

# American Federal Government

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## 3. An Overview of the American Political System

### Chapter Roadmap

In this chapter you will learn the historical context of the creation of the U.S. Constitution (why it was written, and what concerns shaped what was written in it), the ways in which the Constitution fragments political authority to prevent anyone from exercising too much of it, how the American political system has evolved since 1787, and how the U.S. is both a democracy and a republic.

### 3.1 The Historical Context of the Constitution

Constitutions are not handed down from the heavens, but are the products of groups of humans trying to persuade each other about how to best respond to their current situation and try to create a better future. This is no less true of the U.S. Constitution than the constitution of any other country. The Framers of the Constitution were just humans of varying intelligence, with concerns for their own self-interest and the interests of the particular state they represented, and differing beliefs about how different institutions would work in the real world. So naturally they engaged in a great amount of conflict at the Constitutional Convention. But as they struggled to come to agreement they had two general concerns that shaped the type of government they created: The lack of unity among the states and the history of what they saw as tyrannical government in the colonial era.

#### Disunity in the United States

The concern that drove the effort to create the Constitution was the lack of unity among the so-called “United States.” The union was not a single country, but a confederation of independent states. Remember that a “state,” in the classic sense of the word that Max Weber used, and in the international context of diplomatic recognitions, generally means an independent country. This was the way Thomas Jefferson used it in the Declaration of Independence when he wrote that “these United Colonies are, and of right ought to be, free and independent States,” plural, not singular. The first governing document they created after declaring independence was the Articles of Confederation (sometimes called America’s first constitution), which in Article II declared that “Each state retains its sovereignty, freedom, and independence.” This meant that except for a small number of powers they gave up to the Continental Congress they all acted as sovereign independent states do, and even the most casual observer of politics should recognize that independent states have many conflicts.

Remember from chapter 1 that Alexander Hamilton had written during the Revolutionary War that the political system created by the Articles of Confederation was “neither fit for war, nor peace.” Not only did the not-so-united states have difficulty collaborating on the war effort, but they had continuing conflicts after the war over territorial boundaries and economic relationships between states. There were also threats of rebellions within individual states, most notably Shay’s Rebellion in 1786. [Led by Revolutionary War Captain Daniel Shays, the rebellion was an effort by Massachusetts farmers to stop banks from foreclosing on their properties when agricultural prices were too low to enable the farmers to repay their loans.] These problems, and the likely future of the union dissolving, were addressed by Hamilton in Federalist #6.

[W]hat inducements could the States have, if disunited, to make war upon each other? . . . [P]recisely the same inducements which have, at different times, deluged in blood all the nations in the world. . . .

Territorial disputes have at all times been found one of the most fertile sources of hostility among nations. . . . We have a vast tract of unsettled territory within the boundaries of the

United States. There still are discordant and undecided claims between several of them. . .

The competitions of commerce would be another fruitful source of contention. . . . Each State, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent [which] would naturally lead to outrages, and these to reprisals and wars.<sup>1</sup>

The Continental Congress was not a true legislature. Even if the various state's delegates had regularly shown up it had almost no authority to make laws binding on the states and no authority to enforce them, as there was no executive power. More than a century before Max Weber defined the state, James Madison criticized the Articles of Confederation and came to the same conclusion about the relationship between the state and force.

A sanction is essential to the idea of law, as coercion is to that of Government. The federal system being destitute of both, wants the great vital principles of a Political Cons[ti]tution.<sup>2</sup>

Simply put, the Continental Congress was not a true government and lacked any force to hold the union together.

### Fear of Strong Central Government

Naturally not everyone agreed with this bleak outlook. And some people liked the status quo for exactly the reasons others disliked it: they liked the independence of their own state to run its own affairs. To many people, the idea of a real central government looked like a recreation of the tyrannical power they had just fought a bloody and costly war to escape from. Some states were smaller in population and economically weaker than others, and feared political and economic domination by the bigger states. Much of the drive for a stronger central government was led by the largest state, Virginia, and the state that was most opposed, Rhode Island, was one of the smallest.

In the drive to create a new political system to replace the Articles of Confederation, supporters of change had to figure out how to create a stronger central government without trying to create one so strong that people would simply reject it. They had no power to impose a new system;

they had to negotiate with and persuade others to agree. In all negotiations, if one side refuses, the negotiations fail and the status quo doesn't change, so those who like the status quo have a strong hand, and the really hard work has to be done by those who want change.

Leaders of the effort to create a new constitution, such as Madison and Hamilton, faced this problem at each step. First they had to persuade the leaders of the states that change was necessary. Their first effort at a convention (the Annapolis Convention of 1786) failed. Only five of the thirteen states sent delegates, and the convention's only success was to call for another effort the following year. Madison and Hamilton got the Continental Congress to agree to it, giving the next convention a more official status, and in the interim Shays' led is rebellion, increasing public concern. So in 1787 twelve of the thirteen states sent delegates to Philadelphia (Rhode Island refused) for what was then called the Federal Convention, and is now more commonly called the Constitutional Convention. Then at the convention the delegates battled over whether they could only suggest minor changes or propose a whole new system of government, how much authority that government would have, how much representation each state would have, and how the executive would be chosen and how long they would serve. The convention was no intellectual debating society where wise men calmly drafted an ideal system of government, but a vigorous fight where each delegate fought to protect their own state's interests. In the debate over representation in Congress, a delegate from the small state of Delaware said bluntly to the large state delegates, "'I do not, gentlemen, trust you."<sup>3</sup> Finally, after achieving agreement on a compromise-filled plan of government, they had to persuade the people of the states to ratify it, battling against often fierce opposition. The Constitution that emerged from this process is no ideal handed down from heaven but a very human product, "a patch-work sewn together under the pressure of both time and events."<sup>4</sup>

Although the Framers of the Constitution did not know the term liberal democracy, that is the type of government they created. As Madison described his vision before the convention,

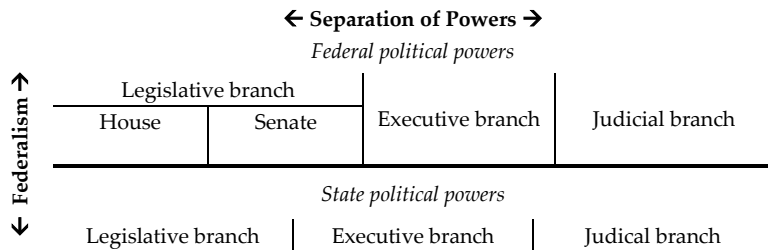
The great desideratum of Government is such a modification of the sovereignty as will render it sufficiently neutral between the different interests and factions, to controul one part of

society from invading the rights of another, and at the same time sufficiently controuled itself from setting up an interest adverse to that of the whole Society."<sup>5</sup>

Ultimate political authority is held by the people, as emphasized by the preamble to the Constitution – “We the people . . . do ordain and establish this Constitution,” and the government is to be restricted from violating the people’s rights.

### 3.2 The Institutional Structure of the Constitution

The political structure created by the Constitution is designed to give the federal government just enough power to manage the states’ collective concerns (such as relations with other countries, both in peace and war) and create a common economic market among them without giving it enough power to interfere in state affairs or violate the rights of the people. Today Americans focus primarily on the Bill of Rights, but it was not part of the Constitution drafted in 1787. The primary method devised by the Framers to limit government was a triple fragmentation of political authority, so that no one person or group of people could control too much power without facing effective opposition. The first level of fragmentation was to transfer only a limited set of political powers from the states to the federal government (federalism); the second level was to split the power given to the federal government among three relatively independent branches (separation of powers), each of which had some ability to obstruct the other branches (checks and balances); and the third level is the division of legislative authority into two legislative houses that have to agree with each other in order to pass legislation (symmetrical bicameralism) (figure 2.1).



James Madison called this structure as a “compound republic,” and described it in Federalist Paper 51.

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments [state and federal], and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

### Federalism

The most fundamental division of political authority in the United States is how power is divided between the state governments and the federal government. Political scientists identify three general political systems: (1) confederal, (2) unitary, and (3) federal (figure 2.2). Under the Articles of Confederation, the thirteen original states had a confederal system, where nearly all political authority was held by the state governments and their people, with very little centralized authority. Confederal systems are uncommon, as the lack of central authority often makes it difficult to hold the members together (as happened with the thirteen original states). Perhaps the closest current example is that of Switzerland, where the individual cantons even control citizenship. In a unitary system the central government holds all or nearly all political authority, and the provinces of the country have very limited independent political authority, or even none at all, sometimes having only authority the central government chooses to allow them (the relationships of American cities to their states is of this type). And in a federal system, both the central government and the respective state (or provincial, or cantonal) governments have significant independent authority. How those particular areas of authority are divided is variable, giving confederations “infinite variety in theory and practice.”<sup>6</sup>

The lines between these categories are vague. For example, whether Switzerland is truly a confederation or just an extreme example of federalism is a judgement call.

The United States is a federal system for a very simple reason. The union of states began as a confederation where each state “retain[ed] its full sovereignty and independence,” and the men who drafted the Constitution each represented their own states. As much as they may have agreed with the need for more central authority, each was unwilling to surrender too much of their own state’s independence. Imagine going back home and having your fellow citizens accuse you of having sold them out, of sacrificing their independence. One of the accusations against supporters of a strong central government was that they wanted a “national” government. Although that word doesn’t shock us today (although it’s at least partly incorrect), in 1787 most people considered their own state their nation, and the union as a collection of nations.

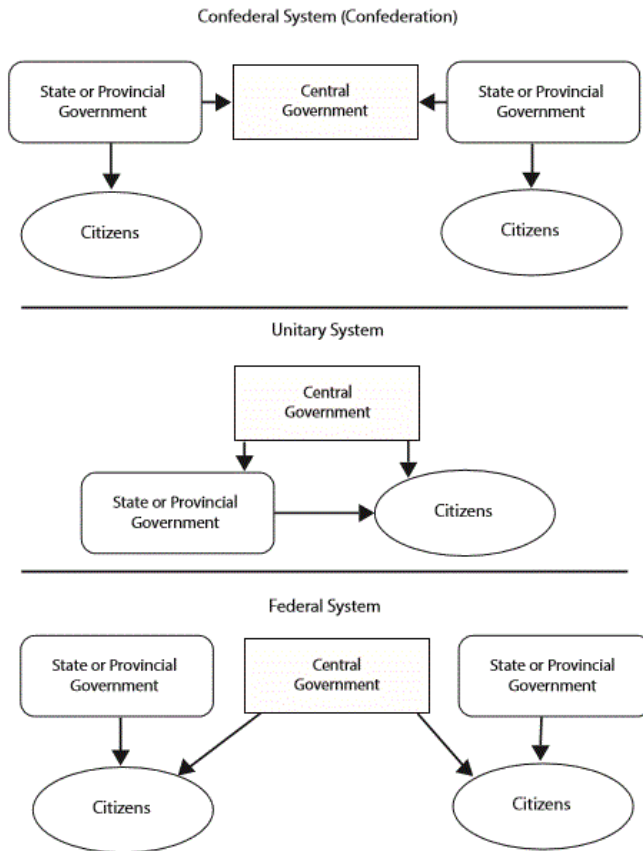


Figure 3.2

The Constitution never uses the word federalism, but the federal structure is created in Article I, sections 8-10. Section 8 gives an enumerated list of powers that the states agreed to delegate to the new federal government, and for this reason we refer to them as both “enumerated powers” and “delegated powers.” Section 9 lists some specific powers that were explicitly forbidden to the federal government. And section 10 lists some specific powers that the states agreed to forbid to themselves (some of which were given to the federal government, and some of which they denied to both state and federal governments (such as the making of ex post facto laws, bills of attainder, or grants of nobility).

That these powers were originally the sovereign powers of the states, that they gave only a limited number of powers to the new federal



government, and that they retained sovereign authority over all powers not delegated (and not surrendered in section 10) seems little understood by most Americans today. But it was stated very clearly by the Supreme Court in 1947.

The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people.<sup>7</sup>

This means that the federal government of the United States is (at least in theory) a government of limited powers, without authority to legislate directly on every issue that may concern people. You can conceptualize this limited set of powers as wrapping around the exterior borders of the U.S., standing between the states and other countries as the sole authority in international affairs, and running between the states along their borders to regulate economic affairs between them, but *not* extending into the states themselves, where authority over nearly all strictly internal matters were retained by the states and not granted to the federal government. There is a limited set of powers that the states delegated to the federal government while keeping themselves. This federal division of specific governmental authorities is pictured in figure 3.3.

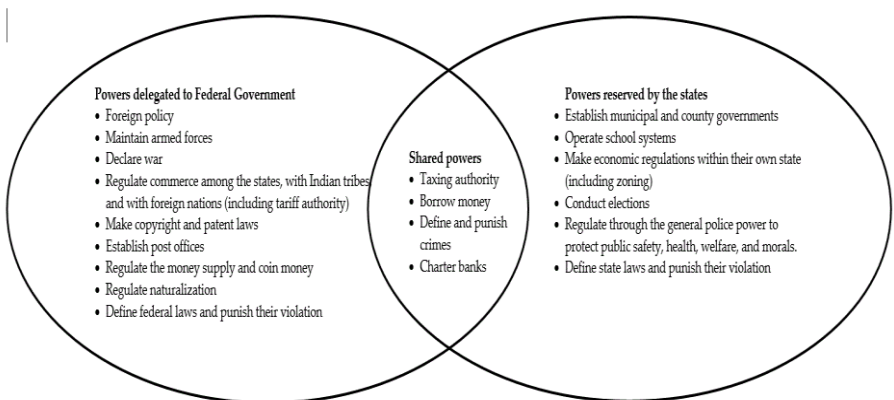


Figure 3.3

Remember that the Framers did not choose federalism because it was understood to be an ideal political system, but because they were entrusted by their states to protect their states' interests, they were suspicious and distrustful of the intentions of other states, and because they had just fought a war to escape from a strong central government. They were not philosophers imagining an ideal political system, but humans responding to the particular political concerns of their era.

As a comparative note, federalism is oddly distributed throughout the world's countries. There are only about twenty-five federal countries out of almost two hundred countries in the world today, with almost all other countries having unitary systems. But despite being unusual there is at least one on every continent, there are both very large ones like the U.S., and tiny ones like St. Kitts and Nevis, and there are both very wealthy ones like Switzerland and very poor ones like Sudan.

### Separation of Powers with Checks and Balances (Separated Institutions Sharing Powers)

After delegating only a limited set of powers that the federal government could legitimately exercise, the Framers split the power of that government into three branches, a legislative branch to exercising the lawmaking powers delegated in Article 1 §8, an executive branch to carry out and enforce those laws, and a judicial branch to resolve legal conflicts arising from those laws.

This separation of powers was intended to prevent any small group of people from making, enforcing, and judging guilt for violation of the laws all on their own. The idea came from the French political theorist Montesquieu (Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, 1689–1755), with whom the leading minds of the revolutionary era were all familiar.

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be

exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.<sup>8</sup>

The plan that Virginia brought to the convention (probably written by James Madison, but introduced by another member of the Virginia delegation and therefore called the Virginia Plan) did not fully separate powers, but proposed to have the legislature select the chief executive (as happens in many parliamentary systems). But opponents of the idea argued that the president would then be dependent on the legislature, unable to act as a check on it, and in the words of one delegate, "usurpation & tyranny on the part of the Legislature will be the consequence."<sup>9</sup> This became one of the most serious debates of the convention. Critics wanted the chief executive to be selected by a vote of the people, which one of the Virginia delegates derided as being like letting a blind man choose colors.<sup>10</sup> The convention ultimately agreed to an electoral college to select the executive, creating separation of powers not through general agreement on the wisdom of it, but as the consequence of a compromise that allowed them to resolve one contentious issue and move forward. Although Madison had supported legislative selection of the executive, when it came to the ratification debates he vigorously argued for the system of separation of powers, paraphrasing Montesquieu and creating a doctrine that, while debatable, has remained a core element of the American political perspective:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.<sup>11</sup>

But while the legislative, executive, and judicial branches are separated from each other, their powers are not actually wholly separate. If there were full separation, the president, for example, might be able to act with impunity, checked only at election time, but uncheckable by either Congress or the courts. So, Madison argued, the branches should not be fully separated, but "so far connected and blended as to give to each a constitutional control over the others."<sup>12</sup> He argued (and it's unlikely that many of his readers disagreed) that power "is of an encroaching nature,"<sup>13</sup> so each branch needed both the "constitutional means and personal

motives”<sup>14</sup> to resist encroachment. The means are the constitutional checks and balances, and the motives are the natural human jealousy for power. “Ambition,” Madison wrote, “must be made to counteract ambition.”<sup>15</sup> The threat of one branch gaining power should cause the other branches to react to protect their own power.

It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.<sup>16</sup>

Presidential scholar Richard Neustadt argued that we are wrong to call this a system of separated powers, when it is really a system of “separated institutions sharing powers”<sup>17</sup> via the checks and balances each branch has over each other. Congress writes bills, but presidents can veto them or sign them into law. President Eisenhower was emphasizing this power when he said “I am part of the legislative process.”<sup>18</sup> Likewise the president can grant pardons, which allows him to step into the judicial process sometimes. The President nominates people to the federal judiciary, but the Senate has authority to approve or reject them. And Congress can impeach presidents and put them on trial in the Senate, a judicial function, but one where the trial judge is the Chief Justice of the Supreme Court, who in that case exercises authority in Congress. And the federal judiciary can declare acts of Congress invalid because they violate the Constitution (a power not explicitly found in the Constitution, but declared by the Court in 1803 and generally accepted today), as well as nullifying actions by the executive branch as either unconstitutional or in violation of the law (see figure 3.4).

So there is separation, but not full separation, of powers. There is some evidence that this was viewed in part as aiding in the effectiveness and efficiency of each branch, particular the executive branch, which in 1787 was expected to have to act quickly on occasion when Congress was not in session and could not be brought into session quickly because of the slowness of communications and travel. But overwhelmingly both critics and defenders of the Constitution emphasized the fear of tyrannical government, and the structure of separated institutions sharing power was

seen as an important internal constraint against the federal government abusing the power delegated to it.

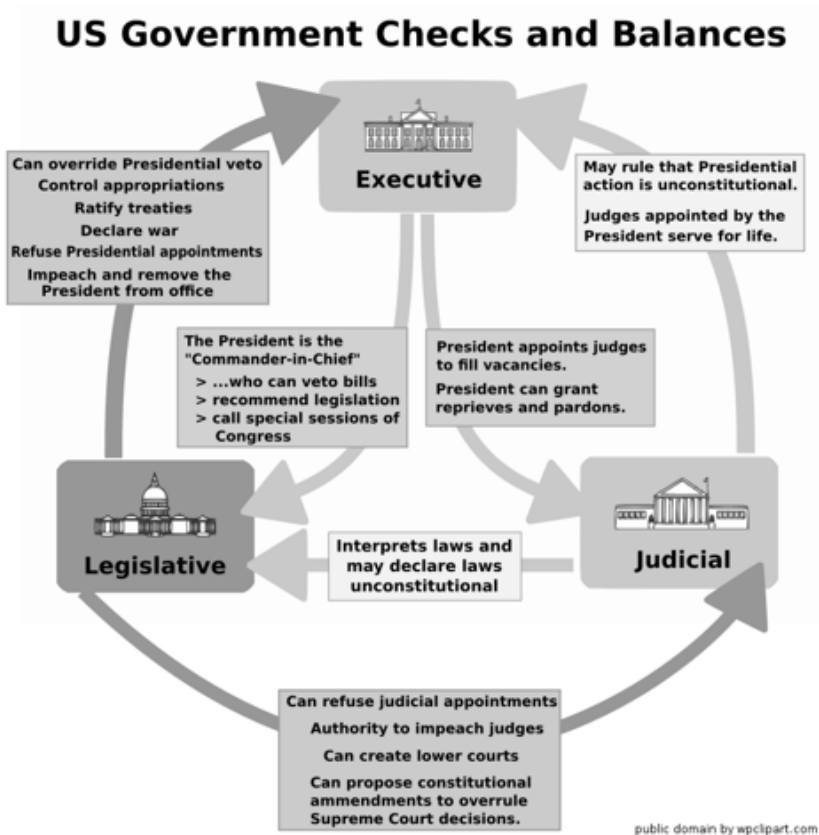


Figure 3.4

### Symmetric Bicameralism

The final division of political authority is the partitioning of the federal legislative authority enumerated in Article 1 §8 into two houses, or chambers of Congress. ("Camera" means chamber, so bicameralism means two chambers.) We will skip over the ferocious convention debates about representation in Congress for now and focus on the political effect of Congressional bicameralism, which is to make it harder to exercise legislative power. If the only purpose in designing a legislature is to make sure it can create legislation, then a unicameral legislature is sufficient. So it is not surprising that slightly more than half the world's democracies have

unicameral legislature. This includes long-standing democracies like Sweden, Denmark, New Zealand, Costa Rica, and Israel. If constitution-makers choose a bicameral legislature they have a choice between asymmetrical bicameralism, where one chamber has dominant lawmaking power, and symmetrical bicameralism, where both chambers have to agree to a law, meaning each can act as a check on the other. Most bicameral legislatures are asymmetrical, including Canada, Germany, Britain, Japan, and the Netherlands. Symmetrical bicameralism is rarer, but in addition to the U.S., Austria, Italy, and Switzerland are notable democracies with symmetric bicameralism.

Because both the House and the Senate in the U.S. have to agree on the precise wording of proposed legislation before they can send it to the President to sign into law, legislation is a difficult process in the U.S. Even if there is agreement in principle, all the details have to be hammered out in negotiations among members of the House, while details are also being hammered out in negotiations among members of the Senate, and then the differences in details each chamber has individually agreed to have to be hammered out in negotiations between representatives from each chamber in a way that will still win majority support from each chamber. All this hammering normally takes a great amount of time, and is not always successful. And that's before we even consider the effects of political parties, which we will pass over in this chapter because they are not mentioned in the Constitution.

Americans complain a lot about the slowness of Congress, and the difficulty of getting legislation passed. But that is not a "failure" of Congress or Congresspersons. It is built into the Constitutional design, so it is, as software designers say, a feature and not a bug. That doesn't mean we have to be happy about it (although if you dislike an active Congress you can be), but it means that if we praise the American system of a symmetrically bicameral legislature and a separate executive and complain about the difficulty of making laws we are contradicting ourselves.

### The Bill of Rights

The United States political system is also characterized by the Bill of Rights, which consists of the first ten amendments to the Constitution. The Framers failed to include a Bill of Rights in their convention work because

they were worn out by the end of the summer of 1787 and it promised to be very contentious work. Alexander Hamilton argued that a Bill of Rights was not even necessary because the government would have only the powers they gave to it, and they were not giving it power to abuse the people's rights. But that was a disingenuous argument intended to prevent the issue from holding up ratification of the Constitution, and few people had faith that the government would not overstep its bounds. The idea of a Bill of Rights came from the founding generation's British political heritage, originating in the Magna Carta, and most of the states' constitutions contained one. Although the failure to include one was innocent, in the political context of the time, when people were concerned that there was a plot to create a powerful government that would destroy their hard-fought liberty, the lack of one appeared suspicious. The primary complaint of opponents of the Constitution was the lack of a Bill of Rights, and even supporters were concerned. Multiple states ratified the Constitution but with a call to add a Bill of Rights.

When the new government began meeting, one of their first items of substantial business (after electing officers and agreeing to rules of procedure) was to consider amendments creating a Bill of Rights. Initially drafted by James Madison, the Congress revised his proposals into a set of twelve amendments that they sent out to the states. Ten of them were ratified quickly, becoming the first ten amendments to the Constitution. (Another one, limiting congressional pay raises, was ratified 202 years later in 1992 as the 27<sup>th</sup> amendment.)

The original body of the Constitution does have a short listing of rights in Article 1 §9, prohibiting ex post facto laws, bills of attainder, and suspension of the writ of habeus corpus except in cases of rebellion or invasion, so it's not entirely accurate to say it contained no bill of rights. But that short listing was not satisfactory to critics, as it did not protect freedoms of religion, speech, and criminal procedure rights, all of which were added in the Bill of Rights.

Although an addition to, rather than an original part of, the Constitution, the Bill of Rights are likely the most influential aspect of the American system (but, again, originating in Britain). Few democracies are federalist, few have as complete a separation of powers (because the chief executive in most is the Prime Minister, the head of the legislature), but most have adopted the idea of a Bill of Rights.

### **3.3 The Evolution of the American Political System**

The Framers drafted a plan of government, but they could not foresee exactly how it would work out, nor would they have expected the Constitution to last this long (they even included in it a process for having a convention to replace it with a new one). Our system today is still in large part their design, but over time all human institutions are, as Scottish philosopher Adam Ferguson wrote only twenty years before the Constitution was written, the result of human action, but not the execution of any human design.<sup>19</sup> The political system we have today is not one that any group of people consciously intended. In this section we will briefly review some of the ways the American system has changed over the nearly two and a half centuries since it came into effect. The purpose here is not to go into depth, but just to show in general how the current system has changed from what the Framers created in 1787.

#### Erosion of Federalism

The U.S. is still a federalist country, with the states retaining certain sovereign political authorities over which the federal government has no authority, but the balance has shifted extensively in favor of the federal government. This has happened in three ways: 1) through direct election of senators; 2) the reinterpretation of the federal government's economic regulation authority; and 3) Congress's power to tax and spend (the power of the purse).

As the Constitution was written, state legislatures appointed their state's U.S. Senators. This meant a Senator's constituency was not directly the people of their state but their state's legislature, giving state governments a strong voice in Congress. State legislators are more attuned than the general public about how federal legislation impinges on states' control of their own internal affairs, and Senators had to be attuned to their concerns. The 17<sup>th</sup> Amendment (1913) shifted selection of Senators to direct election by the people of their states. This shifted the type of concerns to which Senators



had to be responsive, limiting their concern for federal impingement on state issues.

Not long after that Congress's authority to regulate economic matters was greatly increased by the Supreme Court's reinterpretation of the interstate commerce clause. This Article 1 §8 enumerated power gives Congress the authority "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." As originally interpreted, "among the several states" referred to commerce that crossed state lines: for example, if you were moving goods for sale from one state to another. Economic activity occurring solely within a state, like the production of those goods, was almost solely under the regulatory authority of the state in which it occurred.

But this understanding changed when the Great Depression and World War II led to greater demands for federal economic regulation. Congress did pass such legislation, most of which was initially invalidated by the Supreme Court as beyond their constitutional authority. But eventually the Court reinterpreted "commerce among the states" to include any economic activities that substantially "affect interstate commerce."<sup>20</sup> This broader interpretation gave Congress authority to regulate nearly all economic activity that occurs within any particular state. States still retain their own authority to regulate internal economic activity, so today much of business is doubly regulated, by both their state and the federal government.

Finally, in the 20<sup>th</sup> Century Congress also realized that it could use its taxing and spending powers to bribe the states to do its bidding in cases where it did not have direct authority to regulate on a state's internal affairs. By taxing the citizens of the whole country then using that money to fund public policies, Congress presented state governments with a choice: enact the policies Congress wants and get a share of the money or stick to their own policies and pay for everything themselves. This is how a national minimum drinking age of 21 was established. Each state has authority to set its own drinking age, but by federal law they are only eligible for a share of federal road funding if they set their drinking age no lower than 21. Congress uses this financial pressure in a wide variety of policy areas in an effort to establish national policies it does not have the constitutional authority to directly enact.

### Growth in Executive Power

The growth of executive power has been one of the most significant, and to many observers one of the most concerning, changes. Although the President is responsible for putting laws into effect and being the country's sole representative to other countries, in the early days the job was described as being a clerk. The presidency's job was in large part seen as doing what Congress told him to do.

But it was inevitable that Presidents would become policy leaders. First, Congressional leaders have often had difficulty organizing legislators to support policies because each legislator is accountable to their own constituents, not to the leaders in Congress. Presidents are the only ones who can command the whole public's attention, so their vocal support for a policy can sway a legislator's constituents, causing him or her to become more supportive of that policy. Americans today demand that the President be a policy leader, not just a clerk doing Congress's bidding. Any presidential candidate who did not make grandiose promises about their policy goals, but limited themselves to saying they would only follow Congress's lead would get little support.

The federal bureaucracy, which is headed by the President, is also vastly larger today than it was in the beginning, and in addition to enforcing the law they write rules (federal regulations) interpreting the law and specifying how it will be enforced. Congress has learned that it is easier to write vague laws setting general goals and let the federal regulators fill in the details. This has shifted de facto lawmaking power to the executive branch.

Second, the United States has grown from a small country surrounded by the three great powers of the world to being a world power itself. With the President (or their direct agent) being the country's representative to the world, this increased leadership in world affairs has led to an increase in the President's policy leadership. Particularly important here is the President's de facto theft from Congress of the warmaking power. Although the country is not supposed to go to war without Congressional approval, Presidents have learned that they can either force Congressional approval by going to war first then asking for permission or just go to war with or without Congress's approval, and Congress has not yet found a way to effectively reclaim this power.

## Political Parties

The Constitution makes no mention of political parties, and initially formal parties did not exist. But they arose by the third presidential election in 1800, built around existing factions. Today political parties are the most important extra-constitutional element in the American political system. In fact, they are a part of what constitutes the system as much as anything in the formal Constitution itself, and can be said to be “small c” constitution, or part of America’s unwritten constitution.

Liberal democracies probably cannot function without parties to help organize the public and candidates around particular sets of political beliefs. Without them voters are drawn to the most charismatic candidates, who happen to be the ones most likely to become demagogic tyrants. Yet voters at present tend to dislike the political parties more than in the past. As part of the on-going evolution of American politics, an increasing number of citizens refuse to register with either party.

The parties evolve also, realigning from time to time as different issues become more prominent and split apart the existing issue alignments. This happened in the 1820s, shortly after the rise of parties, in the 1850s and ‘60s because slavery, became an issue, in the 1930s because of the Depression, and between the 1960s and 1980s as the Depression era alignments broke up over issues of civil rights, abortion, and economics. Currently (2019) the U.S. likely is in the process of another party realignment, as symbolized by the presidential election of Donald Trump as a very non-traditional type of Republican. The underlying issues are variously argued to be the effects of globalization, an increasing political divide between towns and cities, and the changing demographics of the U.S. Just how it will turn out is unpredictable, but however it does we can be sure these new alignments will also eventually give way to yet another realignment.

## Increased Participation and Legal Equality

The United States also grew more fully into a real liberal democracy. Although the Declaration of Independence resoundingly declares that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness,” it is undeniable that they did not treat all men as equal, nor did they see women as equal to men. But fortunately good ideas are larger than the people who hold them, and not easily kept to the limits of the original

speakers. After the Civil War, the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments banned slavery, prohibited denial of equal rights, and protected the right to vote regardless of ethnicity. Unfortunately, in practice these rights were not always protected, but nearly a century later the 1964 Civil Rights Act and the 1965 Voting Rights Act gave the federal government the power to enforce those constitutional rights against states or cities that violated them. Today there are still battles over just what these amendments mean in practice. In 2016 a North Carolina law eliminating early voting was struck down by the Courts because the state admitted the law was passed because the electoral precincts with early voting were more likely to be predominantly black. But the legislature was majority Republican, and the black voters were overwhelmingly Democrats. So the primary purpose of the law was to try to limit votes for the Democratic party, but the easiest way to do so was to target black Democratic voters.

Women also gained the right to vote, with the 19<sup>th</sup> Amendment in 1920. They had an easier time than racial minorities in getting effective voting rights, but still had to fight for general legal equality. In the 1970s a proposed equal rights amendment specifying that there could be no discrimination based on gender failed to be ratified by enough states, but the Supreme Court has since then generally interpreted the equal protection clause of the 14<sup>th</sup> Amendment to include women.

In summary, while the basic Constitutional structure created in 1787 remains in place more than two hundred years later, there has been substantial change both in the Constitutional text via amendment and in how we interpret the text, all in response to changing political demands over time. While each generation grows up in a particular political and constitutional context that to them seems both fixed-in-place and normal, continuing evolution is a certainty.

### **3.4 Democracy or Republic?**

Politically engaged Americans frequently work themselves up over the question of whether the United States is a democracy (*demos + kratia*: people power/rule) or a republic (*res + publica*: affairs of the public). Sometimes this happens when the majority is upset that it didn't get what it wants, such as when the Supreme Court rules a popular policy unconstitutional, or when a presidential candidate gets a majority of citizens' votes but still loses the

election. At these times the minority is happy to crow “we’re a republic, not a democracy,” (although that doesn’t mean those same people are accepting of outcomes where they’re in the majority and don’t get what they want: people are rarely that consistent in their principles).

The debate is grounded in the founding generation. There is an old story that Benjamin Franklin, who was a delegate to the Constitutional Convention, was asked if they had created a republic or a monarchy, to which he is said to have replied, “A republic, if you can keep it.” And in the Federalist Papers, James Madison responded to critics’ claims that the proposed new government was not democratic enough (compared to some of the states’ political systems) by arguing that a “pure democracy . . . a society consisting of a small number of citizens, who assemble and administer the government in person”<sup>21</sup> is dangerous.

A common passion or interest will, in almost every case, be felt by a majority of the whole . . . and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.<sup>22</sup>

In contrast, Madison argued that a republic, which he defined as “a government in which the scheme of representation takes place,”<sup>23</sup> would prevent factions in part because a greater territory could be governed through representatives than through direct participation of the people, and partly because the representatives people chose would be of superior wisdom and love of justice, and would therefore “refine and enlarge the public views.”<sup>24</sup> (You should notice that Madison is talking about the need for a *liberal* political system, but he did not have the term *liberal democracy* available, which seems to have first appeared in the next decade).<sup>25</sup>

But we should remember that Madison was not writing ideal political theory; he was writing a persuasive essay, trying to convince people to support ratification of the Constitution, and he defined his terms in a way suitable to that end. Traditionally “republic,” simply meant any country that was not a monarchy (which explains why Franklin’s supposed questioner only suggested those two options). And those countries tended to have

representation simply because it was more practical than a pure democracy. And Madison cleverly framed the definition of democracy in his argument by first saying “pure democracy,” then after that dropping the “pure,” and speaking only of democracy, as though he had actually defined all democracies. By doing so, he rhetorically restructured the debate away from concerns about the Constitution not being democratic enough to a concern about the democracy that others wanted, and against which the Constitution was a safeguard.

The democracy that Madison wanted to guard against was the state legislatures that were highly responsive to their local interests, with little regard for other interests in their own state, much less other interests in other states. They also did not see many limits to their authority, and some dominated the executive power to the extent that the legislature was effectively exercising executive power also, violating Montesquieu’s principles. And many were elected on an annual basis, resulting in volatile policymaking that could change directions frequently. Madison wanted more stability in policymaking, a stronger sense of limits to government authority, and consideration for the interests of people throughout the whole union. But notice that these, in his view, overly democratic states, did not meet his definition of “pure: democracy; they were governed by elected representatives. If we take his definitions literally, these states were in fact republics, but we can also recognize that they were democratic in the sense of being very responsive to the public.

So the practice and awareness of representative democracy already existed, even though the term *representative democracy* (like the term *liberal democracy*) seems to have first appeared in print in the 1790s,<sup>26</sup> a few years *after* Madison wrote. John Adams, an independence leader in 1776 and then the second president, used the term “representative democracy” in 1794,<sup>27</sup> and Thomas Jefferson, often a fierce political opponent of Adams, used it in 1815.<sup>28</sup> So even the founding generation described the American system as a type of democracy.

Any distinction between “republic” and “democracy” is more imaginary than substantively meaningful. The Italian city-states of 500 years ago were called republics even they did not govern through representatives.<sup>29</sup> We can also look at how Montesquieu used the terms just a few decades before the American Revolution.

“[A] republican government is that in which the body or only a part of the people is possessed of the supreme power.” . . .

“When the body of the people is possessed of the supreme power, this is called a *democracy*. When the supreme power is lodged in the hands of a part of the people, it is then an *aristocracy*.”<sup>30</sup>

So this influential political theorist (whose writings Madison knew) defined a democracy as a particular type of republic.

Today political scientists generally follow the definition of democracy first clarified by Robert Dahl in the mid-20<sup>th</sup> Century. An ideal democracy has:

1. Equality in voting (one person, one vote that is no greater or lesser in weight than the vote of any other person’s).
2. Effective participation (each person is able to adequately get their concerns on the political agenda and express their preferences).
3. Enlightened understanding (each voter should have opportunity to learn about issues and make their own judgement, which requires freedom of the press and freedom to openly discuss political issues).
4. Final control by the body of voters over the agenda (the *demos* has the authority and effective power to tell their representatives what types of policies they may or may not make).
5. Inclusion (all adults ought to have full rights of participation).<sup>31</sup>

This is almost identical to the first part of the definition of liberal democracy in the previous chapter, because those authors took their definition of democracy from Dahl. It does not mention direct voting on legislation by the people, although it does not exclude it. Of course this is an ideal-type definition, and no democratic country perfectly achieves it, but we distinguish between more democratic and less democratic countries by how close they come to this ideal, not by whether they govern through representatives or not.

The U.S. is a republic because we are not a monarchy and we govern through representatives and the majority does not always get their way because there are checks on the authority and ability of the majority to oppress minorities. The U.S. is a democracy because we have free and fair elections where (nearly all) adult male citizens can vote, the elections are

(mostly) not rigged, and the media and public can freely argue about politics. We are a liberal democracy because we combine those democratic elements with rule-of-law checks on the majority. We are a constitutional country because those rule-of-law checks are written into the Constitution. To cover all the bases, the U.S. might best be described as a *constitutional liberal democratic republic*.

Of course we can continue to debate just how democratic or republican the U.S. should be. Imagine a continuum with pure democracy at one end and what we could call pure republican (all legislators elected by lot, rather than votes) at the other. Constitutions can be written (and revised) to approach more closely to one end or the other, or to seek out the middle ground. The U.S. has since its founding moved more toward the democratic end in several ways: 1) by expanding the right to vote from white propertied men to all adult citizens (although most states still bar anyone with a felony conviction from voting); 2) by taking the selection of Senators out of the hands of state legislatures and giving it to the public; and 3) by doing a better job of protecting the rights of free speech and a free press. At the state level, some states created referendum and initiative systems in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, whereby state legislators can refer a policy to the public for a vote on it or the public can initiate a public vote on a particular policy by collecting enough signatures on a petition.

But the U.S. also remains very republican in that 1) the distribution of electoral college votes among the states determines the presidential winner rather than the popular vote; 2) each state has two senators regardless of its population, so it is not necessarily representative of the national majority; 3) only one-third of the Senate is up for re-election every two years so that it is impossible for an angry public to throw all the bums out; and 4) federal judges have life tenure, are not accountable to the public, and can strike down laws that are supported by the majority.

The U.S. will continue to evolve, as all organizations and systems always do (consider how the rules of your favorite sport have evolved over time, for example), and because different people have different perspectives on what is the ideal political system, this evolution will nearly always be accompanied by fierce debate. The most likely direction of evolution is towards more democracy, as political authority ultimately belongs to the people and majorities of the people tend to see constraints on their political desires as illegitimate. But there are others who would like to reverse the



current course and move back towards a more republican system, for example by repealing the 17<sup>th</sup> Amendment and going back to state legislative selection of Senators. But beneath this struggle is the far more important question: whether the liberal element, the rule of law, in liberal democracy will be retained or destroyed.

## Appendix

Comparison of the Articles of Confederation, the Virginia Plan, and the U.S. Constitution		
Articles of Confederation	Virginia Plan	Constitution
Confederal government	National government	Federal Government
Unicameral Congress (1 house)	Bicameral Congress (2 houses)	Bicameral Congress (House and Senate)
Each state represented equally	States represented proportionally to their population or based on their financial contributions to the government	<b>House:</b> States represented proportional to population <b>Senate:</b> States represented equally
Representatives chosen by state legislatures	Representatives of the first house to be chosen by the people of their respective states; representatives of the second house to be chosen by the first house from people nominated by the state legislatures.	<b>House:</b> Representatives chosen by the people of their state <b>Senate:</b> Senators chosen by their state legislature (changed to election by the people of their state with 17 <sup>th</sup> Amendment)
No power to intervene in state's internal affairs	Right to veto state laws	No power to directly intervene in state's internal affairs
No executive power	A chief executive	A chief Executive (the President)
Congress acted as a supreme court in extraordinary cases	A national judiciary	A national judiciary (the Supreme Court and other national courts as created by Congress)

### What to Take Away from this Chapter (or to be honest, what might you get tested on)

1. Were the United States a single country (state) under the Articles of Confederation or were they 13 independent countries (states) joined in a confederation?
2. Know the difference between a confederation, a unitary state, and a federalist state.
3. Know what conflicts the states had under the Articles of Confederation.

4. Did everyone welcome the replacement of the Articles of Confederation with the new central government created by the Constitution? Why or why not?
5. How are the ways that political power is divided up by the Constitution?
6. What is federalism? What is separation of powers? KNOW THE DIFFERENCE!
7. Know what powers were delegated to the federal government by the states and which powers they reserved for themselves.
8. Know the checks and balances between the three branches of the federal government (and for that matter, know the three branches, because 65% of Americans don't!)
9. Know unicameralism, symmetric bicameralism, and asymmetric bicameralism – which does the U.S. have?
10. What is the Bill of Rights?
11. Know how the American political system has evolved since the Constitution was adopted.
12. Is the U.S. a democracy, a republic, neither, or both?

### **Questions to Discuss and Ponder**

1. Picture yourself as a delegate at the Constitutional Convention, You know there are problems under the Articles of Convention, but you are obligated to look out for your state's interests, and not give away too much of its power. What in the Constitution do you think you would have objected to or had concerns about?
2. The United States is still a federal country, but the federal government has gained in power, bringing it close to being a unitary government. How much independent authority do you think states should have to regulate affairs within their own state? How much national agreement do we need on regulatory issues?
3. What do you think about the democracy vs. republic argument, and the argument made in this chapter? What is your perspective on the issue?

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