

READING 1

The Constitution and Its Key Features

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**Constitutional Law for a
Changing America**
A Short Course

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AN INTRODUCTION TO THE U.S. CONSTITUTION

ACCORDING TO James Madison, “The happy Union of these States is a wonder; their Constitution a miracle; their example the hope of Liberty throughout the world. Woe to the ambition that would meditate the destruction of either.” In a very real sense, the U.S. Constitution is a marvel. It was crafted in an environment of political uncertainty, and its success was by no means certain. Not only has it survived, it has demonstrated its strength, as well, weathering challenges and change that its authors scarcely could have foreseen. Even after two and a quarter centuries, the document remains the foundation for the structure of American government; it is the world’s oldest written constitution.¹ This is especially impressive, given that most constitutions hardly endure for a generation. Since the Constitution was ratified in 1789, national constitutions around the world have lasted an average of only seventeen years.²

In what follows, we provide a brief introduction to the U.S. Constitution—in particular, the circumstances under which it was written, the basic principles underlying it, and some controversies surrounding it. This material may not be new to you, but it is especially important to review, since these concerns frequently frame and inform how the Supreme Court interprets the Constitution.

THE ROAD TO THE U.S. CONSTITUTION

While the fledgling United States was fighting for its independence from England, it was being run (and the war conducted) by the Continental Congress. Although this body had no formal authority, it met in session from 1774 through the end of the war in 1781, establishing itself as a *de facto* government. But it may have been something more than that: About a year into the Revolutionary War, the Continental Congress took steps

¹Technically, the small microstate of San Marino, located completely within the nation of Italy, has the oldest constitution, but it is not a single document. It consists of a series of books that date to 1600.

²Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009).

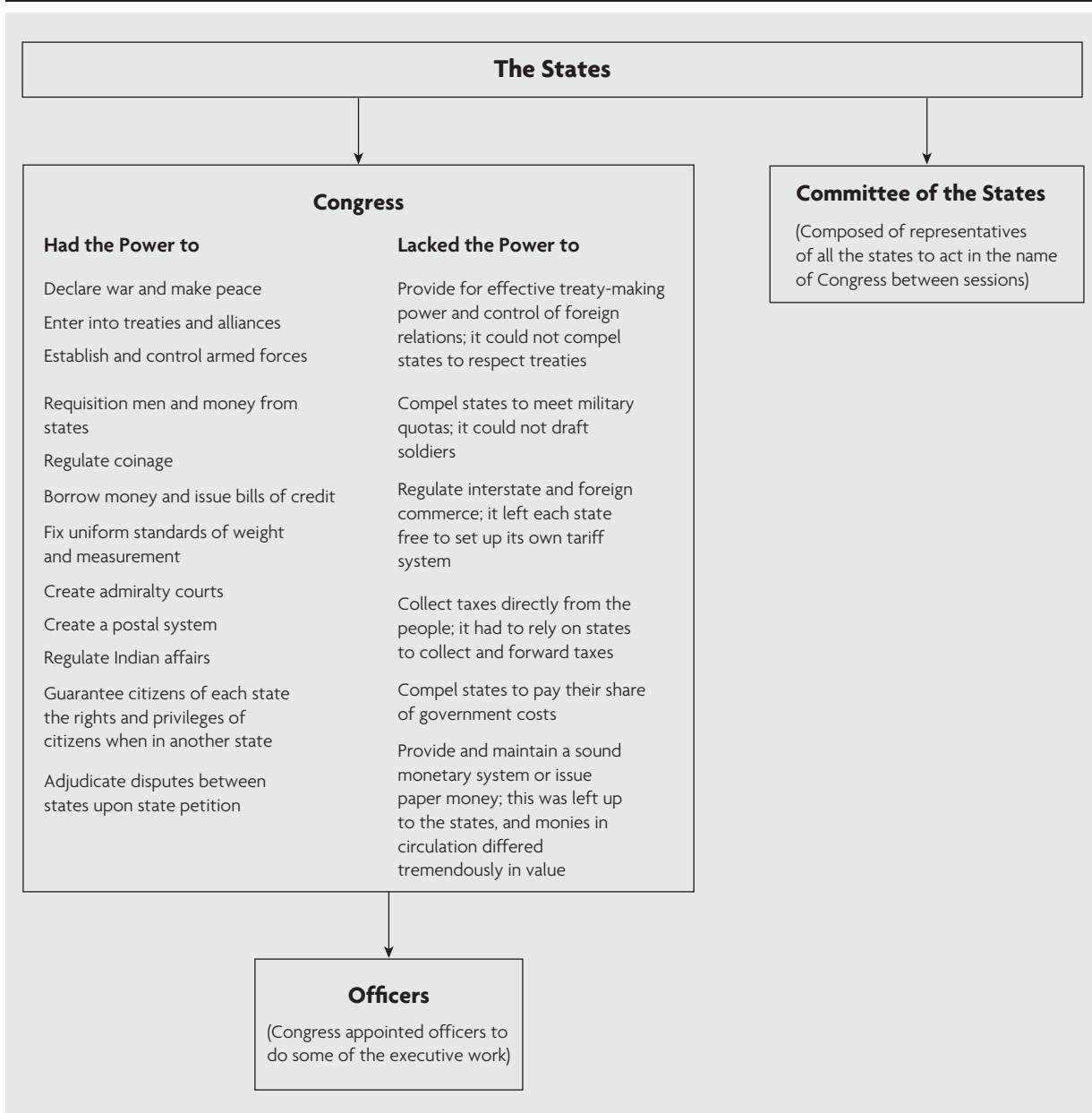
toward nationhood. On July 2, 1776, it passed a resolution declaring the “United Colonies free and independent states.” Two days later, on July 4, it formalized this proclamation in the Declaration of Independence, in which the nation’s founders used the term *United States of America* for the first time.³ But even before the adoption of the Declaration of Independence, the Continental Congress had selected a group of delegates to make recommendations for the formation of a national government. Composed of representatives of each of the thirteen colonies, this committee labored for several months to produce a proposal for a national charter, the Articles of Confederation.⁴ Congress passed the proposal and submitted it to the states for ratification in November 1777. Ratification was achieved in March 1781, when Maryland—a two-year holdout—gave its approval.

The Articles of Confederation, however, had little effect on the way the government operated; instead, the articles more or less institutionalized practices that had developed under the Continental Congress (1774–1781). Rather than provide for a compact between the people and the government, the 1781 charter institutionalized “a league of friendship” among the states, an agreement that rested on strong notions of state sovereignty. Having just fought successfully for independence from what they perceived as “repeated injuries and usurpations” by a distant, overbearing government, they were naturally wary of concentrating power. This is not to suggest that the charter failed to provide for a central government. As is apparent in Figure I-1, which depicts the structure and powers of government under the Articles of Confederation, the articles created a national governing apparatus, however simple and weak. The plan created a one-house legislature, with members appointed as the state legislatures directed, but with no formal federal executive or judiciary. And although the legislature had some power, most notably in foreign affairs, it derived its authority from the states that had created it and not from the people.

³The text of the Declaration of Independence is available at http://avalon.law.yale.edu/18th_century/declare.asp.

⁴The full text of the Articles of Confederation is available at http://avalon.law.yale.edu/18th_century/artconf.asp.

Figure I-1 The Structure and Powers of Government under the Articles of Confederation



Source: Adapted from Steffen W. Schmidt, Mark C. Shelley II, and Barbara A. Bardes, *American Government and Politics Today*, 14th ed. (Boston: Wadsworth, 2008), 42.

The condition of the United States under the Articles of Confederation was less than satisfactory. Analysts have pointed out several weaknesses of the articles, including the following:

- Because it allowed Congress only to requisition funds and not to tax, the federal government was virtually broke. From 1781 to 1783 the national legislature requested \$10 million from the states and received only \$1.5 million. Given the foreign debts the United States had accumulated during the Revolution, this problem was particularly troublesome.
- Because Congress lacked any concrete way to regulate foreign commerce, treaties between the United States and other countries were of limited value. Some European nations (for example, England and Spain) took advantage by imposing restrictions on trade that made it difficult for America to export goods.
- Because the government lacked coercive power over the states, cooperation among them quickly dissipated. The states engaged in trading practices that hurt one another economically. In short, they acted more like thirteen separate countries than a union or even a confederation.
- Because the exercise of most national authority required the approval of nine states and because the passage of amendments required unanimity, the articles stymied Congress. Indeed, given the divisions among the states at the time, the approval of nine states for any action of substance was rare, and the required unanimity for amendment was never obtained.

Nevertheless, the government accomplished some notable objectives during the years the Articles of Confederation were in effect. Most critical among these, it brought the Revolutionary War to a successful end and paved the way for the 1783 Treaty of Paris, which helped make the United States a presence on the international scene. The charter served another important purpose: it prevented the states from going their separate ways until a better system could be put into place.

In the mid-1780s, as the articles' shortcomings were becoming more and more apparent, several dissidents, including James Madison of Virginia and Alexander

Hamilton of New York, held a series of meetings to arouse interest in revising the system of government. At a session in Annapolis in September 1786, they urged the states to send delegations to another meeting scheduled for the following May in Philadelphia. Their plea could not have come at a more opportune time. Just the month before, a former Revolutionary War captain, Daniel Shays, had led disgruntled farmers in an armed rebellion in Massachusetts. They were protesting the poor state of the economy, particularly as it affected farmers.

Shays' Rebellion was suppressed by state forces, but it was seen as yet another sign that the Articles of Confederation needed amending. In February 1787 Congress issued a call for a convention to reevaluate the current national system. It was clear, however, that Congress did not want to scrap the articles; in fact, it stated that the delegates were to meet "for the sole and express purpose of revising the Articles of Confederation."

Despite these words, the convention's fifty-five delegates quickly realized that they would be doing more than "revising" the articles: they would be framing a new charter. We can attribute this change in purpose, at least in part, to the Virginia delegation. When the Virginians arrived in Philadelphia on May 14, the day the convention was supposed to start, only they and the Pennsylvania delegation were there. Although lacking a quorum, the Virginia contingent used the eleven days that elapsed before the rest of the delegates arrived to craft a series of proposals that called for a wholly new government structure composed of a strong three-branch national government empowered to lead the nation.

Known as the Virginia Plan, these proposals were formally introduced to all the delegates on May 29, just four days after the convention began. And although it was the target of a counterproposal submitted by the New Jersey delegation, the Virginia Plan set the tone for the convention. It served as the basis for many of the ensuing debates and, as we shall see, for the Constitution itself (*see Table I-1*). With the delegates now drafting an entirely new charter, they had to consider both the structure of the national government and its relationship to the states. Since the framers reflected competing political ideologies and represented diverse interests from across the states, one might well wonder how they were able to reach consensus—and do so in just four months.

A plausible explanation is that the Constitutional Convention was an assembly of very able men, the generation's leading lights of statecraft. According to historian Melvin I. Urofsky, "Few gatherings in the history of

Table I-1 The Virginia Plan, the New Jersey Plan, and the Constitution

Item	Virginia plan	New Jersey Plan	Constitution
Legislature	Two houses	One house	Two houses
Legislative representation	Both houses based on population	Equal for each state	One house based on population; one house with two votes from each state
Legislative power	Veto authority over state legislation	Authority to levy taxes and regulate commerce	Authority to levy taxes and regulate commerce; authority to compel state compliance with national policies
Executive	Single; elected by legislature for a single term	Plural; removable by majority of state legislatures	Single; chosen by Electoral College; removable by national legislature
Courts	National judiciary elected by legislature	No provision	Supreme Court appointed by executive, confirmed by Senate

this or any other country could boast such a concentration of talent.” And, “despite [the framers’] average age of forty-two [they] had extensive experience in government and were fully conversant with political theories of the Enlightenment.”⁵ That certainly would have been apparent to observers at the time; Thomas Jefferson, who was serving as ambassador to France during the convention, observed that it was “an assembly of demigods.” Indeed, they were an impressive group. Thirty-three had served in the Revolutionary War, forty-two had attended the Continental Congress, and two had signed the Declaration of Independence. Two would go on to serve as U.S. presidents, sixteen as governors, and two as chief justices of the United States.

Nevertheless, some commentators take issue with this rosy portrait of the framers. Because they were a relatively homogeneous lot—white men, well-educated, and affluent—skeptics suggest that the document the framers produced was biased in various ways. This point of view was expressed by historian Charles Beard in *An Economic Interpretation of the Constitution of the United States*, which depicts the framers as self-serving. Beard says the Constitution was an “economic document” devised to protect the “property interests” of those who wrote it.

⁵Melvin I. Urofsky and Paul Finkelman, *A March of Liberty*, 2nd ed. (New York: Oxford University Press, 2002), 94–95.

Various scholars have refuted this view, and Beard’s work, in particular, has been largely negated by other studies.⁶ Still, *by today’s standards*, it is impossible to deny that the original Constitution discriminated on the basis of race and sex or that the framers wrote it in a way that benefited their class. As Justice Thurgood Marshall once observed, the Constitution was “defective from the start”; despite its first words, “We the People,” it excluded “the majority of American citizens” because it left out blacks and women. He further alleged that the framers “could not have imagined, nor would they have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendant of an African slave.”⁷ Over time, of course, Americans have revised the Constitution to make it substantially more egalitarian.

This is not to suggest that controversies surrounding the Constitution no longer exist. To the contrary,

⁶See, for example, Robert E. Brown’s *Charles Beard and the Constitution* (Princeton, NJ: Princeton University Press, 1956). Brown concludes, “[W]e would be doing a grave injustice to the political sagacity of the Founding Fathers if we assumed that property or personal gain was their only motive” (198).

⁷Quoted in *Washington Post*, May 7, 1987. See also Thurgood Marshall, “Reflections on the Bicentennial of the United States Constitution,” *Harvard Law Review* 101 (1987): 1–5.

charges abound that the document has retained an elitist or otherwise biased flavor. Some argue that the amending process is too cumbersome, that it is too slanted toward the will of the majority. Others point to the Supreme Court as the culprit, asserting that its interpretation of the document—particularly at certain points in history—has reinforced the framers’ biases.

Throughout this volume, you will have many opportunities to evaluate these claims. They will be especially evident in cases involving economic liberties—those that ask the Court, in some sense, to adjudicate claims between the privileged and the underdogs in society. For now, let us consider some of the basic features of that controversial document—the U.S. Constitution.

UNDERLYING PRINCIPLES OF THE CONSTITUTION

Table I-1 sets forth the basic proposals considered at the convention and how they got translated into the Constitution. What it does not show are the fundamental principles underlying, but not necessarily explicit in, the Constitution. Three are particularly important: the separation of powers, with checks and balances to govern relations among the branches of national government; federalism, which governs relations between the states and the national government; and the principle of individual rights and liberties, which governs relations between the government and the people.

Separation of Powers with Checks and Balances

One of the fundamental weaknesses of the Articles of Confederation was their failure to establish a strong and authoritative federal government. The articles created a national legislature, but that body had few powers, and those it did have were kept in check by the states. The new U.S. Constitution overcame this deficiency by creating a national government invested with a host of explicit powers and significant authority independent of the states. Despite their desire to invigorate national power, though, the framers were also aware that power could be abused, especially when it was concentrated. One guard against such abuse was to diffuse authority, to divide and disperse it rather than allow it to be centralized. By creating a national government with three branches—the legislature, the executive, and the judiciary—and providing each with its own set of responsibilities, the members of the convention sought to limit the possibility of arbitrary and oppressive policy making.

The framers did not consider the separation of powers sufficient protection, however. As depicted in Figure I-2, they allowed each branch to impose limits on the primary functions of the others through the use of checking powers. Before Congress could enact legislation, it would need the support of the president. The president could not make treaties without supervision from the Senate. If the president, as commander in chief, had designs on entering into foreign conflicts, the Congress retained the power to declare war as well as the fiscal authority to refuse to pay for the executive’s ambitions. The Supreme Court may have been empowered to interpret federal law, but the president and Senate together limit the Court when selecting its members. In addition to these checking powers, the framers included a number of institutional balances: they made each element of the national government responsible to a different constituency and had them all selected on different timetables. This made it unlikely that the national government could be overwhelmed by the prevailing passions of the day.

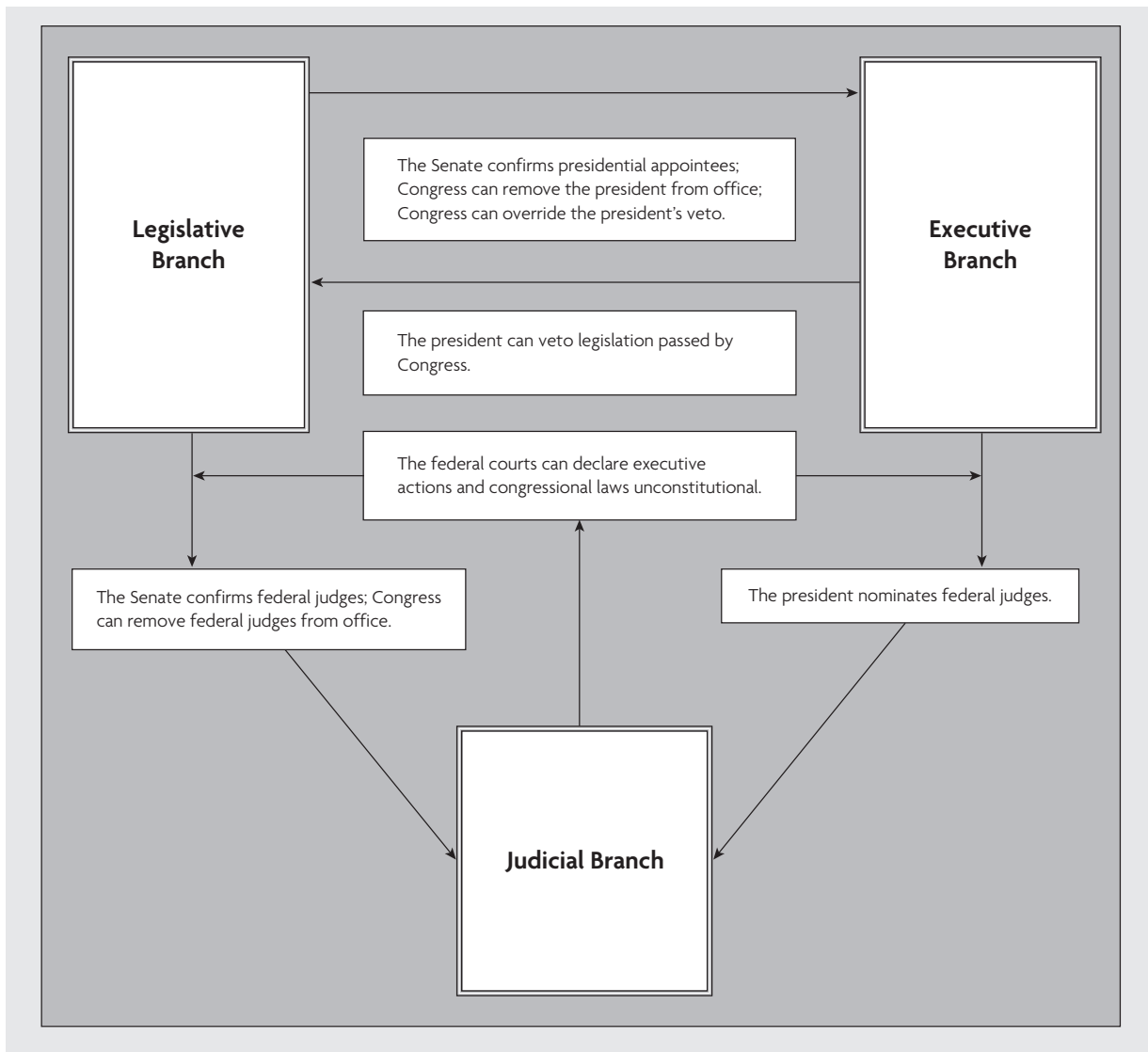
These various institutional designs underscored the framers’ pessimism about human nature. They were realists; as Madison observed, in steering the ship of government, “[e]lightened statesmen will not always be at the helm.” The solution was to craft a government that incorporated their distrust. “Ambition must be made to counteract ambition.”

Federalism

Another flaw in the Articles of Confederation was how the document envisioned the relationship between the national government and the states. As already noted, the Congress under the articles was not just weak—it was more or less an apparatus controlled by the states. Remember that, only a few years earlier, most Americans thought of themselves as residents of British colonies—the Connecticut Colony, the Delaware Colony, the Colony of Virginia, and so on. Now they were independent states, and their citizens did not necessarily have a “national” consciousness. The Articles of Confederation reflected that view; the states were the center of political life.

Some of the delegates at the convention—most notably, Alexander Hamilton—greatly preferred national power over state authority and proposed to place there as much control as possible. Under the articles, states had often pursued their own particular interests, attempting to raise revenue by charging tariffs on goods passing across their borders. These “rival, conflicting, and angry regulations,” as Madison called them, hindered national economic growth.

Figure I-2 The Separation of Powers/Checks and Balances System: Some Examples



Other delegates, by contrast, were quite worried about ceding any power to a new national government. After all, the states were sovereign entities. Skeptical of national authority, they believed that a republican government worked best on a localized level, where policy makers were more likely to be attuned to the needs and desires of those whom they represented. Fortunately, the framers were familiar with the political philosophies of Enlightenment thinkers, and one of the most prominent was Montesquieu. This French

lawyer had written an influential book on democratic theory, *The Spirit of the Laws*, and it contained a number of ideas that appealed to the framers. Most notably, he proposed what he called a “confederate republic,” a government that was composed of *both* a national government limited by the separation of powers and smaller individual governments. By his logic, the national government would provide strength and protect the nation in foreign affairs and the smaller, local governments could better reflect the

interests of the people in crafting domestic policy. Although the delegates modified the specifics of Montesquieu's plan, they adopted its broad principles. Thus, federalism became a key element of the framers' design, one that was meant to appeal to both sides of the debate over national versus state power.

Under this framework, the states agreed to relinquish only some of their sovereignty. The national government would be one of limited authority, restricted to exercising only those powers that were enumerated in the Constitution. Although the Constitution and the laws written by Congress were to be "the supreme law of the land," the states retained all of the remaining power.

This strategy both enlarged and limited the power of the national government, but the Constitution still left unanswered many questions about federal-state relations. For example, would the national government be empowered to exercise other, non-explicit powers in order to carry out its explicit obligations? What would happen if Congress, in exercising one of its explicit powers, regulated something that might have been reserved to the states? Could states judge for themselves the meaning of national law? As you will see, the Supreme Court has played a prominent role in defining the boundaries of federal and state power by answering these questions. In so doing, it has helped shape the contours of American federalism.

Individual Rights and Liberties

The Constitutional Convention was called in response to conditions resulting from the ineffectiveness of government under the Articles of Confederation. For that reason, most of the efforts in Philadelphia were focused on the creation of a new governmental structure, with careful attention given to the powers the national government could wield and appropriate limitations to be placed on those powers. The document that emerged from the convention reflected that emphasis.

The prominence of issues of governmental powers and structure, however, did not mean that the framers had forgotten the purposes of the Revolution. The war for independence had ended only a few years before the convention met. The values of individual liberty and freedom, over which the war was fought, were still fresh in the framers' minds. There is no doubt that safeguarding those rights remained a high priority. In fact, records of the debates indicate that some of the delegates offered specific guarantees of individual rights. George Mason, Charles Pinckney, and Edmund Randolph, for example, all proposed to enumerate rights in the Constitution,

but their efforts could muster no support.⁸ Mason, the author of the Virginia Declaration of Rights, refused to sign the Constitution because it failed to include explicit limits on the powers of the national government.

It is therefore a puzzle to many that the Constitution drafted in Philadelphia had only scant references to individual rights and liberties. Other than prohibiting government from passing *ex post facto* laws or bills of attainder—that is, laws that punish retroactively or legislative declarations that convict and punish—the framers included no explicit limitations. How could such a fundamental governing document produced by those who had led the nation to its independence fail to include a systematic statement of basic freedoms?

One explanation is that the central concern of the convention was increasing, not decreasing, the authority of the national government. In light of the failures of the Articles of Confederation, creating a government that had ample power to stabilize the economy and stimulate growth was the highest priority. There was no immediate civil liberties crisis; oppressive English rule had been overthrown. Moreover, the states all had their own bills of rights that protected individual liberties.

Another reason, according to some of the framers, was that the Constitution itself served to limit the power of the national government. Hamilton and Madison, for instance, pointed out that the national government was one of limited powers, granted by the states. By enumerating power—by explicitly stating what Congress *may* do—the Constitution, in fact, protected rights—by implicitly stating what Congress *may not* do. Not only that, Madison believed that abuses of individual rights were much more likely to take place at the state level, where local populations were more homogenous and thus more likely to be intolerant of political minorities. If national power was to be feared, he was optimistic that the checks and limitations the framers imposed would be sufficient to block abuses of personal liberty.

In addition, there was a more practical problem facing the delegates. By the time the convention had resolved matters of governmental structure and power, the delegates understandably were exhausted. Leaving behind their personal businesses and occupations, they had spent May through September confined together in a hot and humid room, engaged in intense debates and

⁸This information comes from Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution*, 2nd ed. (St. Paul, MN: Thomson/West, 2005), 316–317. This book reprints verbatim debates over the Constitution and Bill of Rights.

negotiations. The prospect of spending additional time attempting to resolve questions of what liberties should be included in a bill of rights and how those rights should be stated was not an attractive one. Yet the question of a bill of rights would not go away. Once the states set about debating ratification of the proposed Constitution, one of the primary complaints was that it lacked a bill of rights. Many argued that despite the various restraints on governmental power placed in the document, the new government would have the potential to become a very powerful institution, and one that would be quite capable of depriving the people of their freedoms. This argument was particularly persuasive, and consequently

ratification was placed in jeopardy. In response, supporters of the Constitution began to suggest a compromise: if the Constitution was ratified, one of the new government's first orders of business would be the drafting of a bill of rights to be added to the Constitution. That compromise took the form of the first ten amendments to the Constitution—the Bill of Rights. Since the ratification of the Bill of Rights, on December 15, 1791, those basic principles of the Constitution—separation of powers, federalism, and individual liberties and rights—have remained the defining features of American government.