CHAPTER 3

A Tour of the Constitution

This chapter explores how the US Constitution was written and how it is structured. The Constitution's full text is reproduced in Appendix A, along with annotations showing the effects of later amendments.

A. Political Background

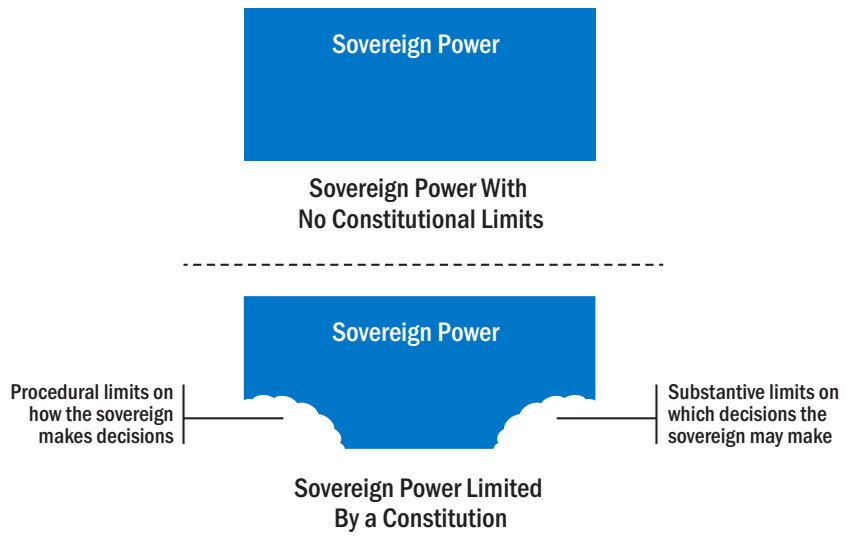
1. States and Sovereignty

To understand the Constitution of the United States of America, one must first understand the concept of a state, which in turn rests upon the concept of sovereignty. As Sir William Blackstone explained it in 1765, under all forms of government "there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the rights of sovereignty reside." A sovereign government may make laws of any sort on any subject, using any method of law-making it chooses. Because the sovereign answers to no one, it cannot be sued or subjected to court orders without its consent—a concept known as *sovereign immunity*.

Who is in charge of the extraordinary power that comes with sovereignty? Blackstone believed that sovereign authority ought to be placed where "the qualities requisite for supremacy, wisdom, goodness, and power are the most likely to be found." In theory, a government could vest its sovereignty in a single person, an absolute monarch. In practice, Britain had a lengthy tradition of divided sovereignty, going back at least as far as the Magna Carta (great charter) of 1215, in which King John—politically weak and desperate for funds—agreed to share his powers in exchange for political and financial support from the aristocracy. By the Framers' time, it was well accepted that Britain's sovereignty was divided

between King and Parliament, with Parliament having the greater share. In addition to being shared, British sovereignty was limited in scope. The unwritten British constitution imposed both procedural and substantive limits on how King and Parliament could exercise their shared sovereign power.

Constitutions As Limits on Sovereignty



By the 1770s, the people of Britain's North American colonies became dissatisfied with British rule and their lack of representation in Parliament. Many colonists began to believe that sovereignty, properly understood, was not held by a King and an aristocratic Parliament, but by the people themselves. By the time of the Declaration of Independence in 1776, its authors could claim that this theory (known as *popular sovereignty*) was a "self-evident" truth: "Governments are instituted among men, deriving their just powers from the consent of the governed." Because the British government had exercised its sovereignty in a manner unacceptable to the people of the colonies, "it is the right of the people to alter or to abolish it, and to institute new government."

Upon independence, the colonists had to decide which government should be entrusted with the people's sovereignty. A few voices argued that sovereignty should be vested in a single national government representing all of the people of the former colonies. However, the consensus in the 1770s was that the colonies formed separate political communities who delegated their popular sovereignty to separate governments. These new sovereign governments were known as "states"—a word that roughly corresponded to what we would today call "nations." They were separate countries with only voluntary obligations to each other.

As the war for independence was fought from 1776 through 1783, the new states began drafting written constitutions for themselves that incorporated the

best-liked features of the unwritten British constitution, such as division of the legislature into upper and lower houses, an independent judiciary, and statements of individual rights. Some of the more influential models included the constitutions of Massachusetts (drafted by John Adams) and Virginia (with a widely admired Bill of Rights drafted by George Mason). Whatever their differences, these early state constitutions all presumed that the state was a sovereign entity—which meant that the state government could enact any laws it wished, subject only to limitations found in the state constitution.

2. Confederation

Some leaders of the independence movement had believed as early as the 1750s that independence would only be achievable through joint action by the colonies. Nonetheless, a sense of unity among the colonies developed slowly over the following decades. **Continental Congresses** convened in the 1770s to debate grievances against Britain and, where possible, to agree to collective action. But there was little sense that these Congresses were in charge of an independent government. As historian Gordon Wood explained, under the prevailing understanding "a state with more than one independent sovereign power within its boundaries was a violation of the unity of nature; it would be like a monster with more than one head, continually at war with itself, an absurd chaotic condition that could result only in the dissolution of the state."

■ TERMINOLOGY

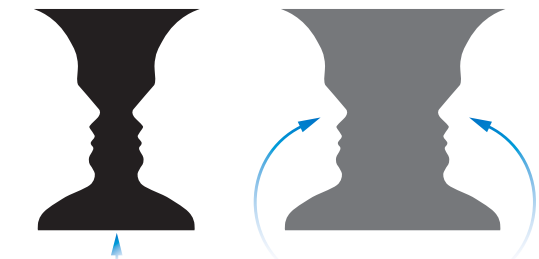
CONTINENTAL CONGRESSES: For the Revolutionary generation, a "Congress" was a convention of delegates from independent governments. Today it might be called a summit meeting. The temporary nature of the Continental Congress can be seen in the closing paragraphs of the Declaration of Independence, which explained that the document was signed by "the Representatives of the united States of America, in General Congress, Assembled." Note how the word "united" was not capitalized. Not until The Articles of Confederation did the phrase "United States of America" become the official name of the nation.

The ad hoc Congresses of the late 1770s achieved a new measure of permanence under the Articles of Confederation and Perpetual Union, ratified in 1781. The Articles created a confederation of states whose joint business would be managed by a regularly-meeting entity known as a Congress. Unlike the sovereign states, who could do anything not prohibited by their constitutions, the Congress could do nothing unless authorized by the Articles. As explained in Article 2: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

In keeping with this vision of a confederation, the Articles gave the entity known as the "United States of America" little independent power. The Articles created no executive offices; instead, Congress appointed individuals to undertake specific tasks on its behalf, such as commanding the armed forces or negotiating treaties with foreign governments. Congress had no power to tax. To raise funds, it

could politely request money from the states, which sometimes complied and sometimes did not. Each state had one vote in Congress. Ordinary actions could be taken if approved by a majority of voting states, but the most important actions (prosecuting the war effort and printing or borrowing money) required a supermajority of nine states, and any amendment to the Articles had to be unanimous. The unanimity requirement for amendments became a notorious stumbling block. In 1782, a proposal to amend the Articles to allow Congress to impose a 5% import tax failed because Rhode Island vetoed it. That state changed its mind when the proposal was floated again in 1786, but at that point New York single-handedly killed the proposal.

Comparison of Articles and State Constitutions



3. Reasons to Change the System

A chronic complaint under the Articles was that Congress accomplished little. Indeed, Congress frequently had to adjourn for lack of a quorum. Some prominent voices began to complain that America needed a more "energetic" government than the Articles could provide. The existing system seemed unable to respond to a number of worrisome problems.

Economic Problems. Generally speaking, the American economy was terrible in the 1780s. Part of the problem involved the money supply. Congress printed a national currency, but many people refused to accept it as payment. States began issuing their own paper currency, sometimes profligately. With a variety of competing currencies, some of them subject to sudden inflation, there was little certainty about the value of money. Another economic problem involved the national debt. Congress had borrowed heavily from Europe to finance the revolution, but Congress's lack of taxing power placed it in constant danger of a default, endangering the nation's credit for future loans. A third economic problem involved the lack of a coordinated trade policy, either internationally or between the states. Some states imposed tariffs on manufactured goods from Europe, while others kept their borders open—a combination that led to smuggling. States also engaged in protectionism against each other, erecting various trade barriers designed to benefit their internal industries at the expense of those in other states.

Political Problems. Most of the states were internally divided between camps that historians have labelled "conservatives" and "radicals." For conservatives, the war against Britain could best be termed the War of Independence. They wanted freedom from European control, but their vision for American society looked a lot like Britain, with political power concentrated among the wealthy. For radicals, the

better term is Revolutionary War. The radicals saw independence from Britain as part of a larger project of broadening political freedoms for a wider part of society.

As radicals and conservatives battled for political control of state houses during the 1780s, concern rose in many quarters that state governments were misbehaving. Where legislatures were controlled by conservatives, radicals believed that the state government was being structured for the sole benefit of the moneyed classes. Where legislatures were controlled by radicals, conservatives lamented that state government was favoring the debtor classes by enacting laws to forgive debts, confiscate property, and print too much money. In addition, state legislators generally had short terms in office, often for a single year. This meant that statutes—and even state constitutions—changed frequently, to the point where it became difficult to predict what the law would be from one year to the next.

Many people began to wonder if these problems reflected an excess of democracy. Legislatures that were too responsive to the popular passions of the majority could enact laws the minority considered tyrannical. The sharpest critics of state legislatures (who tended to be conservatives) fretted that states would descend into mob rule—or even that the experiment with representative democracy had failed.

Military Threats. The lack of effective national coordination placed the United States at military risk. England and France were drifting towards another of their periodic wars. If North America became one of the battlefronts (as it had during the French and Indian War of the 1750s and 1760s), the newly independent states might once again become colonies of the great powers of Europe. In addition, many states were at threat of armed conflict with Indians on their western frontiers, and Georgia shared a worrisome border with Spanish Florida. Despite all these foreign threats, the nation had no army. Washington's Continental Army that had won the war for independence had been disbanded, and the only operating military were local militias not under Congressional control.

Shays' Rebellion. The economic, political, and military dangers seemed to combine in Shays' Rebellion, an uprising in western Massachusetts that terrified leaders nationwide. Reacting to pressure from creditors in Boston who had been demanding repayment of loans to the state government, a series of conservative legislatures chose to raise revenue through new taxes and court fees. The taxes—especially land taxes—fell hardest on the rural poor as the economy worsened. The state began to sell off farms and personal goods at sheriff's sales to recover unpaid taxes.

In late 1786, rebellions broke out in three western counties. Although they were not particularly well coordinated, the one led by Captain Daniel Shays had the highest profile. The rebels focused their attacks on courthouses to prevent them from carrying out foreclosures, but they also unsuccessfully attacked a federal arsenal in hopes of obtaining more weapons. The state was ill-equipped to deal with Shays' Rebellion. The governor called out the local county militias to combat

it, but many of their members had already joined with Shays. Congress had no funds or troops to aid Massachusetts. Ultimately the rebellion was put down in February 1787 by an army privately funded by Boston merchants.

Shays' Rebellion was relatively small (around 4,000 people later acknowledged participation), unfocused, and would not likely have overturned the duly elected government of Massachusetts. Nonetheless, as a symbol of military vulnerability, economic weakness and political disarray, it caused nationwide fright. George Washington's military colleague Henry Lee fretted in a letter that the "malcontents" in Massachusetts had as their goals "the abolition of debts, the division of property, and re-union with Great Britain. . . . In one word my dear General, we are all in dire apprehension that a beginning of anarchy with all its calamities has approached."

B. The Constitutional Convention of 1787

Responding to the fears that the system faced collapse at the state and national levels, Congress in February 1787 called for a convention "for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall . . . render the federal Constitution adequate to the exigencies of government and the preservation of the Union." The war hero **George Washington** agreed to preside over the convention, giving it instant credibility. The convention was held in Philadelphia that summer, in the same room where the Declaration of Independence had been debated.

The delegates included a concentration of national heroes, including the elder statesman Benjamin Franklin, who had been advocating independence since the 1750s. All were prosperous, literate, free white males. Many were lawyers, and most were well-versed in history and political philosophy. They included men who had served their states as governors, supreme court justices, and attorneys general. Others had served Congress as representatives, diplomats, or military leaders. Although they were capable of sophisticated discourse, they were no mere debating society. First and foremost, they were skilled politicians who advocated the positions they thought most favorable for themselves and their states. As a result, the US Constitution should not be viewed as holy writ, but as the product of hard-fought political compromise.

The convention met in strict secrecy. Confidentiality was important, because the delegates, inspired by a proposal masterminded by **James Madison**, had decided to deviate from the assignment given by Congress. Their recommendation would not be to revise the Articles of Confederation, but to scrap them in favor of a new system. If the delegates' task was to follow the instructions of Congress, they were unfaithful servants. But most delegates felt that they were convening not as agents of Congress, but as agents of the people of their states. The Declaration of

Independence said that the people had the right to alter or abolish a dysfunctional government, so that is what the convention proposed.

1. Areas of Consensus

The delegates were able to reach rapid agreement on several basic principles.

a) Energetic National Government

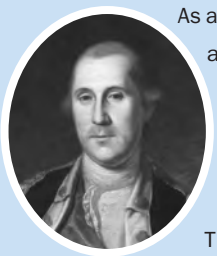
On May 30, the third day of the convention, the delegates approved a resolution "that a national government ought to be established consisting of a supreme Legislative, Executive, and Judiciary." This resolution differed significantly from the theory behind the Articles of Confederation. There should be a "national government" (not a federation); it should be "supreme" (a core attribute of sovereignty); and it should have its own executive and judicial branches.

Consensus in favor of an energetic central government was easier to reach because almost none of the many people opposed to the idea were in the room. Some well-known patriots who opposed a central government (such as Patrick Henry) announced in advance that they would not attend. Of the two states that had notoriously prevented amendments to the Articles of Confederation, Rhode Island never sent a delegation to the constitutional convention, and New York's delegation often lacked a quorum, preventing it from voting. In the end, only a handful of people who were opposed to the central concept stayed with the convention to the bitter end.

b) State Sovereignty

There was no serious argument against the continued existence of states. Despite the suspicions that some delegates harbored against the existing state governments, they were by this

BIOGRAPHY



As a Southerner commanding a mostly Northern army during the revolution, **GEORGE WASHINGTON** (1732–1799) earned nationwide respect. The founding generation admired him so much that many believed Washington could have been appointed King if he were not so committed to representative democracy. As President of the constitutional convention, Washington spoke little, but his mere presence contributed enormously to the convention's success. If the universally beloved General Washington thought a new constitution was a good idea, the proposal would be taken seriously.

JAMES MADISON (1751–1836) joined the independence movement as a young adult, but never saw combat because he stood only five-foot-four and weighed barely 100 pounds. After independence, Madison became active in Virginia politics, serving in the state legislature and later as part of Virginia's delegation to the Articles Congress. His impressive intellect, his ability to build coalitions, and his willingness to work harder than anyone else made him the most influential person at the convention of 1787. From this, he earned the nickname "The Father of the Constitution."

time too politically entrenched to tamper with. This can be seen in the story of Alexander Hamilton's role in the convention. On June 18, he delivered a lengthy speech advocating that sovereignty be placed in a single national government, with states existing only as administrative subdivisions, much like British counties. Hamilton's proposal was so poorly received that he left the convention that week, returning only to sign the finished document in September.

■ TERMINOLOGY

FEDERAL: The meaning of the word "federal" has shifted over time. As Madison used the term, a "federal" government was a (con)federation of independent states, the opposite of a "national" government. Today, the term "federal" most often refers to the national government created by the US Constitution. In some settings, the word "federal" refers to any system where multiple levels of government share sovereignty over the same territory.

By creating a national government that was "supreme" but comprised of states that retained their sovereignty, the delegates had designed an untried form of government. Madison later explained to the public that the new government was "part national" and "part **federal**." The national or central government would be supreme, but only within its areas of enumerated power. In all other areas, states could exercise their sovereignty to make whatever laws they wished. The most important power that states had but Congress lacked was known as *police power,* i.e., the power to enact laws for the health, safety, welfare, and morals of the community. The lack of federal police power remains a crucial difference between the two levels of government.

c) Republicanism

There were two forms of government the delegates knew they did not want: hereditary monarchy and democracy. A monarchy—even a constitutional monarchy with significant powers placed in a parliament—was too prone to tyranny. Democracy—direct rule by the people—had the potential to be fickle, unstable, and equally tyrannical. An unjust law was unjust even if imposed by a majority, and if the majority consisted of selfish or uneducated people, the likelihood of unjust lawmaking would be even worse.

The preferred alternative was a republic—a representative democracy. In a republic, governmental decisions would be made by representatives selected by and accountable to the people. Once selected, these public servants were expected to exercise their best independent judgment, and not be obliged to enact a tyrannical proposal merely because a majority of the people was enamored of it. (The framers assumed there would be no organized political parties, a development that greatly affected the independence of representatives.) There would be two tricks to a successful republic: (a) mechanisms that would lead to selection of the most wise and virtuous public servants, and (b) incentives for those public servants to govern wisely, which would require an ideal combination of independence (freedom to

pursue the public interest) and accountability to the people (to ensure that rulers did not become self-interested).

d) Separation of Powers

Although the legislature would be the most important ingredient of a successful republic, the delegates also wanted to place at least some powers outside the control of the legislature altogether. The philosophical preference for separation of powers was derived in significant part from the French Enlightenment philosopher Montesquieu, whose writings were widely respected in the colonies, especially among conservatives who feared the more radical state legislatures.

Putting judicial power beyond the reach of the legislature had been standard practice for centuries. The legislature should make the laws, but independent judges should decide whether laws had been broken in particular instances. A separately elected and **independent chief executive** was also considered an important check on legislative overreach. As with the legislature itself, the judicial and executive branches would require a good selection mechanism and the optimal balance of independence and accountability.

■ OBSERVATION

INDEPENDENT CHIEF EXECUTIVE:

Not all modern nations follow the American *presidential system* that separates the executive from the legislative branch. More popular is a *parliamentary system,* where the day-to-day administration of government is handled by a Prime Minister chosen by, and answerable to, the legislature. By avoiding the conflict or deadlock that can arise when a legislature and an independent President disagree over priorities, a parliamentary system makes it easier to enact and enforce laws that are preferred by the majority. Reasonable people have differed over whether that is a good or a bad thing.

2. Areas of Division and Compromise

In any negotiation, the devil is in the details. At the constitutional convention, three main topics proved to be especially contentious. The compromises reached on these topics have had lasting ramifications to the present day.

a) Representation in Congress

Madison and many others believed that a republic would be intrinsically illegitimate (and also likely to lose the respect of the populace) unless the legislature were apportioned according to population. Proportional representation was consistent with the view that the people of the United States formed a single political community for purposes of popular sovereignty. The alternative would continue the method of the Continental Congresses and the Articles, where each state had the same amount of representation. That approach was consistent with the view that each state was its own sovereign political community. But it also meant that a voter in a small state would have greater influence over the national legislature than a similarly situated voter in a large state.

The formula for representation was debated for weeks. At times it seemed likely to derail the effort altogether, with some of the more vociferous smaller states threatening to leave the convention. Some delegates argued that the small states' fear (that they would be the victims of legislation uniquely harmful to them) was more theoretical than real. According to Madison, "the States were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from their having or not having slaves. The great division of interests in the United States did not lie between the large and small States: it lay between the Northern and Southern." This reasoning did not satisfy the small states, who genuinely feared harm from a lack of influence.

The final resolution to this hard-fought debate was the "Connecticut Compromise," named after its proponent Roger Sherman of Connecticut. One house of the legislature would be apportioned by population, and the other by state. The small states were so insistent upon their equal representation in the Senate that Art. V of the Constitution forbids any future amendment that would reduce a state's equal suffrage in the Senate without its consent. Given the political reality that no small state would ever forfeit its **influence in the Senate**, the only way to create a national legislature with proportional representation in both houses would be to scrap the US Constitution in favor of an entirely new one.

■ OBSERVATION

INFLUENCE IN THE SENATE: According to the 2010 census, small states representing approximately 17% of the US population have enough votes in the Senate to defeat any bill.

For the Framers, apportioning the House of Representatives by population did not necessarily imply that the entire population would have the right to vote. No state had universal suffrage. Most followed some variation of the British tradition which gave the vote only to those who owned some minimum amount of property. Property qualifications for voting were justified in many ways, chief among them the widespread belief that the wealthy had better character than the poor. Other arguments were that landowners were more permanent and hence had a greater stake in the community; that they had a greater claim to representation since they were subject to more taxation; and that tenants could be easily manipulated into voting in their landlords' interests anyway. Property qualifications were under challenge in some of the states, but at the time of the convention there was no uniformity among states in this regard. Since the convention was unlikely to agree on a national standard for voting qualifications, it was decided not to impose one. People could vote for the US House of Representatives if they could vote for the equivalent house of the state legislature. Art. I, § 2, cl. 1.

Aside from property qualifications, the states tended to have very similar laws with regard to voting—and these reliably denied the right to vote to most of the population.

Women. Although women were understood to be citizens, the bundle of legal rules known as *coverture* dictated that a married woman's legal personhood was covered by that of her husband. A husband was analogous to a sovereign of the household, supreme over all others. It would violate the husband's domestic sovereignty for a wife to own property, enter into contracts, commence litigation, or decide where the family would live. All of this meant that a wife could not vote. To begin with, she owned no property. More to the point, women were assumed to be not intellectually capable of the task. Because it was assumed that wives would vote as their husbands dictated, allowing them to vote would effectively give married men more votes than single men. Besides, the theory went, the husband would give proper weight to the interests of the wife when casting his own vote. Single women were for most purposes treated as if they were married.

With that said, the original US Constitution was predominantly gender neutral. Other than using the pronoun "he" to refer to office holders such as the President, it said nothing specific about sex, and no constitutional rights were expressly limited to men. As for voting, the US Constitution refers to voters as "electors," who could in theory be of any sex if state law allowed it. In the early republic only New Jersey allowed (unmarried, property-owning) women to vote, but it disenfranchised them in an 1807 statute that limited the vote to "free, white, male citizens."

People with Mental Disabilities. As a practical result of the property qualification, or by specific statute, those considered to be "idiots" or "insane" were not allowed to vote. The Massachusetts constitution of 1780, for example, excluded from voting "paupers and persons under guardianship."

Minors. Then as now, only adults had the vote. Most states considered 21 to be the minimum voting age, although some adult rights—such as the right to marry—could be exercised by younger people.

Non-Citizens. Then as now, states tended not to allow resident aliens to vote in state elections.

Indigenous People. Europeans had been able to settle North America so rapidly in large part because communicable diseases they brought with them wiped out vast numbers of Native Americans. By the 1780s, most of the surviving Indians lived west of the areas of European settlement; they were considered aliens without voting rights. Those Indians who had assimilated into the European communities were treated as citizens. For purposes of apportioning the House of Representatives, the US Constitution excluded from the census all "**Indians not taxed**"—that is, those not assimilated into white communities. See Art. I, § 2, cl. 3 & Fourteenth Amendment, § 2.

■ HISTORY

INDIANS NOT TAXED: After Congress in 1924 made all Indians citizens of the United States, there are no longer any "Indians not taxed." *Squire v. Capoeman,* 351 U.S. 1 (1956).

Felons. The colonies followed British law, where for centuries serious crimes not punishable by death were subject to the sentence of "civil death" or outlawry. Civil death entailed the loss of almost

all legal rights, including all political rights. The wise outlaw would simply leave the country in hopes of starting fresh somewhere else. Beginning in the 1790s, states began to write explicit limitations against voting by felons into their state constitutions. In some states, voting rights could be restored after release, but in most the disqualification was permanent.

Indentured Servants. Although the practice died out in the early 19th century, many young European males came to North America as indentured servants, who owed a term of labor (typically seven years) to their masters. Indentured servants were not considered free until their terms of labor expired, and hence they were not allowed to vote in any state. Nonetheless, the US Constitution included them in the census for purposes of calculating representation in the House. Art. I, § 2, cl. 3 (in the representation formula, "free persons" would include "those bound to service for a term of years").

Slaves. No state allowed slaves to vote. States varied as to whether they gave the vote to free black people. New Hampshire, Massachusetts, New York, New Jersey, and North Carolina allowed them to vote, while other states did not.

b) Slavery

■ HISTORY

SLAVERY EXISTED IN ALL OF THE STATES: Pennsylvania was the first state to pass abolition legislation in 1780, in the form of a gradual emancipation law. In 1783, Massachusetts became the first state to abolish slavery altogether, as a result of a court opinion holding that slavery violated the state constitution's statement that "all men are created free and equal." The remaining Northern states adopted either gradual or immediate emancipation by 1804.

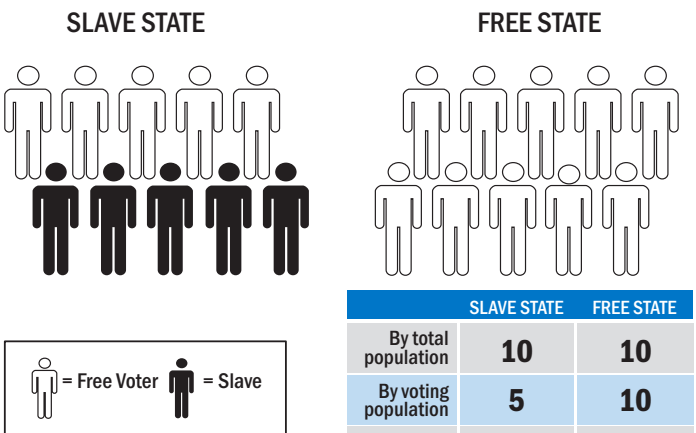
Almost 20% of the total population of the colonies were slaves of African descent. At independence, **slavery existed in all of the states**, but it was far more prevalent in the South. Although some delegates to the constitutional convention disliked slavery, no widespread abolitionist movement existed at the time, and there was never any serious consideration of forbidding slavery at a national level. The choice to continue or abolish slavery was a matter for state law. Nonetheless, the delegates were keenly aware that slavery represented the largest difference between North and South. The Southern delegates were extremely hard bargainers when it came to any proposal that might hinder their states' ability to maintain slavery, frequently threatening to walk out over the issue.

As written, the US Constitution did not contain the words "slave" or "slavery." Several provisions, however, make sense only in the context of slavery.

The Three Fifths Clause. Since the House was to have proportional representation, the convention needed to decide whether its seats would be allocated according to a state's total population or its voting population. A formula based on total population would give the voters in slave states a comparatively greater voice in the House, because fewer voters would have the power to elect the same number of representatives. For Southern delegates, this result seemed entirely just. In the aggregate, the

Southern states had a smaller voting population than the North, so they wanted extra representation to ensure that their interests would not be routinely outvoted in the House. In addition, all states had some nonvoters (women, children, felons, etc.), and there was no reason for different treatment of the nonvoters who happened to be slaves. For the Northern delegates, the slave states were unjustly seeking greater representation simply because they happened to own a certain type of property. If a slave owner gets extra representation for his property, Elbridge Gerry of Massachusetts asked sarcastically, then why not give a Northern farmer extra representation for his horses and oxen?

Competing Formulas for Representation in the House



	SLAVE STATE	FREE STATE
By total population	10	10
By voting population	5	10
By 3/5 clause	8	10

The final resolution of this debate was the infamous Three Fifths Clause, which allocated seats in the House on a formula that counted "the whole number of free persons" (plus the indentured servants but minus the Indians not taxed) plus "three fifths of all other persons"—where the "other persons" were the slaves. Art. I, § 2, cl. 3. The Three Fifths Clause did not mean that the Framers viewed slaves as three fifths of a person. For purposes of voting, they were zero fifths of a person. Or perhaps less, since they gave a representational bonus of three fifths of a person to their masters. As historian Richard Beeman noted:

> In reviewing the controversy over the three-fifths clause, one comes away with a depressing sense of the near-total absence of anything resembling a moral dimension to the debate. The three-fifths compromise was, fundamentally, about states' individual interests, not the morality of slavery. Those few Northerners . . . who voiced unhappiness with the idea of counting the slave population in apportioning representation did so either out of a fear that Northern interests

> were being sacrificed to those of the South or . . . the "disgust" that their white constituents may have felt about being considered even in the same category as slaves. . . . That uneasiness was generated at least as much by a deeply seated racism as by any humanitarian concern about the plight of enslaved Africans.

Protection for the International Slave Trade. The slave states with the strongest demand for imported slaves worried that Congress could use its power over international commerce to ban the slave trade, or use its taxing power to heavily tax imported slaves. (Although there was no significant abolitionist movement at the time of the convention, moral objections to the international slave trade were in the air.) Protections for the international slave trade ultimately entered the Constitution as the result of an elaborate horse trade. In general, Northern states desired national power to regulate the economy more than Southern states did. Records of the convention reveal that in exchange for the Deep South supporting Congressional commerce power, New England states agreed that the national government could not prohibit "the migration or importation of such persons as any of the states now existing shall think proper to admit"—an elaborate euphemism for the international slave trade—before 1808, or at any time impose an import tax of more than $10 per slave. Art. I, § 9, cl. 1. (Another part of this bargain was Art. I, § 9, cl. 5, which prevented Congress from imposing any taxes on goods exported from states. Since the biggest customers for the products of Southern plantations were in Europe, the South had more to fear from export taxes.)

The Fugitive Slave Clause. Art. IV, § 2, cl. 2 obliged states to extradite fugitives from justice back to the states from which they had escaped. Late in the convention, with little discussion, the delegates added a parallel provision for the return of fugitive slaves—who were described as "person[s] held to service or labor in one state, under the laws thereof." Art. IV, § 2, cl. 3.

Proportionality of Direct Taxes. Southern states worried that a future abolition-minded Congress might impose an economically crushing tax on the ownership of slaves. To protect against this, the Constitution forbids any federal "**capitation** or other direct tax" unless it is "in proportion to the census." Art. I, § 9, cl. 4. A similar formula appears in Art. I, § 2, cl. 3, in the same sentence that contains the Three Fifths Clause. As a result, if the federal government imposed a nationwide tax of $1 per person nationwide, it could tax no more than $0.60 per slave—and it could not tax slaves at all unless it was willing to tax all free persons. Artfully, the tax proportionality provisions protected the economic viability of slavery without including any

■ TERMINOLOGY

CAPITATION: A capitation is a flat tax per person. It is also known as a "head tax," reflecting its origins in the Latin word *caput* (head), which also gives us the phrase *per capita*. Taxes per head are also known as poll taxes, from the Middle English word *pol* (head). In the late 19th century, Southern states began to limit the vote to persons who had paid their poll taxes—a requirement that effectively disenfranchised most blacks and poor whites. The US government has never imposed a capitation, and the 24th Amendment made it unconstitutional to condition the right to vote in federal elections on payment of any tax.

euphemisms for slaves at all. Nonetheless, the text of the Constitution provides a huge clue that this limitation on the tax power served slaveholders' interests: Art. V states that neither the tax proportionality requirement nor the protections for the slave trade could be amended before 1808.

c) Choosing the President

Devising a method to choose the President proved to be one of the more frustrating tasks at the convention. Everyone knew that the universally respected George Washington would be the unanimous choice for the first president, but how should his successors be chosen? There was a general consensus against a nationwide popular election, since it might give the office to a demagogue who could skillfully manipulate mass opinion. The search for an alternative brought out rivalries between the big and small states, and the Northern and Southern states. The convention eventually considered and rejected dozens of motions on the subject of Presidential selection before finally settling on the Electoral College. Under that system, each state would choose "electors"—wise people whose job it would be to select the President. Art. II, § 1, cl. 2. After choosing the President, the Electoral College would disband, ensuring Presidential independence.

The tussles over representation in Congress repeated themselves with regard to representation in the Electoral College. The ultimate decision was that each state would have a number of electors equal to the sum of their senators plus their representatives. Art. II, § 1, cl. 2. This meant the Electoral College would not have proportional representation, creating the risk that its results would **not match the national vote**. The divergence between the Electoral College and the popular vote follows predictable patterns. Small-population states have extra influence, as they do in the Senate. While the Three Fifths Clause existed, slave states would have extra influence, as they did in the House. As a result, between the founding and the Civil War, eight out of twelve Presidents—who held office for forty-nine of the nation's first sixty-one years—were slaveholders.

■ HISTORY

NOT MATCH THE NATIONAL VOTE: On five occasions, the presidential candidate receiving the most popular votes did not receive the most votes in the Electoral College: in 1824 (Andrew Jackson over John Quincy Adams); 1876 (Rutherford B. Hayes over Samuel Tilden); 1888 (Benjamin Harrison over Grover Cleveland); 2000 (George W. Bush over Al Gore); and 2016 (Donald Trump over Hillary Clinton).

C. A Tour of the 1787 Constitution

There is no substitute for reading the Constitution for yourself. This section is intended to help you work through the document, focusing on the parts that have proven (in hindsight) to be the more important features of the system.

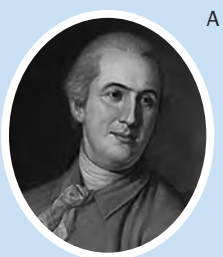
Preamble

The Preamble explains why the Constitution was established: "to form a more perfect union, establish justice, insure domestic tranquility, provide for the

common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." It also says who established it: "We the people of the United States." In these famous opening words, the Preamble reflects the notion of popular sovereignty previously expressed in the Declaration of Independence.

The Preamble was written by **Gouverneur Morris**, as part of the Committee of Style that convened after the hardest negotiations had finished. Courts have never viewed the Preamble as a source of power for the federal government (i.e., it does not enumerate a power to "promote the general welfare"). At most, the Preamble has been used as a reference point when interpreting the operative language of the Constitution.

BIOGRAPHY



A child prodigy born to an influential New York family, **GOUVERNEUR MORRIS** (1752-1816) graduated from college at age 16 and became a lawyer at age 19. Although politically conservative, he ardently supported the independence movement. He was a signer of the Articles of Confederation, and during the war he helped preserve badly needed funding for George Washington's army. In 1787, Morris was the most frequent speaker at the Constitutional Convention, typically arguing in favor of stronger national powers (such as James Madison's never-adopted proposal for Congressional veto power over state laws). He was the only delegate to speak openly against slavery during the Convention, once calling it a "nefarious" institution "in defiance of the most sacred laws of humanity" and "the curse of heaven on the states where it prevailed."

Article I: The Legislature

Substance of Legislation. Congress is given "all legislative powers herein granted." Art. I, § 1. The term "herein granted" signals that Congress does not have "all" legislative powers the way an absolute sovereign would.

Most of the enumerated powers are found in Art. I, § 8, which deserves careful study. It begins with the phrase "The Congress shall have power. . ." A few other passages in the Constitution also state that Congress "shall have power" to do certain things, or that it "may" or "shall" do certain things. See Art. III, § 3, cl. 2; Art. IV, §§ 1, 3-4; and Art. V. Many of the amendments from the Thirteenth onward also contain enumerated powers. Notice the absence of "police power" (the power to enact laws for the health, safety, welfare, and morals of the community) or any generalized power to enact laws that seem like a good idea.

Art. I, § 9 is the flipside of § 8, because it identifies categories of laws that Congress cannot pass. Many of the clauses within Art. I, § 9 describe economic regulations that are off limits, such as export taxes or preferences for the ports of a single state. Others involve individual rights, such as the writ of habeas corpus (freeing a person from custody if they have not been duly tried and convicted); the ban on *ex post facto* laws (laws punishing conduct that was lawful when it occurred); the ban on bills of attainder (laws declaring persons guilty of crimes and imposing punishment without trial); and the ban on titles of nobility.

Art. I, § 10 identifies various laws that the states cannot pass. Many of these involve areas that are better handled at the national level, such as establishing a national monetary system and pursuing international diplomacy and warfare. Others are laws violating individual rights that irresponsible state legislatures had enacted under the Articles of Confederation, such as *ex post facto* laws, bills of attainder, and laws "impairing the obligation of contracts" (i.e., laws that had erased debts or made them more difficult to collect). Note how some of the enumerated powers of Congress in Art. I, § 8 are paired with prohibitions on similar state powers in Art. I, § 10, making doubly clear that certain powers are reserved to the federal government. For example, Congress may coin money, but States may not. Congress may create a system of bankruptcy, but states may not impair the obligation of contracts. Congress may raise and maintain an army and navy, but states may not "keep troops, or ships of war in times of peace."

Procedure for Legislation. The Congress is bicameral, with a House of Representatives chosen through election, Art. I, § 2, cl. 1, and a Senate appointed by state legislatures, Art. I, § 3, cl. 1. Not until the 17th Amendment (ratified 1913) were Senators directly elected. To become a law, a bill must pass both houses of Congress and be signed by the President, although if the President refuses to sign, it will become law if two-thirds majorities of both houses vote to override the veto. Art. I, § 7, cl. 2. The Framers saw divided legislative power as a protection against bad laws. It would be difficult for an oppressive or tyrannical law to overcome a series of gatekeepers, each of whom is responsible to a different constituency. To be enforced, a law must (a) gain majority support in a House where every member represents a different district; (b) gain majority support in a Senate where every member is selected by a state legislature; (c) be signed by a President who is accountable to the entire nation, and (d) be upheld as constitutional by federal judges who serve for life and will only be removed through death, retirement, or impeachment.

Article II: The Executive Branch

The President controls "the executive power." Art. II, § 1, cl. 1. Sections 2 and 3 of Art. II describe some attributes of the executive power more precisely, such as command of the military; appointment of judges, ambassadors, and other federal officers; negotiation of treaties; and granting of reprieves and pardons to federal prisoners. As a general matter, the President "shall take care that the laws be faithfully executed." Art. II, § 3. Beyond this, the Constitution provides little detail about the President's powers or duties.

Presidents and other officers of the United States, including federal judges, may be removed from office for "treason, bribery, or other high crimes and misdemeanors." Art. II, § 4. Removal occurs only if the official is impeached (charged) by the House of Representatives, Art. I, § 2, cl. 5, and convicted by two thirds of the Senate, Art. I, § 3, cl. 5. Impeachment was considered a humane

improvement over the methods historically used in Britain to remove the King's highest officers, which involved bills of attainder, high-profile treason trials of questionable fairness, and death sentences.

Article III: The Judicial Branch

"The judicial power" is vested in one Supreme Court and "in such inferior courts as the Congress may from time to time ordain and establish." Art. III, § 1. (Congress has a corresponding enumerated power "to constitute tribunals inferior to the Supreme Court." Art. I, § 8, cl. 9.) The convention did not reach agreement on the need for federal trial courts; the competing option was for all federal laws to be enforced in state courts, subject to review by the US Supreme Court. Article III allows Congress to make that choice; ever since the first Congress in 1789 it has chosen to operate federal trial courts.

Just as Congress has enumerated powers, federal courts have enumerated subject matter jurisdiction. Art. III, § 2, cl. 1. The scope of federal subject matter jurisdiction tends to be studied in Civil Procedure, Jurisdiction, and Federal Courts.

The Constitution gives federal judges an extraordinary amount of independence. Unlike members of Congress and the President who face periodic elections, judges "shall hold their offices during good behaviour," Art. III, § 1, which has been interpreted to mean that they may be removed only through the impeachment process from Art. II, § 4. In addition, judicial salaries "shall not be diminished during the continuance in office," Art. III, § 1, to ensure that the legislature cannot control judicial rulings by tampering with judges' paychecks.

Finally, Art. III requires some protections for criminal defendants accused of violating federal law. These include a right to a local jury trial, Art. III, § 2, cl. 3, and significant limits on treason prosecutions, Art. III, § 3.

Article IV: Interactions Among States

Art. IV deals with the relationships among states, with an eye towards combining them into a working whole. States were to give "full faith and credit" to official records in other states. Art. IV, § 1. In its most common application, this meant that a creditor who obtained a judgment on a debt from a court in one state could collect on that judgment in another state where the debtor held assets.

States were not to discriminate against citizens of other states. Instead, out-of-state citizens were "entitled to all privileges and immunities of citizens [of that state]." Art. IV, § 2, cl. 1. This meant, among other things, that citizens of one state could own property, operate businesses, or commence litigation in other states.

States were also obliged to extradite fugitive criminals to the states where they faced charges, Art. IV, § 2, cl. 2, and return fugitive slaves to the states from which they had fled. Art. IV, § 2, cl. 3.

Finally, Art. IV, § 3 gave to Congress control over territories that were not yet organized as states, removing a probable source of contention and jealousy between states. Congress was also to contribute to the justice and domestic tranquility of the states by guaranteeing to them "a republican form of government," protecting them against invasion, and (if requested by the states) protecting them against "domestic violence." Art. IV, § 4.

Article V: Amendments

The US Constitution was designed to be easier to amend than the Articles of Confederation, although a high degree of consensus is still required for any changes. Amendments require two-thirds approval of both houses of Congress, followed by ratification by three-fourths of the states. Although not as extreme as the single-state veto that was possible under the Articles, the Art. V formula gives **states with small populations** a disproportionate ability to block amendments, since they have equal representation in the Senate notwithstanding population, and an equal voice in the state ratification process.

■ OBSERVATION

STATES WITH SMALL POPULATIONS: With 50 states in today's Union, it takes 38 states to ratify a constitutional amendment. This means 13 states voting not to ratify will defeat an amendment—and according to the 2010 census, the smallest 13 states contain 4.4% of the total US population.

Article VI: Miscellaneous Provisions

Art. VI gathered together some provisions that did not fit neatly elsewhere. The most important of these declares that the US Constitution, laws enacted by the US Congress, and treaties negotiated by the President and ratified by the Senate "shall be the supreme law of the land." Art. VI, § 2. Federal law would control in both federal and state courts, "any thing in the constitution or laws of any state to the contrary notwithstanding." *Id.*

Showing the Framer's concern over the nation's creditworthiness, the new government would honor the debts accrued by Congress under the Articles. Art. VI, § 1. Also, people of any religion could hold office in the federal government, contrary to the practices in some of the states. Art. VI, § 3.

Article VII: Ratification Procedure

The Framers predicted that if unanimous approval of the states were required, the new Constitution would never take effect. There were many possible holdouts, most likely Rhode Island, which had sent no delegates to the constitutional convention. Ratification by a supermajority of nine out of thirteen states was deemed sufficient.

Moreover, ratification would not be channeled through the state legislatures (many of which were not trusted by the Framers). Under the theory of popular sovereignty, the people, not their public servants, had authority to alter or abolish governments. Each state was to convene a ratifying convention as the means to

ascertain the will of the people in each state. Each state could choose its own method for staffing the convention, although in practice all of the ratifying conventions consisted of propertied free white males.

D. Ratification Conventions and The Bill of Rights

Ratification Conventions Begin. After the Framers signed the proposed Constitution on September 17, 1787, George Washington prepared a cover letter to Congress, explaining what the convention had done. His transmittal letter emphasized two things. First, the nation required a stronger central government, even if that meant the states would have less power than before.

> The friends of our country have long seen and desired, that the power of making war, peace, and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union. . . . It is obviously impracticable in the federal government of these states, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest.

Second, Washington warned Congress not to tinker with the many compromises that had been hammered out during the convention.

> In all our deliberations on this subject we kept steadily in our view, that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each state in the Convention to be less rigid on points of inferior magnitude, than might have been otherwise expected; and thus the Constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable.

Congress took Washington's hint, and relayed the proposed Constitution to the states without comment. By early January 1788, five ratification conventions had been held. Delaware, New Jersey, and Georgia ratified unanimously, Pennsylvania by a two-to-one margin, and Connecticut by a three-to-one margin. But the Massachusetts convention in February ratified by a narrow vote of 187 to 168. Opponents of the Constitution were becoming better organized, and ratification by nine states was not assured. Moreover, it was widely understood that Virginia and New York (the largest and most prosperous states) would need to ratify for the new government to have any chance for success.

The chief argument against the Constitution was simply that it would vest too much power in a central government. Depending on where you sat, that government ran the risk of being dominated by the wrong states. Besides, large powerful governments tended to be tyrannical, from the Roman Empire to the British. The colonists had gone to war to be free of domination by a distant central government that was disdainful of local concerns; why should citizens of newly independent states seek to reconstruct a similar relationship? In **The Federalist** #10, James Madison made a clever counterargument. A properly structured large government would actually be *less* oppressive, he argued, because it would be harder for self-interested factions to dominate a diverse national legislature, as compared to a smaller and more localized legislature.

■ HISTORY

THE FEDERALIST: To build public support for the Constitution in New York, Madison—along with Alexander Hamilton and John Jay—published a series of pro-ratification articles under the pseudonym "Publius" in early 1788. They titled these papers *The Federalist,* even though their opponents believed that the proposed Constitution was too national and not federal enough. The name stuck. Those favoring the new Constitution became known as federalists, and its opponents anti-federalists. Although they were not the only publication circulated at the time, *The Federalist Papers* have since come to be regarded as a leading explanation of the philosophy and methods of the US Constitution. Meanwhile, articles published under pseudonyms including "Brutus," "Centinel" and "A Federal Farmer" opposed ratification. Historians later collected these writings into a set of *Anti-Federalist Papers*.

The Debate over A Bill of Rights. As the debates continued in the spring and summer of 1788, the most politically powerful argument against the proposed Constitution was its lack of a bill of rights. For example, most state constitutions protected freedom of speech for all persons. The proposed Constitution only protected the speech and debate of members of Congress. Art. I, § 6, cl. 1. Congress would be able to engage in censorship one way or another, given its powers to tax, to regulate commerce, and to enact laws that were "necessary and proper" for carrying the other powers into effect.

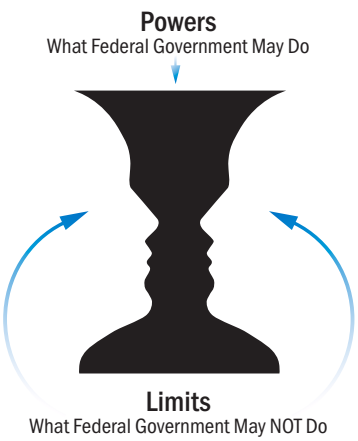
Defenders of the Constitution argued that enumerated rights were simply not necessary. Oppressive national laws would not be passed, because they were not within the federal government's enumerated powers, and because the lawmaking process was divided among gatekeepers who could squelch oppressive proposals. Moreover, no list of rights could ever be complete. If a constitution expressly protected some list of enumerated rights, this would imply that all other rights were not protected. The Federalist arguments against a bill of rights had some logical coherence, but they could not explain why the Constitution *already* included some protections for individual rights, as found in Art. I, §§ 9–10, in Art. III, § 3, and Art. VI, § 3.

As the spring of 1788 wore on, s realized that the absence of a federal bill of rights was a significant political liability. In response, they promised that once the Constitution was adopted, the first order of business would be to amend it to add

a bill of rights. This proved to be a winning approach: ratifying conventions did not have to give up what might be the last best hope for a functional nation, because they could add rights to the document through amendment.

Ratification and Amendment. With ratification by Maryland, South Carolina, and New Hampshire by June, the requisite nine states had approved the Constitution. Virginia and New York ratified during the summer, although the votes were close: 89 to 79 in Virginia, and 30 to 27 in New York. With eleven states on board, the new government was formed. The first Congressional elections were held in late 1788, and the first Congress convened in April 1789. As predicted, George Washington was unanimously elected President by the first Electoral College. The remaining states finally ratified after the new government was up and running: North Carolina in November 1789 and Rhode Island in May 1790. Wary to the end, the Rhode Island convention ratified by a narrow vote of 34 to 32.

Federal Government Under The Constitution (1787) and The Bill of Rights (1791)



The first Congress began the promised amendment process in 1789, culminating in ten amendments ratified in 1791. James Madison, now a representative from Virginia, was in charge of drafting. To deal with the problem that any list of rights would inevitably be incomplete, he proposed the text that became the Ninth Amendment: "The enumeration in this Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Responding to requests for a clearer statement that states remained sovereign in areas not controlled by the supreme federal government, Madison included what became **the Tenth Amendment**: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

When presenting the proposed Bill of Rights to Congress, Madison observed a potential problem: it could be ignored by any majority with enough political power. For Madison, this was a serious problem that could ultimately be prevented only by genuine popular commitment to individual rights.

It may be thought all paper barriers against the power of the community are too weak to be worthy of attention. I am sensible

■ OBSERVATION

THE TENTH AMENDMENT:

Madison told Congress that the Tenth Amendment "may be deemed unnecessary; but there can be no harm in making such a declaration" since the enumeration of federal powers in the original Constitution meant the same thing. Unlike the Articles of Confederation, which said Congress had only those powers "expressly delegated to the United States," the Tenth Amendment omits the word "expressly."

> they are not so strong as to satisfy gentlemen of every description who have seen and examined thoroughly the texture of such a defense; yet, as [written descriptions of protected rights] have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might be otherwise inclined.

Madison's statement echoed a line attributed to Benjamin Franklin at the close of the constitutional convention. Franklin was asked by the Philadelphian Elizabeth Powel what sort of government the convention had designed. "A republic," replied Franklin, "if you can keep it."

E. Is the Written Constitution Complete? *Calder v. Bull*

The United States now had a written constitution. But as seen in the public debate over the need for a national Bill of Rights, questions remained over how complete any written constitution could ever be. Perhaps it omitted important rights or beneficial powers. When unforeseen circumstances arise (as they always do), could a government actually function if it is limited to the contents of a short document written by committee in a single summer?

The question is often framed as a conflict between *positive law* and *natural law*. Positive law refers to rules created by governing officials, nowadays in the form of written codes, statutes, or regulations. Natural law refers to rules that are understood to be beyond the control of mere officeholders. For many religious believers, natural law may be traced to a deity. Non-believers may conceptualize natural law as a set of principles that spring from the legendary social compact, from current or historical social consensus about human rights, or from biological or evolutionary imperatives. Whatever its source, those who adhere to natural law consider it to be superior to positive law.

As 18th-century statesmen, the Framers were entirely comfortable reasoning from natural law, and relying upon truths that were "self-evident." Natural law was often invoked in the debates over independence. Supporters of independence argued that Britain's conduct violated natural law (or phrased alternately, that it violated "the rights of Englishmen"). In addition, the people had a natural law right to resist tyranny with force. Natural law trumped the positive law imposed on the colonies by the mother country, including its laws against treason.

Debates over the proper role for natural law have recurred in one form or another throughout American constitutional history. An early example is *Calder v. Bull*, 3 U.S. 386 (1798), a dispute over a Connecticut statute that retroactively expanded the time available to challenge a probate court ruling. The legal question was whether the statute was an *ex post facto* law forbidden by Art. I, § 10. The US

Supreme Court concluded that it was not. In the process of deciding that question, an illuminating difference of opinion arose in dicta.

The lead opinion of Justice Samuel Chase suggested that state *ex post facto* laws were forbidden not only because of Art. I, § 10, but because of "the very nature of our free Republican governments."

> I cannot subscribe to the omnipotence of a State legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. . . There are acts which the federal, or State, legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established.

■ OBSERVATION

A FEW INSTANCES:
Several of the examples offered by Justice Chase had been used for centuries in British law as examples of legislation that would violate "the law of the land" (the term used in the Magna Carta of 1215) or that are undertaken "without due process of law" (a term in use since the 1300s). See Ch. 18.A.

> An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority. The obligation of a law, in governments established on express compact and on republican principles, must be determined by the nature of the power on which it is founded. **A few instances** will suffice to explain what I mean: a law that punished a citizen for an innocent action, or, in other words, for an act which, when done, was in violation, of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B. It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.

> The genius, the nature, and the spirit, of our State governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private

> property. To maintain that our federal, or State, legislature possesses such powers if they had not been expressly restrained would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.

In contrast, Justice Iredell's concurrence asserted that limits on government arose solely from constitutional text.

> [If] a government, composed of legislative, executive and judicial departments, were established by a constitution which imposed no limits on the legislative power, the consequence would inevitably be that whatever the legislative power chose to enact would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true, that some speculative jurists have held that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any court of justice would possess a power to declare it so. Sir William Blackstone, having put the strong case of an act of Parliament which should authorise a man to try his own cause, explicitly adds, that even in that case, "there is no Court that has power to defeat the intent of the Legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the Legislature, or no."
>
> In order, therefore, to guard against so great an evil, it has been the policy of all the American states, which have individually framed their state constitutions since the revolution, and of the people of the United States, when they framed the federal Constitution, to define with precision the objects of the legislative power and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority but in a clear and urgent case. If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law within the general scope of their constitutional power, the Court cannot pronounce it to be void merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

flashforward

The Future of Natural Law. Justice Chase's approach—a direct appeal to a natural law more powerful than any written constitution—is obsolete. The Supremacy Clause of Art. VI, § 2 declares that the Constitution "shall be the supreme law of the land," not subordinate to anything else, including natural law. The legal realists of the early 20th century, led by Justice Oliver Wendell Holmes, argued in essence that all law is positive law: created, implemented, and changeable by living people. If law is what people say it is, then there is no natural law.

Nonetheless, the rhetoric of natural law still echoes in modern debates about judicial protection for unenumerated rights. Modern-day judges are unlikely to rely on what they consider to be "natural law," but they often note that the text of the Constitution itself indicates that there is to be protection for some unwritten rights. Most prominently, the government is forbidden to deprive people of "liberty" without due process of law. Since "liberty" is not defined, it may be necessary to consider sources outside the text of the Constitution to decide which freedoms count as protected "liberties." Similarly, the Ninth Amendment declares that the enumeration of some rights in the text should not be construed to disparage other (unnamed) rights "retained by the people." See Ch. 19.

Chapter Recap

A. The Constitution was the result of political compromise and intense negotiation.

B. The Constitution was written to create a national government that would be more "energetic" than a mere confederation of sovereign states, and be supreme over them. The new government would take the form of a republic with separation of powers.

C. The states would nonetheless continue to exist as sovereign entities, with power to enact any laws not forbidden by state or federal constitutions. By contrast, the federal government would have power to act only in those areas authorized by the US Constitution. The federal government's enumerated powers did not include a general police power.

D. The Constitution was quickly amended to add a Bill of Rights, enumerating a set of individual rights against abridgment by the federal government.

E. Debate continues over whether the Constitution requires the government to respect unenumerated rights.