



AMERICAN CONSTITUTIONAL HISTORY

A Brief Introduction

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Acknowledgments

Five political scientists and historians have inspired the organization of this book as revealing how the Constitution evolved through a series of republics. None of them have developed the idea of six republics. Bruce Ackerman, who is also a law professor, Stephen Skowronek, Theodore Lowi, Richard Cortner, and Michael Lind have all argued that while the Constitution is virtually unchanged since the ratification of the Bill of Rights in 1791, the document did indeed evolve through distinct periods. I am grateful to them for their observations and analyses, which have informed my own thinking but which also differs from theirs in many respects.

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Prologue

The United States Constitution is the oldest, continuous, national republican document in existence today. It was not the first. Republics, or mixed regimes as they are also known, existed long before the Americans crafted theirs in 1787. Most did not last very long. In the ancient world, the Roman republic collapsed when it degenerated into empire. During the Renaissance, the Florentine republic in Italy survived a mere 14 years, from 1498 to 1512. It dissolved when the powerful Medici family, which had once ruled Florence, re-established a dictatorship. According to the classical republican tradition, republics were fragile political organizations, because the critical balance between the various branches of government could easily crumble when one or two dominated the others. The Americans modeled their constitution on the British government with its one-person executive and two-part legislature. The British failed to create a true republic, because a hereditary monarch led the executive branch and hereditary aristocrats controlled the upper house, the unelected House of Lords. Large landowners controlled the House of Commons and only a few men possessed the right to vote. Americans believed that after separating from the British Empire, they could create a true republican structure where citizens participated in decision-making and enjoyed peaceful transitions of power.

The Constitution created a democratic republic, not a democracy. In a democracy, citizens vote directly on government policies, while in a republic, they elect representatives to develop policies on their behalf. Vestiges of democracy remain in America. They include the New England town meeting when residents directly vote on

issues, such as whether the town should purchase a new police cruiser. The ballot initiative, also called the referendum, exists in over 40 states, allowing voters to make specific policies, such as whether a state should repeal its capital punishment law. Most laws in the United States today, however, are passed by representatives elected by the citizens. This system comprises the republic.

Americans wanted their new government to represent every person, including those ineligible to vote, such as women, making it a democratic republic. The Constitution addresses “persons,” not “citizens” or “voters” when it guarantees a structure, rights, and liberties. It reserves direct elections only for the House of Representatives, because many delegates to the constitutional convention, including James Madison, believed that ordinary citizens failed to have the requisite education, intelligence, or common sense to decide who should be a senator or president. They initially devised a system of indirect election for those offices. The people elected state legislators who then chose US senators, a procedure that changed only in 1913 when the states ratified the Seventeenth Amendment. In presidential elections, the people vote for a special group of people, known as Electors. They alone vote directly for the president. Today, Electors still choose the president.

Since the Constitution’s ratification 225 years ago, Americans have formally added only 27 amendments. Congress still makes the laws, the president enforces them, and the courts interpret their constitutional validity. Formal changes to the document have typically occurred during or just after political or social crises. A few examples will suffice. The first 10 amendments, known collectively as the Bill of Rights, emerged in 1791 as a direct reaction to the Constitution’s ratification process. Many state ratifying conventions made the addition of a bill of rights contingent

on their ratification. They declared that if the first Congress declined to amend the original document to protect basic civil liberties, their ratification vote was void.

The Twelfth Amendment in 1804 resulted from the highly contested 1800 presidential election. The Constitution provided for candidates for president and vice president to run separately for office. The candidate with the highest number of electoral votes became president, the second highest vice president. This arrangement worked in the first three elections, despite the outcome in 1796 when men from different parties became president: John Adams, a Federalist, and vice president, Thomas Jefferson, a Republican. However, when Jefferson ran for president in 1800 with Aaron Burr as his vice presidential running mate, the electoral vote ended in a tie between the two men. The Twelfth Amendment allowed presidential and vice presidential candidates to run together on the same ticket.

The most striking examples materialized during and after the Civil War: the Thirteenth Amendment in 1865 ended slavery; the Fourteenth in 1868 ensured the equal protection of the laws; and the Fifteenth in 1870 guaranteed the right to vote for the newly freed black slaves. The Nineteenth Amendment in 1920 extended the vote to women in national elections, a consequence of many years of contentious advocacy for the right. With the adoption of the Twenty-Second Amendment in 1951, the states created a two-term limit for presidents after Franklin D. Roosevelt won four presidential elections from 1932 to 1944. Years later, the war in Vietnam paved the way for lowering the national voting age to 18.

The Constitution is notoriously difficult to amend. Over the years, members of Congress have proposed tens of thousands of amendments, but few have passed the stringent requirements set out in Article V: two-thirds of

both houses of Congress must approve an amendment or the same two-thirds could call a constitutional convention to propose one, and then three-quarters of the states must ratify it. Among the failed amendments are those guaranteeing equal rights to women, balanced federal budgets, term limits for members of Congress, prayer in the public schools, as well as those outlawing abortion and flag desecration. While 27 amendments have altered several constitutional provisions, the document has in reality changed only 13 times since 1804. The founders modified and tinkered with their work as the new government was becoming settled, first in New York City, then Philadelphia, and finally Washington, DC. The founding generation added the first 12 amendments within 15 years after the document was ratified: the Bill of Rights in 1791; the Eleventh Amendment in 1795, overruling a decision by the Supreme Court to forbid citizens of one state to sue another state; and the Twelfth Amendment in 1804.

While American constitutional history comprises the story of these formal alterations, it is even more an account of informal changes. This is where constitutional interpretation comes in. The wording of the document is vague and imprecise. It demands that people interpret the meaning of its words, like due process of law, equal protection, and cruel and unusual punishments. The First Amendment declares that “Congress shall make no law ... abridging the freedom of speech.” Was it left only to Congress to protect free speech? Did this mean the states could abolish it? What does “no law” mean: literally no law whatsoever, so that free speech is an absolute value that must be protected at all cost? What does “abridge” mean? No universal agreement has ever been reached when it comes to any provision – by the justices of the Supreme Court, the members of Congress, or the president.

This is why it is important to learn how the branches of government have interpreted the Constitution's words and spirit. Numerous informal changes have been due to a president's decisions, especially in military affairs and national security, to Congress in the realm of lawmaking, or to the Supreme Court in deciding cases. Differing interpretative approaches have sometimes been a matter of partisan politics and political ideology, but more importantly it has been the result of competing values among liberals and conservatives in response to various events. When can the president act alone without congressional or judicial oversight? What is the appropriate relationship between the federal and state governments? What is the proper balance between liberty and security in a democratic order? What is the best way to pursue equality? How does religious faith figure in American society and government? These and other questions like them have faced all three branches over the past 225 years.

The president, Congress, and the Supreme Court have all changed the Constitution's meaning as they make public policy. Presidents issue executive orders, sign executive agreements, and claim unilateral authority, especially in matters of national security and military affairs. They have used "signing statements" to set forth their reasons for not enforcing a law even after they have signed it. While Congress may not delegate its authority to another branch of the government, it possesses the authority to change or repeal existing laws. Finally, Supreme Court justices have long held that precedent, known formally as the doctrine of *stare decisis* ("let the decision stand"), is an important principle to ensure legal continuity and stability. They have also held that it is not an inexorable command whenever they overrule earlier decisions. Congress and the states too may overrule Supreme Court decisions by adding a

constitutional amendment to the Constitution as they did when the states adopted the Eleventh Amendment in 1795.

Structure of the Book

The American republic today reflects the constitutional changes that have taken place formally and informally over the past two centuries. It has evolved through a series of clearly identifiable stages. In the new republic, the framers implemented their principles into practice, often tinkering with changes that developed into the first 12 amendments. Overshadowing everything was the institution of slavery, which became increasingly contentious in the republic as the nation hurtled toward division and ultimately civil war. The aftermath of that horrendous struggle, in a period known as Reconstruction, led to new ideas and social movements as the United States entered the industrial age and the world of the free market. Manufacturing and the rise of the railroads contributed to the idea that government must avoid regulation as much as possible. At the same time, a countervailing ideology called for governmental intervention to help wage earners, farmers, and women. These reformers promoted wage and hour laws, unionization, and equal rights for women.

The welfare state took hold in the United States after the Depression of 1929 with President Franklin Roosevelt's New Deal. New national entitlement programs and the drive for legal and social equality were hallmarks of Roosevelt's presidency. They included social security, minimum wage and maximum hour laws, and even the regulation by the US government of local businesses. In the 1950s and 1960s, leaders of the civil rights movement like Dr. Martin Luther King stimulated a reconstituted vision of the Constitution as a guarantor of rights and liberties for minorities, including African-Americans and women. This

struggle, often known as the Second Reconstruction, opened a new debate over affirmative action programs as a means to help minorities enter mainstream society. Others argued affirmative action was reverse discrimination.

The book is divided into five parts, one for each phase of the American republic. These phases are not hardbound and rigid. The new republic was also a slave-owning republic and free market advocates have flourished well into the twenty-first century. Social reformers supported government-sponsored welfare and labor laws during the free market republic, and supporters of civil rights advocated changes in the nineteenth century as they did during the civil rights movement and today. Each of the five parts begins with a summary and a description of the formal constitutional amendments ratified by the states. In addition, readers will find in each part boxed excerpts concerning developments in the Constitution's evolution. The chapters highlight this evolution through three major developments: government regulation of the economy, individual and civil rights, and executive power with or without congressional authorization. A short summary concludes each part. The goal is to help readers understand how the Constitution evolved through formal amendments and informal decisions by the president, the Congress, and the Supreme Court.

Part 1

The New Republic, 1781-1828

The Constitution’s first three articles set forth the structure of the new government with three separate and coequal branches: a Congress, divided into two houses, to make laws; a president to enforce them; and a Supreme Court to interpret them. The structure reflected the classical republican tradition, which envisioned a mixed regime where power was divided to avoid tyranny and to promote a public spirit among the people. The framers’ vision of a republic hearkened back to ancient Greek ideas about political organization. In one of his most celebrated works, *The Politics*, Aristotle, the fourth century BCE philosopher, was concerned with the most practicable rather than the ideal state. He observed that society was naturally divided into three social classes: royalty, nobility, and the common people. In terms of governmental decision-making, this division falls into the categories of the one, the few, and the many. Only one ruler, a king or prince, comes from the royal class, a few from the aristocracy, and many from the people. In government, each class corresponds to a political body organized along these lines:

	<i>Rule by the One</i>	<i>Rule by the Few</i>	<i>Rule by the Many</i>
Society:	Royalty	Nobility	Common People
Government:	Monarchy	Aristocracy	Democracy

To ensure that government represents all three classes, the political structure must guarantee that each has a role in making decisions and setting policy. The mixed regime, or republic, balances the three elements to ensure that

citizens participate in decision-making, if only indirectly through representatives.

Early republics defined citizens as only male property owners and excluded all others. Landowning citizens possessed a stake in society; they were public spirited and had the desire and qualifications to participate in decision-making. No one held office for a long period of time, because when citizens rotate in and out of office they avoid corrupting influences. The great Renaissance theorist Niccolo Machiavelli argued in his *Discourses on Livy* that this public spiritedness promoted virtue (*virtú*), the highest ideal a republican citizen could achieve. Rooted in the Latin *res publica*, the term *republic* literally means the “public thing.” In the eighteenth century, the framers used the word republic, or *res publica*, to refer to the “common good,” the “public good,” or the “good of all.” Three examples from history illustrate the republic and the balance of the mixed regime work in practice: ancient Rome; Renaissance Florence; early modern England. In each, the mixed regime combined all three forms of government. They supplied the republic with what Aristotle and Machiavelli thought was the most practicable way to achieve the common good. The structure followed this scheme:

	<i>The One</i>	<i>The Few</i>	<i>The Many</i>
Rome:	The Consuls	The Senate	The Council
Florence:	<i>Consigliere de justicia</i>	The Senate	The Great Council
England:	The King	House of Lords	House of Commons

While Americans believed that this pattern provided a model, many of them also thought that Britain did not have a true republic because of its hereditary king and nobility.

Six months before the formal break with Britain in 1776, pamphleteer Thomas Paine wrote that its two remaining ancient tyrannies, the king and the Lords, dominated the “new republican materials” in the Commons. “The two first, by being hereditary,” he contended, “are independent of the people; wherefore in a *constitutional sense* they contribute nothing towards the freedom of the state.”

The Americans’ first constitution, the Articles of Confederation, did not follow the historic pattern of the classical republic ([Box 1](#)). Only one branch existed, a Congress, which had no authority to raise revenue. The government also lacked an independent judiciary. After some Americans saw the shortcomings of this scheme, they reconsidered the structure of their republic. After a rancorous debate, they ratified the Constitution, paralleling the ancient Roman Republic and its political heirs:

Box 1 The Articles of Confederation, Agreed to by Congress November 15, 1777; ratified and in force, March 1, 1781, excerpts

Preamble

To all to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting.

Whereas the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the Year of our Lord One Thousand Seven Hundred and Seventy seven, and in the Second Year of the Independence of America, agree to certain articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts-bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, in the words following, viz:

Articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts-bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

Article I. The Stile of this Confederacy shall be "The United States of America."

Article II. 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.

Article III. The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

	<i>The One</i>	<i>The Few</i>	<i>The Many</i>
United States:	The President	The Senate	The House of Representatives

The Congress, with its bicameral legislature, and the president had links to the people through the electoral process, though mostly indirectly. The framers also created an unelected, unaccountable judiciary independent of the other two branches. The judges served terms “during good behavior,” which means they remained in office until they retired, resigned, died, or were removed by Congress through impeachment. Congress could never lower the judges’ compensation to influence their decisions. Americans thus engaged in a political experiment in ratifying a constitution that they hoped would achieve the good of all.

The framers divided power horizontally between the executive, legislative, and judicial branches of the national government in a scheme called the separation of powers. While classical republicanism promoted the separation of powers, the eighteenth-century French theorist, Baron de Montesquieu (1689–1755), strongly advocated it in *The Spirit of the Laws*. The framers were as familiar with

Montesquieu's work as they were with Aristotelian and Machiavellian republican ideas. In Federalist 47, one of the essays designed to inspire the ratification of the new Constitution, James Madison noted that "the oracle who is always consulted and cited on this subject, is the celebrated Montesquieu."

The new American republic also divided power divided vertically between the states and the national government in a structure known as federalism. The states retained the authority to make laws regulating behavior within their own geographic territory. The delegates who signed the Constitution on September 17, 1787, were certain that no one branch of government and no state or federal entity could dominate the others. Divided power ensured that just and fair laws would pass, the president would sign them, and the courts would ensure their constitutionality.

John Locke, Deism, and Religious Liberty

The classical republican tradition and Montesquieu's doctrine of the separation of powers formed part of the principles of the American republic. The influential ideas of John Locke (1632-1704) also contributed to the framers' understanding of government. Locke, an English political philosopher and statesman, provided the rationale for the overthrow of the Stuart monarchy in England in 1688 and the rise of parliamentary supremacy. While very few copies of his *Second Treatise of Government* (1689) turned up in America in the eighteenth century, his views were important to the development of Anglo-American political thought.

Locke posited a genial, pre-government state of nature when human beings mostly lived in peace. The few who

failed to understand the needs and desires of their fellow human beings lived beyond the law of nature as outlaws. Men's responsibility was to destroy those who violated the peaceful state of nature, but this was an inconvenient duty. To overcome these inconveniences, the people entered into a social contract and gave up some of their natural rights in exchange for the security that government offered them. A legitimate government protected the people's possessions and their rights of life, liberty, health, and happiness. Natural rights were thus transformed into civil rights and civil liberties. Locke especially wanted to protect property rights. He developed an early form of the labor theory of value, which maintained that a person had the right to enjoy the fruits of his own labor. Government based on these principles was good.

Locke also set forth a theory concerning revolution. When government became oppressive and deprived its citizens of their civil rights and liberties, it broke the social contract. The people, in turn, have a right to change it, even by force, to create a new contract. The opening lines of the Declaration of Independence reflected this Lockean view of revolution: "When in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation." Jefferson, the principal author of the document, pointed to three of the four rights that Locke had addressed: life, liberty, and the pursuit of happiness. Some commentators have assumed that the latter was a euphemism for "property" or wealth, or at least its pursuit.

The reference to the laws of nature and nature's God in the Declaration reveals Jefferson's religious views. He did not believe in a personal God to whom he could pray for salvation, health, or riches. Like many of the American founders, he was a deist, who believed in Enlightenment reason and science. Deism holds that God exists only as a creator who had instilled free will in human beings. After he created the universe, God relied on men to improve or destroy it. Benjamin Franklin, George Washington, James Madison, and Alexander Hamilton were deists. John Adams was more orthodox in his Christianity.

The idea that God instilled in human beings a longing for freedom was rooted in early American history. It was embodied in the idea that freedom is as much a spiritual condition as it is a political and social one. The Puritan impact on New England colonies was profound. Obedience to state authority, especially to the established church, ensured a moral and righteous citizenry. John Winthrop, the seventeenth-century Puritan minister and governor of Massachusetts Bay Colony, understood this when he was on board ship in 1630 headed to America, the "New Israel." He famously sermonized that "we shall be as a City upon a Hill," or else the Almighty would bring down His wrath. Fifteen years later, he told his flock that natural liberty differed from moral liberty. The former was the liberty "to do evil," whereas the latter was liberty "to do only what is good." To perform good deeds meant that the citizens had to adhere to the officially established church, its dogma, and teachings. Christian liberty demanded that citizens submit to the laws of the secular authority and, consequently, the will of God.

Not all religious leaders followed these precepts. Notably, Winthrop expelled Roger Williams from Massachusetts Bay in 1636 for heresy. Williams, a Baptist, believed in religious liberty. He moved south to found Rhode Island, a new

colony, specifically underscoring the importance of the separation of church and state. William Penn, a Quaker who founded Pennsylvania as “a Holy Experiment” in 1681, mirrored Williams’ beliefs in religious freedom. Penn’s colony was to be a refuge for those seeking political and religious liberty. Quakers became so politically powerful in Pennsylvania that they controlled the colonial legislature until the mid-eighteenth century.

Although principles of religious liberty spread throughout the new American republic, most states, even after the ratification of the First Amendment’s establishment clause, maintained officially established churches, some well into the nineteenth century. In the 1780s, Thomas Jefferson and James Madison fought against the establishment of the Anglican Church in Virginia. Jefferson initially drafted his bill, the Virginia Statute for Religious Freedom, as early as 1777 as a member of the Virginia legislature. It failed to pass until Madison reintroduced it by attacking tax revenues used to support the state-established Church. His powerful arguments in “Memorial and Remonstrance Against Religious Assessments,” published anonymously, underscored the importance of religion as a private affair between man and God within the church and the family. It was not a matter for the public square of politics and government. In 1786, the Virginia assembly passed Jefferson’s bill when he was serving in France as America’s ambassador.

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Ideological Origins of the New Republic

The new republic began in 1781 after the ratification of the Articles of Confederation and continued when the Americans replaced the Articles with the United States Constitution 7 years later. In 1789, the people elected their first federal government. Over the next 15 years, the founding generation made substantive formal changes: in 1791, the states adopted the first 10 amendments, known collectively as the Bill of Rights, followed by two others in 1795 and 1804. The United States doubled its geographic size in 1803 when the Jefferson administration purchased the Louisiana territory from France.

The new republic endured slavery, even as some states began its gradual elimination in the 1780s. Most Americans focused on modifying their new government and its powers while declining to resolve the future of slavery. To avoid contention and disunion, the delegates to the constitutional convention did not address it. The words “slavery” or “slave” appear nowhere in the document. Some abolitionists like Benjamin Franklin – a former slave owner himself – John Adams, Alexander Hamilton, and Benjamin Rush attempted to raise the issue, but their efforts failed. Later leaders like William Lloyd Garrison, who founded the abolitionist paper, *The Liberator*, in 1831 and was co-founder of the Anti-Slavery Society, were active throughout the period. It was not until the end of the Civil War that slavery finally ended.

The period also saw the enhancement of the Supreme Court’s authority when Chief Justice John Marshall issued

his unanimous opinion in *Marbury v. Madison* in 1803. Marshall wrote into the Constitution that the judges' duty was to interpret the document and to overturn all laws that conflicted with that interpretation. New institutions were created, such as the Bank of the United States, and the Court unanimously approved Congress's authority to create it. James Monroe became the first president to issue a signing statement, indicating his ideas of legislation and how he intended to enforce it.

The Articles of Confederation and the Constitutional Convention

Five years after the Continental Congress issued the Declaration of Independence, the states adopted the Articles of Confederation, though Congress had acted from 1776 as if this had already occurred. Because the new government lacked sufficient authority to create a uniform legal system, the states were supreme. The Articles placed all power, limited though it was, in a single-house Congress. There was no separate executive, but only a "president" who chaired a temporary congressional committee when Congress recessed. Nor did the Articles provide for a judiciary. Congress itself was the nation's highest tribunal.

The problems with the Articles lay embedded in one of the main themes outlined in the Declaration. Jefferson ended the document with the resounding words that "these United Colonies are, and of Right ought to be Free and Independent States ... and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish commerce, and to do all other Acts and Things which Independent States may of right do." The use of the term "states" was significant. A state, as the founders understood it, signified a nation of people

organized under one government in a defined territory. Many leaders of the new 13 states believed their states were independent, not only of Britain, but of each other, with the exception of maintaining unity to combat Britain in the Revolutionary War. Accordingly, with the exception of Connecticut and Rhode Island, which simply adopted their existing colonial charters as their new constitutions, each state prepared new documents for internal governance. Because those two states were originally “corporate” colonies, they only had to revise their charters to eliminate British parliamentary supremacy and mandatory review of these laws by British officials in the Privy Council in London.

Other leaders, like Virginia’s Patrick Henry, favored the Articles, because it preferred state supremacy over the new national government. The document amounted to a treaty between the states, an alliance of convenience undertaken due to the war with Britain. Unity was not, however, the goal beyond defeating Britain. “Each state retains its sovereignty, freedom and independence,” the Articles announced, “and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.” The United States Confederation seemed to have an existence only “in Congress assembled.” Without the authority to raise revenue, Congress had to rely on the generosity of the states to send monetary “gifts” to keep the government in operation. Without a national leader, no executive enforced its laws. Without a national judiciary, the states resolved all civil and criminal actions.

Meantime, the states were subject to fierce interstate competition, even potential warfare, over water and mineral rights and boundaries. James Madison, Alexander Hamilton, and George Washington thought that a weak United States made it especially vulnerable to outside

influence, attack, and even conquest. They strove to strengthen the new government when a group of entrepreneurs wanted to open the Potomac River to navigation. To begin the process, Washington invited some Virginia and Maryland citizens to meet at his home at Mount Vernon to find ways to establish better communication between the two states. A representative from Pennsylvania later attended. Madison saw this as an opportunity to discuss the future of the Confederation and persuaded the Virginia legislature to appoint commissioners to meet with their counterparts in Annapolis in September 1786 to address improvements to the United States government.

The attendance at the Annapolis meeting shows how divided the states were. Only five sent representatives: New York, New Jersey, Pennsylvania, Delaware, and Virginia. Four others appointed commissioners, but none attended. Apparently, Maryland, Connecticut, South Carolina, and Georgia were uninterested. After the meeting, Hamilton, who represented New York, drafted a report to the Confederation Congress. He wrote that the commissioners unanimously championed a future meeting of delegates from all the states to strengthen the republic by amending the Articles. Although the Annapolis commissioners were mainly concerned with the breakdown in commercial relationships among the states, Hamilton carefully noted that other problems might also surface. He closed the report with a request to Congress to authorize the states to send delegates to Philadelphia the following May to discuss the matter.

The constitutional convention met 8 months later and throughout the summer of 1787. Congress charged the delegates with reporting all proposed amendments to it. Under the Articles, Congress's acceptance of an amendment required the unanimous consent of the states.

Convention delegates in Philadelphia elected George Washington, the most popular man in America, to preside over the proceedings. Not only was he the hero of the victory over Britain, he was also regarded as America's savior, "the father of his country." Madison took notes every day and rewrote them every night. Franklin served as a delegate from Pennsylvania. Jefferson did not attend: he was serving in France as the American representative or minister. John Adams also was not present: he was the American minister to Britain.

Unlike the Annapolis convention, every state – with the exception of Rhode Island – sent representatives to Philadelphia. As it turned out, Rhode Island became the last state to ratify the Constitution, and then only after the first federal government was already operating. Its ratifying convention adopted the Constitution by a narrow vote of 34 to 32. Some delegates who attended occasionally left, because they were either uninterested or had to attend to their businesses or professional duties. This was true especially of the New York delegation. Two of the three delegates immediately became disillusioned and left. The third, Alexander Hamilton, returned to his law practice in New York City for much of the summer. Once the process began, the delegates decided against proposing amendments to the Articles and instead crafted an entirely new document. Although Congress could have simply rejected it, because the delegates had disregarded their charge to recommend amendments, the members decided to forward the new document to the states for consideration and ratification ([Box 1.1](#)).

Box 1.1 The Constitution of the United States, the first three articles, excerpts

Preamble

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I, Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 8

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; – And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over

those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State...

Article II, Section 1

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector...

Article III, Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

The new Constitution was founded on a series of compromises, especially the longest, Article I, regarding Congress. Two key issues involved the legislative branch. First, the question of how to divide power in a democratic way when the more populous states like Virginia, New York, and Pennsylvania dominated. Delegates from these large states thought representation should be based on population: the Virginia Plan. Smaller states like Maryland, Delaware, and New Jersey, however, possessed far less voting power in terms of population. The New Jersey Resolutions essentially kept the same scheme created by the Articles of Confederation when each state could elect between two and seven delegates but the states all had one vote only. The second issue concerned slavery. Given the prevalence of large slave populations in mostly southern states, the question was whether slaves should be counted in apportioning the House of Representatives. If so, the South would numerically dominate the House and the election of the president, given that electoral voting is based on a combination of the number of senators, two from each state, plus the number of representatives in the House.

To resolve these two main issues, the delegates agreed to major compromises to ensure that the Convention stayed together. If the delegates failed to deal successfully with either one, the Convention could have dissolved. The first compromise concerned the structure of Congress's bicameral legislature. The House, elected every 2 years, represented the people. Each state possessed congressional districts of approximately equal numbers of people. Article I, Section 2, suggests that all the people in the district should be counted, not only registered voters: "Representatives ... shall be apportioned among the several states ... according to their respective numbers." To emphasize this point, when the Fourteenth Amendment was ratified in 1868, Section 2 stated that "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed." These ideas reflected the classical republican ideal that electoral districts should be more or less equal in population or voters and that elections should be frequent. The Senate represented the states, not the people or its voters. Each state was to have two senators no matter its geographic location or population size. Senators sat for 6 years, a long term, but the delegates agreed that the length was necessary for a body theoretically more deliberative than the House. Senate elections were undemocratic, because state assemblies, not the people, elected them, a procedure that lasted until 1913 when the Seventeenth Amendment was ratified. Indirect election of senators reflected most delegates' view of human nature. As Madison famously wrote in Federalist 55, human passions and emotions always trump human reason: "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."