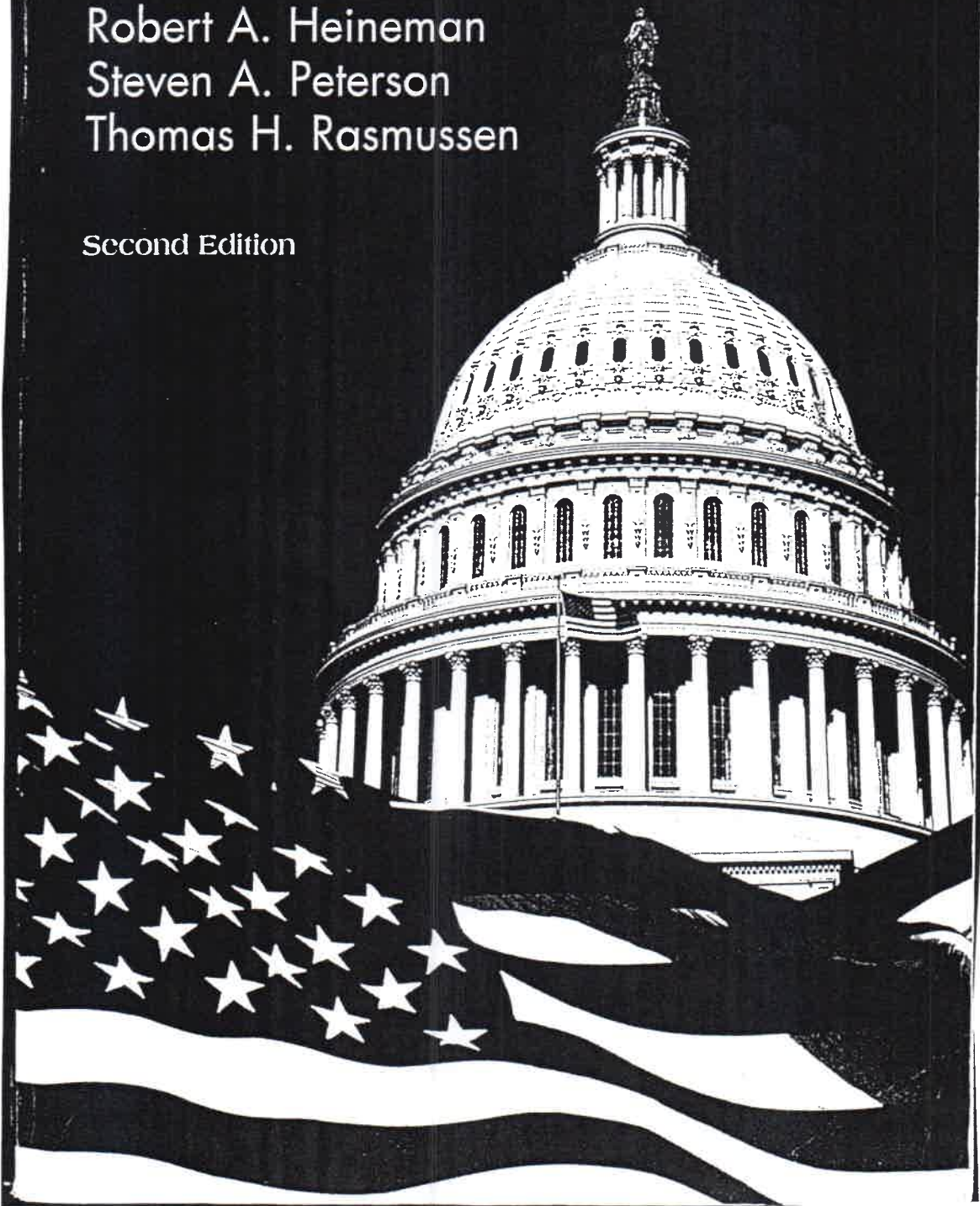


American Government

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Second Edition



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CHAPTER 2

The Founding Fathers

Time Line

1690	John Locke's <i>Second Treatise of Civil Government</i> is published
1700s	Commonwealthmen (radical Whig) writing catches on in the colonies, heightening suspicion of the English government
1773	Tea Tax is levied
1774	First Continental Congress
1776	Declaration of Independence
1781	Articles of Confederation approved
1787	Constitutional Convention is held in Philadelphia
1789	The first year of government under the United States Constitution

In 1787, fifty-five distinguished Americans met in Philadelphia to draft the Constitution, a document which has served the United States for 200 years.

The Founding Fathers were influenced by European debates over the nature of government, by the evolution of parliamentary sovereignty in England, and by their own political experience in the thirteen colonies. The Constitution was the product of heated debate about the proper relationship between people and their government. This chapter presents some of the central issues, summarizes the contents of the Constitution, and offers several interpretations of the Founding Fathers' motives.

Background of the New Republic

To understand the origins of the United States Constitution, one must go back in time from 1787 and consider the European political debates over the nature of government and the relationship between the people and their government. One also must look at the English experience and, even more, at the Americans' interpretations of the English "constitution." Finally, one must take into account the political forms with which the Americans were most familiar: how the colonies and then the states were governed. A brief consideration of these subjects makes the debates in the Constitutional Convention in Philadelphia more comprehensible. So, too, does such an examination render more clearly the disputes between the Federalists (those who supported the proposed Constitution after the 1787 Convention) and the anti-Federalists (those who disagreed with the proposed Constitution). At the outset, it is critical to note that a key issue in the enterprise is the relationship between the people and their government. The proper nature of representation lies at the root of the debate over the Constitution.

Some scholars who study the Constitution believe that great philosophical ideas governed the formulation of that document. Others view the Founding Fathers in Philadelphia as representing narrow economic interests. Were the gentlemen who gathered in Philadelphia an assembly of "demigods," as argued by Thomas Jefferson? Were they a narrow elite defending their personal-property interests, as historian Charles Beard has alleged? Or were they hardworking, pragmatic democratic politicians, as John Roche has asserted? None of these portrayals is accurate standing alone. As this chapter develops, questions such as these will be addressed in an attempt to provide a deeper understanding of the founding of the United States of America under the Constitution.

European Political Thought

A long tradition asserts that people should have a significant role in their own governance. As early as Aristotle's *Politics*, one can find an argument in favor of democracy as the practically (although not ideally) most virtuous

form of government. Marsiglio of Padua (1280–1343), in his *Defensor Pacis*, asserted:

The legislator, or prime and proper cause of law, is the people or body of citizens, or *its more weighty part* [emphasis is by the authors]. . . . The more weighty part, I say, takes into consideration the number and quality of persons in that community for which the law is enacted.

The part of this quotation with emphasis added has been seized upon by some political thinkers as an early argument for majority rule.

In 1579, French dissenters published the *Vindiciae contra Tyrannos*, which contended that the king is in fact a representative of the people and draws his power from them. The *Vindiciae*, at one point, says:

In a commonwealth, commonly compared to a ship, the king holds the place of pilot, the people in general are owners of the vessel, obeying the pilot, whilst he is careful of the public good; as though this pilot neither is nor ought to be esteemed other than servant to the public.

These various sources all emphasize one singular point—the citizenry, in some form, is sovereign, whether through direct democracy or through some form of representation.

Locke

One idea accepted by some of the leading figures in the Constitutional Convention was that political society represented a kind of social contract in which, at some point, citizens had consented to live under a certain political structure. A theorist commonly deemed important for the American Revolution and the Constitution because of his social-contract theory of government is John Locke. He is sometimes referred to as the "philosopher of the American Revolution," a title that would no doubt have dismayed him. Locke began by assuming that before people entered civil society, they had lived in a state of nature. Life in that environment was not totally unpleasant. However, inconveniences existed. For instance, if two people disagreed over a matter, how was the issue to be resolved? Without any authoritative source of decision making, such as government, resolution of such disputes would be uncertain.

As a result of the inconveniences of life in the state of nature, people created a social contract by which they called into being civil society; once this society was formed, the people then further contracted to create government. Government acted to protect people's liberties—especially the right to property. Each citizen was viewed as the recipient of a set of natural rights owed to that person by the mere fact that the individual was human. Government, as Locke is normally understood, is to be limited so that it does not infringe

each city, and two representatives from each borough. The summons given to the bishops by the king included the phrase “What touches all should be agreed by all.” Those attending the parliament were to have full and sufficient authority to act on behalf of those whom they represented.

By 1603, practically, the consent of a now official Parliament was necessary for the king to act. Its role was to advise and consent. Early on, then, representation was deemed vital in England to justify raising revenues for government. Indeed, “taxation without representation” was considered inappropriate. As time went on, the representatives came to have greater input into a wider variety of policies, such as responses to personal petitions from individuals, settling grievances, and deciding on administrative and broader policy matters. By 1688, with the “Glorious Revolution,” Parliament had for all intents and purposes become the central actor in English politics. For a long time, then, some form of representation in a legislative body was part of the governing process in England. This long heritage was part of the background of the colonists in the new world at the time of the American Revolution and, later, at the Constitutional Convention.

The Americans found key elements in the unwritten English “constitution”:

1. Meaningful representation—by which English citizens had at least an indirect role in government.
2. Limited government—the sense that leaders could not exercise power in tyrannical fashion, the belief that there were real limits on what governments could do.
3. The primacy of the common law—which would protect individuals from arbitrary government power (recall Harrington’s claim that governments should be empires of law and not of men).

The Colonial Experience

Two features of the colonists’ experience are especially important to understand in the rush toward revolution and, later, in the debate over the proposed Constitution in 1787: the influence of the English radical thinkers and the colonial political and social structure.

The English Radical Whigs

As to the first, it seems clear that the so-called radical Whigs or Commonwealthmen in England were widely read and appreciated by the colonists—much more so than in the writers’ home country. The key point raised by these thinkers was that there was a conspiracy afoot in England to

destroy the English “constitution.” With this destruction would come tyranny and repression, the end of the freedoms so closely associated with England at that time. The culprits were those political leaders (and opposing factions) who were trying to enhance their power and fortune. Robert Walpole, a prime minister of the period, was singled out for criticism by the radical press during his administration (1721–1742).

The Political Structure of the Colonies

The experiences of the colonists with their own political institutions tended to reinforce the near paranoia nurtured by the Whigs. In pre-revolutionary America, the legislature (especially the lower house) was often set against the governor, who was appointed in England. The crown governors had great powers on paper (such as a veto over colonial legislation, the power to dissolve the lower house in a colony, and authority to appoint or dismiss judges). At the same time, the colonial assemblies held the power of the purse, that is, the right to raise revenues for government functions. This created a great weapon against the governors, who had to bargain with the colonists’ representatives for funding.

The result was tension and conflict. The colonists interpreted conflict in terms of the writings of the radical Whigs. As such, the colonists were convinced that the conflict proved that the governors and their superiors in England were trying to abridge the colonists’ freedoms. The colonists responded by placing greater faith in their representatives, especially in the lower houses of the colonial assemblies. First, they advocated and were successful in increasing the number of representatives as new towns developed. This increased the degree to which colonists’ views were presented in the assemblies. Second, to prevent governors from using corrupt means, such as bribery, to get cooperation from representatives, colonists adopted the technique of “instruction.” The people of a town, in essence, *instructed* their representatives how they should vote on matters before the assemblies. This made it difficult for governors to control the representatives. Thus Americans developed confidence in the representative legislature as a bulwark of freedom.²

Whom did the leading thinkers in the colonies most look to when they debated their future course of action? Locke and Enlightenment thinkers as well as radical Whigs were cited frequently in the debate over independence. However, in political pamphlets published from 1760 until 1805, a period which embraces the Revolution, the Declaration of Independence, and the Constitution, Montesquieu was most cited, followed by Blackstone (a chronicler of the English common law). Well behind in total number of citations were Locke, Hume, Plutarch, Trenchard and Gordon, Pufendorf, and Cicero, to mention some of the better-known names.

In addition, the Bible was, far and away, the single most cited source (as opposed to individual political thinkers). In the 1780s, the decade in which the Constitution was authored, the Bible was the most cited general source; Enlightenment thinkers were second and Whigs third, although the Bible was not cited much from 1787 to 1788 during the debates surrounding the Constitution.³

The Social Structure of the Colonies

Historian Jackson Turner Main has examined financial records of the Revolutionary period to ascertain what the social structure was across the thirteen colonies.⁴ He contends that several clearly defined classes emerge. First, between one-third and two-fifths of the men were in a lower class. These numbers include black slaves, white servants, and landless laborers hired by property owners. Those in the lower classes had little income or wealth. Nonetheless, most of their needs were met, and there were good prospects for white lower-class individuals to advance into a “middling” range.

The middle class was predominantly made up of small farmers, artisans, and professionals (doctors, ministers, teachers). Members of this class generally lived comfortably. The vast bulk of white men (70 percent) can be placed here. Finally, there was an upper class (perhaps 10 percent of the white male population), composed of large landowners, commercial traders, and very successful professionals. The upper class lived very well. It was more difficult to move from “middling” status to becoming one of the “better sort” than it was to progress from the lower class to the middle class. The 10 percent in the upper class probably accounted for 50 percent of the income received by individuals in the colonies.

While there seems to have been movement toward greater inequality before the Revolution, the War for Independence apparently halted this trend momentarily. Main says that

the consequences are to be seen particularly in the greater ease with which men could enter the urban elite, the rising standard of living especially among farmers, the declining significance of titles . . . and the comparable democratization of the officer class. All of these were much more pronounced in the North.⁵

Revolution and Confederation

The Declaration of Independence

The conflicts between governors and legislatures fed the distrust reinforced by the ideas of the radical English thinkers. Add to this the series of taxation measures imposed on the colonies after the French and Indian War

(1754–1763), and we begin to see the serious move toward independence. However, the colonies did not demand complete independence right away; they drifted toward it through several stages.

The first response to the perception that England was overstepping its bounds was the claim that the colonies ought to be represented in the English Parliament. Benjamin Franklin argued that if the colonies were granted an equitable delegation in Parliament, the result would be a relaxation of tension and, in fact, a stronger bond between the colonies and the mother country. However, passage of the Stamp Act, a direct tax on all colonial transactions, prodded colonial leaders to abandon this position.

The second phase was development of the claim that there was a difference between external and internal taxation. External taxation meant that Parliament could regulate trade among the different colonies of the empire, including the American colonies. However, internal taxation, that is, direct taxes levied against the colonies and their inhabitants, could be authorized only by the colonial legislatures, not by Parliament. After the 1773 Tea Tax was enacted, this phase ended.

Finally, the colonists drew on the philosophical view that all humans possess certain rights that cannot be trampled on by the government. James Wilson, one of the leading legal minds in the colonies, said:

All men are, by nature, equal and free: no one has a right to any authority over another without his consent: all lawful government is founded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is, that the happiness of the society is the first law of every government.⁶

This was a potentially explosive doctrine, for if colonists came to see England as violating their basic rights, revolution could be easily justified.

England took stricter action still against the colonies, including efforts by the English military to seize the munitions of the colonial militia outside Boston. The battles of Lexington and Concord led to the final break. By the summer of 1776, the decision to declare independence was made by the Second Continental Congress. On June 7, Richard Henry Lee of Virginia introduced the motion that “these United Colonies are, and of right ought to be, free and independent states.” To draw up a justification for independence, the Second Continental Congress appointed a committee of John Adams, Benjamin Franklin, Thomas Jefferson, Robert Livingston, and Roger Sherman.

On July 4, 1776, the Second Continental Congress formally adopted this Declaration of Independence, authored largely by Jefferson. The introduction

to this document was theoretical; the remainder of the Declaration was a recitation of the allegedly wicked acts of King George III that led the colonists to break with England.

The first two substantive paragraphs summarize a belief in people's basic rights ("life, liberty, and the pursuit of happiness"). They also claim that if government fails to protect these, the people have the right to revolt against it and create a new government. Jefferson's ideas bear a considerable resemblance to Locke's theory. Whether or not the Declaration of Independence is a common restatement of Locke or, more generally, of the Enlightenment (there is debate over this matter), its major points were considered the common sense of the matter.⁷

After independence was declared, the states began to draw up new constitutions. For the most part, these provided for legislative dominance, since these representative bodies were seen as protectors of the people's rights and instruments for carrying out the citizens' will.

The Articles of Confederation

The Second Continental Congress assigned a committee the task of drawing up a structure for the national government in 1776. In 1777, the Congress agreed to the Articles of Confederation. This first American constitution needed to be approved by all thirteen states. The last, Maryland, ratified the Articles in 1781. The name of the new government was to be the United States of America. The document allowed each side to retain "its sovereignty, freedom and independence."

The major institution of government was the national Congress. Each state had one vote—all were equally represented, although each state could send between two and seven delegates. The major difficulty of governing the country under the Articles of Confederation was the weakness of the central government. For instance, the Congress could request revenues from the states to fund national programs, but sometimes the states simply did not comply. Moreover, routinely, the states did not provide the amount called for. Hence the very basic ability of the national government to fund its activities was subject to the willingness of the states to pay their share. There also was such distrust of a standing national army that the military force of the United States was extraordinarily weak. As a result, British forts continued to operate within the territorial boundaries of the new nation after the peace treaty with England was concluded. Further limiting the central government, states reserved the right to place tariffs on imports from other states. Interstate commerce was hobbled as a result, as states sometimes took part in trade wars.

After the successful conclusion of the Revolutionary War, the interest of many representatives in Congress waned, as the sense of immediate danger from England declined. One unfortunate result was declining attendance, such that by 1784 quorums became harder to attain and little business could be transacted. As new delegate to Congress James Manning informed a colleague, "Matters highly interesting to this Confederacy; and indeed I think to the Question whether the federal government shall long exist, are now before Congress, and there are not states sufficient to transact the necessary Business."⁸

An additional problem with Congress under the Articles of Confederation was that membership turned over rapidly, thus preventing development of institutional memory and a stable leadership structure. The state assemblies, in contrast, had less turnover and manifested greater ability to get things done as stable leadership structures evolved.⁹

The Articles of Confederation were not a complete failure, however. After all, the War for Independence was won and a peace treaty had been signed under this first American constitution. The Northwest Ordinance was passed, providing for the development of the Northwest Territory and the future admission of new states carved from it into the United States.

Also worth noting is that under the Articles there was, to some extent, a transfer of political power from the "better sort" (the wealthy, well-born men who had been politically dominant in the colonies before the Revolution) to the "middling" class (professionals, artisans, and yeoman farmers). Under the Articles, the proportion of representatives in the state legislature who were what today is called middle class increased after the Revolution, at the expense of the "better sort" (or what today is called the upper class). This seems associated with the discontent many eminent persons felt toward the governing process.¹⁰

At both the state and national levels, the legislatures were the supreme governing bodies. This was in large part a reaction against the royal governors' alleged usurpation of power before the Revolution. People believed that legislative supremacy was the best way to preserve freedom.

The Road to the Constitutional Convention

The Call for Change

The problems associated with the Articles of Confederation led some leaders to call for changes in the document (amending the Articles required unanimous support). A conference at Mount Vernon in 1785 sought to settle a number of disputes involving trade between Virginia and Maryland. Delegates

were sufficiently encouraged by the results of this meeting to desire a larger one to deal with the problems of governing under the Articles of Confederation. A convention was scheduled for Annapolis in 1786. All the states were asked to send delegates to discuss regulation of interstate commerce. Few states sent representatives. Those who attended, though, resolved to petition Congress to sponsor a convention to amend the rules under which the United States operated.

Shays' Rebellion

While there was some skepticism in a number of states over calling such a convention, the problems with the Articles were widely recognized, and many leading figures of the day agreed that some revisions were needed. Shays' Rebellion that winter was the final element that led to a convention being authorized for Philadelphia. Shays' Rebellion was a short-lived expression of despair by debtor farmers in western Massachusetts. They organized and moved to shut down courts in that state to prevent foreclosure on their lands by the banks. The rebellion was easily quashed, but it emphasized the weakness of the national government, which had no forces to deal with such a disturbance.

The Constitutional Convention

The Founding Fathers: A Portrait

Demographics

The Founding Fathers—the 55 men who gathered in Philadelphia in the summer of 1787—were by no means typical Americans of the day. They were a group of powerful political figures, much better educated than the average American and well-to-do by the standards of the time. A few were among the wealthiest men in the United States, such as George Washington and Robert Morris. Most were from coastal regions and from cities, even though the vast bulk of Americans lived in rural areas. The delegates to the Constitutional Convention numbered in their ranks some of the ablest and best leaders in the country. George Washington, Benjamin Franklin, James Madison, Alexander Hamilton, Roger Sherman, and James Wilson were among the most capable men around. Few of the major figures of the time were absent. Patrick Henry was selected as a delegate, but he did not attend because he “smelt a rat,” fearing that it was foreordained that a strong national government would be created to replace the Articles. Samuel Adams and John Hancock were not there either. Nor did Thomas Jefferson or John Adams attend, since both were abroad.

Political Beliefs

The basic sources of knowledge and ideas that animated debates in the Constitutional Convention were (1) the Founding Fathers' understanding of the English “constitution”; (2) their experience with the colonial and state governments as well as with the Articles of Confederation; (3) the legal and political heritage stemming from England; and (4) the ideas of such thinkers as Locke, Harrington, and Montesquieu.

Basic political views were shared by the bulk of delegates to the Constitutional Convention. For one thing, they distrusted human nature. As James Madison said in *Federalist 51* (one of a series of essays published in New York to aid ratification of the Constitution in 1788 and coauthored with John Jay and Alexander Hamilton), “If men were angels, no government would be necessary.” He followed up this statement, however, by declaring that, in fact, people were not angels. They pursued their own interests and could use power to advance their own goals and abuse the rights of others. At one point, *Federalist 63* concluded that “there are particular moments in public affairs, when the people, stimulated by some irregular passion, or some illicit advantage, . . . may call for measures which they themselves will afterwards be the most ready to lament and to condemn.”

Delegates also saw property as an important right to be protected by government. Many felt that this was the preeminent purpose of government. There was a general spirit of “republicanism,” that is, a support for some kind of representative government with the people playing a role in selecting their leaders. While some delegates, such as Alexander Hamilton and Gouverneur Morris, had aristocratic or monarchist tendencies, even they believed that some significant element of popular representation was necessary. Overall, support for a popular role was conditional; few of the delegates trusted the masses to exercise direct control over government (James Wilson was one exception). They chose to have the people's will “refined” through the mature judgment of their representatives.

The Constitutional Convention Begins

The Virginia Plan

The delegates from Virginia arrived as a group before the others. They put the time to good use by devising a plan to introduce at the opening of the Convention. In this way, they would control the agenda. The Virginia Plan, largely written by James Madison, was introduced by Governor Edmund Randolph when enough states' delegations had arrived in Philadelphia to begin business. George Washington was selected to chair the convention.

The Virginia Plan called for a two-house legislature, with both houses having proportional representation. The number of representatives from each state was to be determined by the state's population. For instance, if one state had twice as many citizens as another, it would have two times the number of representatives in both houses. This scheme was advantageous for states with larger populations, since they could control decisions in the Congress. There was also a roughly drawn provision calling for the national legislature to "negative all laws passed by the several states, contravening in the opinion of the National Legislature the articles of Union."¹⁰ This would establish that, in cases of dispute between state and national law, the national power would be supreme.

The New Jersey Plan

The small states were not pleased. They countered with the New Jersey Plan, calling for a one-house Congress in which each state would have equal representation. This, of course, went against the Virginia Plan. Interestingly enough, the New Jersey Plan, which plainly claimed that it was designed merely to revise the Articles of Confederation, contained an even more clearly defined supremacy clause, which later became part of the new Constitution. This clause stated that all acts and treaties of the national government would be the "supreme law of the respective States," overriding any state laws or constitutions that were in disagreement.

Votes taken on the two plans early in the convention led to the defeat of the New Jersey Plan. The lineup in favor of proportional representation tended to show Massachusetts, Pennsylvania, and Virginia (large states) joining with North Carolina, South Carolina, and Georgia. (A common view among the delegates was that the southern states would have greater populations than the northern states in the future.) The New Jersey Plan was supported by New York (whose delegation was controlled by opponents of a strong national government), New Jersey, Delaware, Maryland, and Connecticut (the latter four being small states). New Hampshire's delegates did not arrive until later, and Rhode Island never did send delegates.¹¹

The Connecticut Compromise

Although the large states had the votes, they also knew that the small states would not agree to a Constitution in which their votes would be swamped in Congress. After much turmoil, a compromise that had been floating around for some time began to look more attractive. The Connecticut Compromise, authored by Roger Sherman, advocated a two-house Congress, with one body's representation based on population and the other's grounded in equal representation of each state. After several delegates fortuitously left the Con-

vention, the large-state bloc lost its dominance. A crucial tie vote led to a committee being formed to develop a proposal. This turned out to be a version of the Connecticut Compromise. At this point, the states lined up solidly behind it. The issue of representation that had threatened the Constitution was now resolved.¹²

Major Decisions

Separation of Powers

In the early stages of the Convention, most delegates expected a Constitution providing clear legislative dominance (both the Virginia and New Jersey plans featured Congress appointing the executive). As time went on, though, delegates became uncomfortable with one branch being so dominant. Support began to develop for a separation of powers.

The Founding Fathers drew upon Montesquieu and other thinkers to justify this. They argued that legislative power (lawmaking), executive power (carrying out the laws), and judicial power (interpreting and applying laws to cases) should be separated into three branches of government. The logic was that if these powers were located in one branch, that body might wield power in a tyrannical way and abridge the rights of citizens.

Checks and Balances

However, mere separations of powers was not enough. The different branches also would need checks on one another; hence, the principle of checks and balances.

The president can veto an act of Congress (a check on that branch) and appoints justices to the Supreme Court (a check on the judiciary). In turn, Congress can override the president's veto and can impeach the president. Congress, through the Senate's power to consent to presidential nominees to the judiciary, also has a check on the Supreme Court. In addition, Congress has the power to impeach and remove justices from office. The judicial branch's checks are not as clearly laid out in the Constitution. Practice (and the words of some of the Founding Fathers) are the basis of the judiciary's power of judicial review, that is, the authority to declare unconstitutional acts of Congress and the president which violate the terms of the Constitution.

The logic for this mechanical structuring and counterbalancing of the branches is made plain by James Madison in *Federalist 51*:

The great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defense must in this,

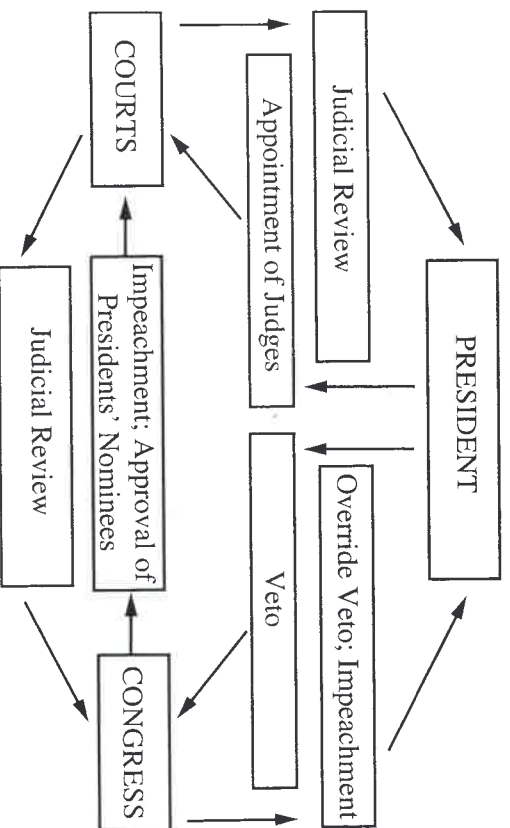


Fig. 2.1 Checks and Balances

as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.

Thus, the original enchantment with legislative dominance had begun to erode in favor of separation of powers and checks and balances. Those who wanted strict separation included representatives from New Hampshire, Massachusetts, North Carolina, South Carolina, and Georgia. States lining up behind the more fluid checks and balances were Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia.¹³

Federalism

Another important characteristic of the Constitution is federalism, most simply defined as the division of power between state and national governments with considerable authority granted to each level of government. Practically, the Founding Fathers had to allow much power to reside in the states or the people would not have allowed the Constitution's approval. Indeed, some of the delegates in Philadelphia would have embraced a Constitution placing sole power at the national level. Nonetheless, such a program would have been politically unfeasible. Citizens (and many of their leaders) had loy-

alties to their own states and would not have accepted the dismantling of states' power.

Slavery

An issue important to states with widespread slavery was the status of that “peculiar institution.” The Constitution recognized slavery, treated slaves as property, and called for fleeing slaves to be returned to the state from which they escaped. The document allowed continued importation of slaves (at least until 1808).

Other Rights and Powers

The Constitution also addressed several fundamental deficiencies of the Articles of Confederation:

1. It gave the power to control interstate commerce to Congress; states could no longer regulate trade with their fellow states.
2. Its supremacy clause gave any actions properly enacted under the Constitution supremacy over any state's constitution and laws.
3. It empowered the national government to raise revenues directly, rather than relying on requests to individual states.
4. It gave the national government the sole right to regulate commerce with other nations; no longer would each state be in a position to carry on its own foreign trade policy separate from the other states.

Provisions of the Constitution

Article I

The first article defines the structure and powers of the legislative branch. It calls for a Senate (the states are equally represented, with each state electing two senators) and a House of Representatives (each state's delegation size is based on the state's population—the greater the population, the more representatives).

Basic powers are outlined in Sections 7 and 8. Section 7 provides for revenue (tax) bills to originate in the House; it also allows Congress to override a presidential veto by a vote of two-thirds of the members in each house. Section 8 lists a long array of legislative powers (such as control over interstate commerce, authority to declare war, and power of taxation). The final paragraph gives Congress the power “to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” This is com-

monly known as the elastic clause. The first article is the longest in the Constitution, reflecting the belief of the Founding Fathers that Congress would be the dominant branch.

Article II

The second article speaks to executive power, vested in the president. It lays out the method of electing a president and vice president and impeaching the president. The second article is quite brief, not speaking in great detail of the powers of the executive. It provides for executive power over the military (as commander in chief) and treaty making and permits the president to appoint high government officials (federal judges and foreign ambassadors).

Article III

The third article defines the role of the Supreme Court and allows Congress to create a lower court system. It specifies those cases over which the federal courts have jurisdiction (or the power to hear a case).

Article IV

States must honor the public acts and proceedings of other states according to the first section of this article. The second section calls for citizens of each state to have the privileges of citizens of all the states and allows for extradition of prisoners from one state to another. This article also provides for admission of new states into the Union and guarantees a republican form of government for each state.

Article V

The procedure for addition of amendments to the Constitution is spelled out here.

Article VI

Debts contracted before the Constitution's adoption were to continue as valid. This article's second paragraph contains the Supremacy clause, which states that "this Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land." That is, the Constitution, federal law, and treaties are superior to the states' constitutions and laws.

Article VII

The approval of nine states puts the Constitution into operation, according to this article.

Reflections

Upon examining the structure of the Constitution and the debates surrounding its formulation in Philadelphia, we see that the Founding Fathers preferred a "messy" system of government (for want of a better term) rather than one facilitating authoritative decision making. Separation of powers, checks and balances, and federalism, when added together, create the conditions for gridlock and for making it difficult to take quick action routinely. The conditions are ripe for much negotiation and bargaining and compromising in order to get things done, across levels of government and across branches of government.

The end result, however, would seem to increase the odds against tyranny coming about; the Founding Fathers had feared the rise of tyranny if there were one central power source within the system. In current debates, then, many of those who want to alter the constitutional balance to increase "efficiency" of government, that is, reducing the odds of gridlock taking place, fundamentally misunderstand the desires of the Founding Fathers and the system which they constructed.

The Founding Fathers: An Economic Elite or Democratic Politicians?

Charles Beard's Thesis

Charles Beard's *An Economic Theory of the Constitution of the United States*¹⁴ created a great stir upon its publication in 1913. Beard claimed that the Constitution was an undemocratic document drawn up and ratified in an undemocratic way for the benefit of a personal-property elite. He argued that personal-property interests (public securities, shipping and manufacturing interests, money loaned at interest—in general, capital) were adversely affected under the Articles of Confederation. As a result, personal-property interests bypassed the existing rules of government to create a new order that would accommodate their interests.

Inflationary policy pursued in states such as Rhode Island punished those who lent money (banks). Poor farmers would take out a loan and then, after the state legislature passed "easy money" laws, pay back the loan to the bank in less valuable, inflated dollars. While this was advantageous to the debtor

farmers, it was just as surely harmful to other economic interests. As a result, safeguards were built into the new Constitution to protect property interests; for example, only the national government was allowed to coin money.

The Constitution was ratified in a novel departure from the amending process under the Articles of Confederation, which called for unanimity. The Constitution would go into effect with the approval of nine states. Thus, according to Beard, there was an “end run” on the Articles of Confederation. Furthermore, says Beard, many farmers were disenfranchised because of property restrictions; thus many people were unable to express their views toward the Constitution.

Critics of Beard

Later analyses indicate that Beard simply is wrong. Forrest McDonald notes, for example, that those delegates who refused to sign the Constitution were a veritable all-star team of personal-property holders.¹⁵ According to Beard, however, such people should have been advocates. McDonald points out in addition that a large proportion of the political factions and regions within each state were represented at the Convention. For example, Hamilton represented the Schuyler faction from New York, while Lansing and Yates stood for the Clinton faction. Thus two of the major contending political forces were accounted for in Philadelphia. One could hardly say that the deck was stacked in advance in favor of any single interest. Votes in the Convention itself did not seem to be related to the individual delegate’s personal versus real property (land) holdings.

Robert Brown authored another powerful critique of Beard.¹⁶ He attacks Beard on several fronts. First, he contends that no single economic interest of personal property spearheaded the Constitution. Actual patterns of support for the Constitution—in the Convention and later in the states’ ratifying processes—did not correspond to a simple breakdown of real property versus personal property.

Was the Constitution put into operation undemocratically? Brown reports that the franchise among white American free men was widespread indeed. He examines the historical evidence and finds extraordinarily broad voting rights among adult free white men in states as diverse as New Hampshire and New York. Furthermore, the debates in the Convention show that

Being practical politicians, the Convention delegates recognized that they had to write a Constitution which would meet the approval of the electorate. Perhaps the most convincing evidence for the wide extent of

democracy was the constant concern in the Convention for what the people would or would not accept.¹⁷

This does not mean that economic factors had no impact. Many scholars acknowledge that economic factors did play an important role. However, Beard’s thesis is not correct, and any explanation must be more complex than his argument about real and personal property.

The Founding Fathers as Democratic Politicians

Another influential perspective is that the Founding Fathers were practical democratic politicians. John Roche has contended that the delegates were not about to go back to their home states with a document that could not receive support from the people.¹⁸ There was continual reference in the debates in Philadelphia to what the people would or would not accept in a new government. The delegates, as practical people, readily compromised on key issues, such as allocating representatives among the various states. One difficulty with the strong form of this argument, however, is that there was not the degree of consensus on basic issues that Roche claims; rather, there were some fundamental ideological conflicts between the delegates. Roche contends that ideology was of little significance given the practical nature of the democratic politicians. In addition, he downplays too much the economic influences at work during the constitutional debate.

Jackson Turner Main has demonstrated that the anti-Federalists (those who opposed the proposed Constitution) tended to come from noncommercial areas (living away from the shores and the rivers, since waterways were dominant transportation routes by which goods could enter into the stream of commerce). Furthermore, they tended to be strongly influenced by the radical Whigs and were uneasy about strong government as a consequence. On the other hand, Federalists (supporters of the document) generally came from commercial areas and were more sanguine about a more energetic national government.¹⁹

The Ratification Battle

Drawing up a Constitution agreeable to the delegates of eleven states was difficult enough (New York did not have a quorum because two of its three delegates were opposed and left the Convention in the middle of its work; Rhode Island, of course, did not send any delegates at all). There remained the political task of securing the approval of nine states.

When the Convention finally finished its business, the Constitution was sent to each state for ratification (or approval). States organized special ratifying conventions; when nine states approved the document, it would go into effect. Some states ratified quickly. In others, debate was dramatic and the issue was in doubt until the final vote took place. In the end, however, the Federalists (those who favored adopting the Constitution) triumphed over the anti-Federalists (opponents of the proposed Constitution).

Advantages of the Federalists

It appears that the numbers in the two camps were rather even. What, then, accounts for the Federalists' overwhelming success? They had a number of important resources:²⁰

1. The support of George Washington, whose prestige among Americans cannot be overemphasized.
2. Their superior political organization (Federalists cooperated across the states; they had developed a well-oiled political organization).
3. Their control of the newspapers in some states (such as Pennsylvania), which, as a result, allowed them to shape what people would read about the debates (needless to say, anti-Federalist positions would be little publicized).
4. Their deflection of the major issue of the anti-Federalists—the lack of a Bill of Rights in the Constitution—was met by promises to add a Bill of Rights after the Constitution went into effect.
5. The sheer eminence of the Federalist leaders (while there were important opponents of the Constitution, such as Patrick Henry in Virginia, Elbridge Gerry in Massachusetts, and George Clinton in New York, the glittering array of supporters outshone even those luminaries).
6. The agreement by most that the Articles of Confederation had to be changed because of their deficiencies.

Points of Debate

Although the Federalists had the advantages, the debate over the proposed framework for a new government was important in that it focused attention on significant elements of that new government and clarified for later generations the assumptions underlying the Constitution.

Representation

One key point separating the contending parties was their differing views of the nature of representation. The Federalists tended to distrust the people more than their opposition did. Consequently, they favored what is often called the trustee or Burkean orientation toward representation. The trustee believes that he or she is selected to exercise mature judgment and conscience in decision making. The trustee does not accept the idea that he or she simply must reflect what constituents want. For instance, Gouverneur Morris, a leading Federalist, said that “the best course that could be taken would be to leave the interests of the people to the representatives of the people.” James Madison, in *Federalist 63*, said:

To a people as little blinded by prejudice, or corrupted by flattery, as those whom I address, I shall not scruple to add, that such an institution [as the Senate, with longer terms for its members] may be sometimes necessary, as a defense to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers; so there are particular moments in public affairs, when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentation of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow mediated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?

In other words, a Senate with a long term will be able to examine issues dispassionately and make mature judgments—not responsive directly to the “momentary whim” of the populace—just as would be expected from trustees.

Anti-Federalists were more likely to take the delegate or mandate perspective. Here a representative is obliged to act for the people as they would themselves, that is, to do what the people expect of him or her. One way of accomplishing this was to demand term limitations of those who hold office, a position of the anti-Federalists that foreshadows the contemporary debate about term limits for Congress (see Chapter 8). Luther Martin, for example, argued two centuries ago in classic anti-Federalist fashion that a representative ought to vote in the same manner that his constituents would do . . . provided his constituents were acting in person, and had the same knowledge

and information as himself: and therefore that the representative ought to be dependent upon his constituents, and answerable to them; that the connection between the representatives and the represented ought to be as near and as close as possible.²¹

In general, anti-Federalists distrusted power. In that sense, they were, as historian Cecilia Kenyon put it, “men of little faith,” being pessimistic about the ability of people to use power properly. Federalists, while themselves fearful of abuses of power, felt that government could be structured to check tyrannical uses of power. One way of doing this, in Madison’s words, was to “set ambition against ambition.” Separation of powers and checks and balances were means of accomplishing this.

Federalist 10

Madison’s *Federalist 10* is one effort to defend a large-scale republic. The anti-Federalists feared that a faction (a group of self-interested people) would seize control of the strong national government and curtail citizens’ liberties. Madison argued that a large republic could actually safeguard freedoms. He begins by noting that “the latent causes of faction are thus sown in the nature of man” and that “the most common and durable source of factions has been the various and unequal distribution of property.”

To prevent a single faction from exercising tyrannical power, a large republic was in order. Madison contended:

The two great points of difference between a democracy and a republic are, first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of the country. . . . Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves.

. . . The other point of difference is, the greater number of citizens, and extent of territory, which may be brought within the compass of republican, than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former, than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a ma-

jority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

In this remarkable passage, two important themes relative to the Federalist versus anti-Federalist debate emerge. The first is the call for a trustee-style representative to moderate the people’s occasional poor judgment; the second is the advocacy of larger republics as a way to minimize the odds that any single group will take over the machinery of government for its own selfish ends.

The Bill of Rights

One concrete contribution of the anti-Federalists was the impetus to add a Bill of Rights to the Constitution. Many were fearful of government under the proposed Constitution having too much power and suppressing the people’s freedom. To counter this telling criticism, the Federalists offered to add a Bill of Rights upon adoption of the Constitution. Once they advanced this proposition, considerable opposition melted away. Indeed, shortly after the new republic began business under the Constitution, the Congress drew up a Bill of Rights which it then transmitted to the states for their approval. Finally, ten of these (the first ten amendments to the Constitution) were ratified, the Bill of Rights as people know it today.

Constitutional Change

The Constitution can change through a variety of mechanisms. The three most important are amendment, judicial interpretation, and actual practice.

Amendment

The process of amending the Constitution, according to Article V, includes the following routes:

1. Two-thirds of each house of Congress will propose an amendment which is then subject to ratification by three-quarters of the states’ legislatures or by conventions in three-quarters of the states (Congress decides which will be in operation).
2. The legislatures of two-thirds of the states will call for a convention to propose amendments which will be subject to ratification in the same manner as above.

Thus far, no amendment has been approved in the second manner. Twenty-seven amendments have been added through the first path, the last being accepted in 1992 (Congress shall not be able to change its pay until after the intervention of an election). Among the more significant are the First Amendment (guaranteeing freedom of speech, religion, and press), the Fourth Amendment (protecting against illegal government searches and seizure of one's effects), the Fifth Amendment (prohibiting being forced to testify against oneself), the Sixth Amendment (guaranteeing right to counsel), the Thirteenth Amendment (abolishing slavery), the Fourteenth Amendment (guaranteeing to blacks due process and equal protection of the law), the Fifteenth Amendment (giving former slaves the right to vote), the Sixteenth Amendment (allowing a federal income tax), the Nineteenth Amendment (giving women the right to vote), and the Twenty-sixth Amendment (giving 18-year-olds the right to vote).

Judicial Interpretation

Another, informal, way of altering the Constitution is judicial interpretation. For instance, there is no clearly stated power of judicial review (the power of a court to strike down a law as unconstitutional), but the Supreme Court in *Marbury v. Madison* (1803) inferred the existence of this power. Thereafter, it has been generally accepted that the courts indeed have this authority. Courts' decisions, then, can change the Constitution's meaning.

Actual Practice

Finally, actual practice can affect the Constitution's meaning. At the origin of the republic, political parties were feared. People felt that parties divided the citizenry and led to domestic disturbances. The Constitution itself does not mention parties at all. Yet, over time, these organizations have become central actors in American politics.

Democratic theorists emphasize the concern of the Founding Fathers for providing the citizens with real input into their national government, for example, through their election of members of the House of Representatives. They contend that the records of the debates in the Constitutional Convention testify to the concern of the delegates with the people's will. Democratic theorists observe that the American enterprise, begun with the Constitution, is the culmination of the philosophical tradition, begun with Aristotle, that the people should rule.

Elite theorists come to a different conclusion. They see the Founding Fa-

thers as an elite of their day—not typical of average Americans at all. Even if personal-property concerns did not motivate the Founding Fathers, it is clear that economic factors were involved. The fact is that many Americans were not in favor of the Constitution, and the sheer political might of the Federalists' organization carried the day. Elitists argue that it is not coincidence that the Constitution was written at a time when the "middling" class was beginning to gain political power at the expense of the better sort.

Finally, pluralists see James Madison's Federalist 10 as a kind of theoretical wellspring for their perspective. Madison's view that politics is about the clash of contending interests lies at the heart of current pluralist theory. It is probably relevant that the bulk of the political factions (or groups) of the day were represented in Philadelphia. This can be interpreted as saying that the Constitution itself was the result of pluralistic politics at work, with accommodation of competing interests, multiple centers of power, and distinct factions each gaining something from the new government as a result of the bargaining process.

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Chapter 2

1. Although it may be too simplistic to claim that the United States is a consistently liberal, egalitarian society, one can make the case that there are also illiberal, inequalitarian strands in American ideology. See Rogers M. Smith, "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America," *American Political Science Review*, 87:549–566, 1993.
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3. Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," *American Political Science Review*, 78:189–197, 1984.
4. Jackson Turner Main, *The Social Structure of Revolutionary America*, Princeton University Press, Princeton, N.J., 1965.
5. *Ibid.*, p. 287.
6. James Wilson quoted in Alpheus T. Mason and Richard H. Leach, *In Quest of Freedom*, Prentice-Hall, Englewood Cliffs, N.J., 1959, p. 56.

7. For instance, compare Carl Becker, *The Declaration of Independence*, Vintage Press, New York, 1942; Garry Wills, *Inventing America*, Vintage Books, New York, 1978.
8. Quoted in Calvin Jillson and Rick K. Wilson, "The Continental Congress and the Origins of the U.S. House of Representatives," paper presented at the American Political Science Association meeting, Chicago, 1987, p. 24.
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Chapter 3

1. Edward C. Banfield and James Q. Wilson, *City Politics*, Vintage Books, New York, 1963, pp. 64–65.
2. 9 Wheaton 1. (See note in Chapter 11.)
3. 4 Wheaton 316.
4. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).