president this authority and holding him accountable.

Arguments against:
1. The national government is different. The Founding Fathers considered many veto alternatives and limited the president’s “qualified negative” power to rejecting a bill in its entirety, subject to an override by a two-thirds vote of Congress.
2. There is no clear evidence that the line-item veto restrains state spending or that the aforementioned 1996 law restrained federal spending.
3. Popular support for the line-item veto dwindles when people are reminded about our system’s separation of powers and checks and balances.

Your decision:
Favor amendment ________
Oppose amendment ________
veto, are quite different from the federal government in power and responsibilities. Whether a line-item veto would work as well in Washington, D.C., as it does in many state capitals is something that we may simply never know.

Finally, proposals to curtail judicial power are thinly veiled attacks, the opponents argue, on the ability of the courts to protect essential citizen rights. If Congress and the people do not like the way the Supreme Court has interpreted the Constitution, they can always amend the Constitution to change a specific ruling; there is no need to adopt some across-the-board limitation on court powers.

Who Is Right?

Some of the arguments of these two sets of critics of the Constitution may strike you as plausible or even entirely convincing. Whatever you may ultimately decide, decide nothing for now. One cannot make or remake a constitution based entirely on abstract reasoning or unproven factual arguments. Even when the Constitution was first written in 1787, it was not an exercise in abstract philosophy but rather an effort to solve pressing, practical problems in the light of a theory of human nature, the lessons of past experience, and a close consideration of how governments in other countries and at other times had worked.

Just because the Constitution is over two hundred years old does not mean that it is out-of-date. The crucial questions are these: How well has it worked over the long sweep of American history? How well has it worked compared to the constitutions of other democratic nations?

The only way to answer those questions is to study American government closely—with special attention to its historical evolution and to the practices of other nations. That is what this book is about. Of course, even after close study, people will still disagree about whether our system should be changed. People want different things and evaluate human experience according to different beliefs. But if we first understand how, in fact, the government works and why it has produced the policies it has, we can then argue more intelligently about how best to achieve our wants and give expression to our beliefs.

The Framers of the Constitution sought to create a government capable of protecting both liberty and order. The solution they chose—one without precedent at that time—was a government that was based on a written constitution that combined the principles of popular consent, the separation of powers, and federalism.

Popular consent was embodied in the procedure for choosing the House of Representatives but limited by the indirect election of senators and the electoral college system for selecting the president. Political authority was to be shared by three branches of government in a manner deliberately intended to produce conflict among these branches. This conflict, motivated by the self-interest of the people occupying each branch, would, it was hoped, prevent tyranny, even by a popular majority.

Federalism came to mean a system in which both the national and state governments had independent authority. Allocating powers between the two levels of government and devising means to ensure that neither large nor small states would dominate the national government required the most delicate compromises at the Philadelphia convention. The decision to do nothing about slavery was another such compromise.

In the drafting of the Constitution and the struggle over its ratification in the states, the positions people took were chiefly determined not by their economic interests but by a variety of factors. Among these were profound differences of opinion over whether the state governments or the national government would be the best protector of personal liberty.
Reconsidering the Enduring Questions

1. What view of human nature is embodied in the Constitution?

The Constitution reflects a mixed view: people are self-interested, but they also have enough virtue to make representative democracy possible. Such key constitutional concepts as the separation of powers and federalism are predicated on the belief that humans are capable of virtue but prone to vice. As James Madison argues in Federalist No. 10, because people tend to “vex and oppress” one another, freedom begets factions. Because “enlightened statesmen will not always be at the helm,” the Constitution structures government so that the “public good” may be achieved even when those in public office are neither especially wise nor especially good. As Madison himself summarized the answer in Federalist No. 51, “As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature, which justify a certain portion of esteem and confidence.”

2. Is representative democracy possible without political compromise?

On most issues, the answer is no. When the nation faces a crisis, or nobody notices the proposed policy, there may not be any need for compromise. But the American republic was born through political compromise, and contemporary government would grind to a halt without it. Delegates to the Constitutional Convention fought for weeks over the Virginia Plan and the New Jersey Plan, but settled for the Great (or Connecticut) Compromise, which permitted the small states to predominate in the Senate and the large states to predominate in the House. James Madison entered the convention demanding a strong national government that could veto state laws, but he left it defending a constitution that would protect states’ rights and create a federal republic. Many Federalists opposed having a bill of rights, but they promised to add one to the Constitution in order to win enough votes in enough states to get the Constitution ratified. Of course, what is necessary politically is not thereby defensible morally. Witness the most consequential political compromise in American history, namely, the so-called three-fifths compromise over slavery, which led to the worst social and political catastrophe in the nation’s history—the Civil War. Today, many Americans say they favor politicians who are slow to compromise their principles, yet they are frustrated by how politicians always seem to be fighting with each other rather than getting things done. We cannot have it both ways: in a representative democracy, politicians fight more when they compromise less.

3. Has the system of separate institutions sharing powers protected liberty and promoted equality as the Framers envisioned it would?

Up to a point, yes, but at least several caveats are in order. The Founders did not mean by “equality” what many Americans today mean by it. To the Framers the task was to keep government so limited as to prevent it from creating what they viewed as the worst inequality, namely, political privilege, not differences in wealth. Those who contend that the system has not, in fact, delivered on the Framers’ promises do not all share the same diagnosis of what went wrong. For example, some argue that the failure resides in the fact that the national government has grown too strong, while others agree that the system has failed but insist that it has done so because the national government has become (or has always been) too weak. Likewise, some critics say liberty and equality have suffered because the system is now too democratic, while others maintain that the system is not now, and never has been, democratic enough. Contemporary constitutional reform proposals have been made to remedy each of these real or perceived defects, but so far none have been enacted. The best way to answer this question is one constitutional feature at a time. For example, the Federalists claimed that the division of powers between the national government and the states would leave most citizens free to grasp economic opportunity, protect the political rights of local minorities, and frustrate the formation of tyrannical national majorities. Has federalism fulfilled this promise? The next chapter should help you decide.
World Wide Web Resources

To find historical and legal documents:
- Emory University Law School: www.law.emory.edu/FEDERAL/conpict.html
- National Constitution Center: www.constitutioncenter.org
- Congress: www.thomas.loc.gov/ (choose Historical Documents)

To look at court cases about the Constitution:
- Yale University Law School: www.yale.edu/lawweb/avalon/avalon.htm
  Washington Times: www.washtimes.com

Key Terms

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Suggested Readings


Farrand, Max. The Framing of the Constitution of the United States. New Haven, Conn.: Yale University Press, 1913. A good, brief account of the Philadelphia convention by the editor of Madison’s notes on the convention.


