The Design and Reasoning behind the U.S. Constitution

As Interpreted from the Federalist Papers

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"The answer to 1984 is 1776." – Alex E. Jones

1 Introduction

This document attempts to explain the thinking behind the Constitution of the United States. Many people feel the Constitution is seriously flawed. However, once you understand *why* the founding fathers set it up as they did, it becomes clear how carefully they thought it through.

Much of this information was taken from *The Federalist Papers*. These were written between October 1787 and May 1788 by Alexander Hamilton, James Madison, and John Jay, under the shared pen name Publius.[1] Their goal was to explain why the Constitution should be accepted by the thirteen colonies, and particularly by New York. The Papers are difficult reading for the modern American, being written in the now archaic style of the late 1700's. This effort is, in part, a translation into modern English.

This introduction and most of Chapter 2 discuss the culture and society in the late 18th century. Many will find this interesting and relevant, but it is not vital to understand the Constitution. Chapter 3 summarizes the Constitution itself, which one needs to understand the good stuff, which begins in Chapter 4.

1.1 Historical Background

It helps to understand the culture in the thirteen colonies before, during, and after the Revolutionary War (roughly the 1770's and 1780's).

- Estimates of the literacy rate in New England often exceed 95%, although good records were not kept. There was a strong ethic to teach children to read, so they could read the Bible themselves. Literacy was lower in the south, perhaps 60%, but this was still higher than the general literacy rate in England.
- Some sources suggest that many teachers (headmasters) wouldn't take students who didn't already know how to read. They were reluctant to accept a student who didn't know something that was so easy to learn.
- *The colonists were not illiterate bumpkins.* British general Thomas Gage was the military governor of Massachusetts in 1774 and 1775. He complained that Americans could not be buffaloed, because they were all lawyers.[2]
- Life expectancy was around 35 years.[3] The food supply was better than one would find in much or most of the world. But it was not all that reliable, and not always varied enough to provide a

[1] Alexander Hamilton can be seen on the $10 bill, James Madison on the $5000 bill. John Jay was the first Chief Justice of the Supreme Court.

[2] From "Whatever Happened to Justice?" by Richard J. Maybury, Bluestocking Press, 2004 (recommended reading). The original reference is "Law in America" by Bernard Schwartz, McGraw-Hill, NY, 1974, page 3.

[3] Sources vary. A secondary source says 45 years. Infant mortality was high, which, when included, can change the number significantly.

balanced diet. Vitamin deficiency diseases (e.g. scurvy, pellagra, and rickets) were common, especially in urban areas, and not understood. Sanitation fell far below today's standards. Drinking water quality was often so poor that even children would be drinking wine and ale. Winters could be harsh (which apparently hasn't changed).

- Medical care was poor to non-existent.[4] Simple problems could be life threatening. If you were sick, you might have to call on the town veterinarian. Or your doctor might be looking after your horse. Any significant procedure was likely to be very painful.
- Women were expected to bear between 5 and 10 babies, and would be lucky to raise four of them to adulthood.
- There was no readily available welfare "safety net." Charity could be had, but that was limited and often provided only when the recipient was deemed worthy of the help. You were likely to work hard for your living from an early age. The Biblical admonition, "He who will not work, let him also not eat" was taken seriously.
- The society had a unique trait among Western culture: it lacked an aristocracy. In short, we had the (relative) social parity defined by "All men are *created* equal."
    - The distribution of wealth, while not even, was much less uneven than other civilized countries.
    - In many respects, differences in social standing among men represented a "meritocracy." That is, if a man held an esteemed position in society, he likely had to earn it. Moving up the social ladder was doable, if not easy. Moving *down* was easy. In England, such transitions were often prevented by every means possible.
    - In England, commoners were to bow down, obey, and defer to the nobility. American merchants doing business in England were considered commoners. These men, successful by their own hard work, found this ritual degrading. Particularly when the nobleman was clearly a pompous fool.[5] Few Americans wanted their children to suffer that indignity.

All this hard work did pay off. The overall standard of living in colonial America was higher than most of the "civilized" world.

The resulting society was filled by people who worked hard, read often, and understood the world around them. Most likely, they had little patience for those who wouldn't. Equally likely, these were fiercely independent people who valued the freedom to guide their own lives.

1.2 Recent Colonial History

In the mid 1770's, the colonists were headed towards war against an oppressive monarchy.[6] The Articles of Confederation were created at the start of the Revolutionary war. To manage a war against one of the strongest militaries in the world, the colonies needed to fight together. But each colony also wanted to maintain its own independence.

[4] Medicine at that time was primitive, at best. George Washington died during a blood leeching procedure.
[5] One must not accuse England of having a monopoly on pompous fools. They just had a habit of keeping them in prominent positions.
[6] To be fair, by historical standards, England in the late 1700's could be considered a fairly progressive state. For which Americans should perhaps be more thankful.

The Articles provided only a weak bond between the colonies. The Federal Government lacked the authority it needed to govern, particularly in peacetime. After the war, the new nation was unstable and disorganized. Clearly, a state bound together too loosely would not work.[7] A better solution was needed.

To correct the situation, a Federal Convention (also the Philadelphia Convention, or Grand Convention of Philadelphia)[8] was held from May 25, 1787 to September 17, 1787. Many of the delegates arrived assuming the goal was to fix the Articles of Confederation. Others wanted to create a new kind of balance between a big government and a loose confederacy. None of the States would suffer being a vassal to the others. Nor did they want another centralized and unrestrained government, like the English one that had just been painfully removed. However, a stronger central government was needed.

The resulting document, the United States Constitution, represented the best shared thinking of some extraordinary men. All were very well read. They understood how governments of the past worked, and how they failed. They created a Constitution based on firm principles and an understanding of human behavior[9], which has (so far) served the nation well for over 200 years.

1.3 Systems of Government

We will reference a number of commonly employed systems of government, which you should understand. The definitions given below are far too terse and not exact. Plus their usage is often fluid, depending on the whims of the ruler(s) of any particular country. These will be used freely, where required.

Monarchy

> An absolute monarchy puts one person in command of the state. He has unlimited and unquestioned rule over the people.
>
> A limited monarchy also has one person as the head of state. However, his powers are limited by another authority, such as a parliament.

Democracy

> A direct democracy is a strict adherence to majority rule. The society follows whatever the majority wants. This can work well when the society is made up of well educated, fully functional, caring adults.[10] However, people are imperfect. Democracies fail for very predictable reasons.

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[7] *The Federalist 15* through *The Federalist 22* discuss reasons for the failure of the Articles of Confederation in some detail. While interesting, that information is beyond the scope of this work.

[8] Only later was this referred to as the Constitutional Convention.

[9] *The Federalist 6* notes "that men are ambitious, vindictive, and rapacious." Recent history suggests that even in times of plenty, such men still exist in uncomfortably large numbers.

[10] The Lewis and Clark Expedition (Continental America, 1804 – 1806) had at least one notable use of a purely democratic process. That action will not be discussed here, but the expedition was a remarkable success, including only one death during two years away from "civilization", out of 31 original members.

A representative democracy puts the power into the hands of representatives who have been elected by the people. The U.S. House of Representatives can be considered a representative democracy.

Republic

A republic is a government that considers the country a *public* matter, and not owned by a ruler or ruling class. This typically involves multiple co-leaders, who do not inherit their positions but who are elected from among the people.[11]

A constitutional republic is a republic which adheres to a *constitution*. This is a document that describes the design of the government and limits the powers of that government.

Socialism

Socialism includes a wide variety of social and economic systems. Their goal is the collective ownership of capital goods[12] and the control of economic markets. Essentially, "the state" owns and controls (almost) everything. *In theory*, production and distribution can be managed for the greatest benefit of all the people. However, the *reality* is quite different (see Chapter 4).

1.4 Caveats

This work comes with some caveats as to text and style.

First, we cover the Constitution and the Bill of Rights, but reference the subsequent Amendments only occasionally. Our primary goal is to provide insight into the original document.

Second, the writers of the Constitution used masculine pronouns when talking about specific people, such as the President. We acknowledge that society has changed in that regard. However, we continue to follow the original tradition only for ease of reading. The English language has no appropriate gender neutral pronouns.

Third, we make no mention of slavery or race.[13] The Convention's goal was to amend the Articles of Confederation, not to end slavery. Consequently, *the Constitution itself makes no direct mention of slavery or race.* While some indirect references are present, they are given in generalized terms. Those references are ignored here because they represent political compromises rather than the design of the government.

Fourth, this is not a legal discussion of the various interpretations of the Constitution. Nor is it legal advice. We only wish to consider *why* the government was designed as it was in the late 1700's. The material given here has been abridged somewhat, covering only the basics that every citizen should know. Full, factually correct discussions can (and do) fill volumes.

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[11] *The Federalist 39* defines a republic to be "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."

[12] Loosely, any "durable" equipment used for the production and distribution of marketable products.

[13] See *The Federalist 54* for comments on the representation of slaves in the House of Representatives.

2 The Need for the States to Unite

"We must, indeed, all hang together, or most assuredly we will all hang separately." – Benjamin Franklin

This comment from Dr. Franklin[14] came at the signing of the Declaration of Independence, in response to a comment made by John Hancock. It admits that the signers were criminals in the eyes of the King. All of them knew they were committing treason and subject to the death penalty. Many of them lost their fortunes, if not their lives, in the coming conflict.

During that conflict, the colonies had to unite if they hoped to mount a serious challenge to the British military. However, each colony was jealous of its own independence. This led to a unifying document, the Articles of Confederation, which left the colonies largely independent. At the end of the war the Articles remained intact, but the resulting Federal Government was too weak to govern well. And this problem was obvious enough that a convention was held in Philadelphia during the summer of 1787 to address it.

2.1 Options

The colonist had three realistic options:

1. Disband as a country and set up a number of separate countries.
2. Amend the Articles of Confederation to correct the weaknesses in them.
3. Build an entirely new type of Federal Government to unite the colonies.

Of course, each colony could have sacrificed its own independence, melding into one large state. But this was probably not realistic. Each colony had a sternly independent nature, its own culture, and a well-earned fear of large, centralized governments.

The attendees at the Constitutional Convention chose option 3: design an entirely new government.

2.2 Reasons to Unite[15]

The thirteen colonies were fiercely independent. Joining into a single country meant sacrificing some of their power to a central authority. This required a strong justification.

The **security, safety and liberty** of the people were the driving concerns.[16] On a national level, this especially meant preventing wars. Wars are inherently destructive, particularly for the losers, but often enough no one really wins. And ensuring a good standard of living for the people meant avoiding armed conflicts as much as possible. A second goal was enhancing commerce within and between the States. This was thought to be a primary source of the wealth in a nation.

[14] Franklin was mostly self-taught, but had honorary doctorates from University of St. Andrews (1759) and Oxford University (1762). Read his biography. He earned them.

[15] Most of this section is taken from *The Federalist Papers, 3 through 11*.

[16] For those not well versed in history, these appear to be uncommon concerns among national leaders of most previous governments. Or even most current governments.

2.2.1 International Conflicts

America was beginning to trade with other nations on a large scale. Nations such as Britain had a monopoly on many of the profitable trade routes and markets, and were not likely to give those up easily. For example, American fisheries could supply Britain and France with food more efficiently than those nations could supply themselves. But they would be unlikely to welcome competition. America was also challenging Britain and France for trade with India and China.

In addition, conflicts had already risen between the border colonies and the neighboring British and Spanish territories. Britain had blocked American ships from the St. Lawrence River, and Spain had blocked her from the Mississippi river.

These problems created a playing field that was ripe with the potential for war.

The thinking of the founding fathers included:

1. During an international conflict, a single colony would not be able to defend itself. And thirteen separate militias would "dwindle to comparative insignificance". Only a strong nation with a capable navy could expect to protect international trade routes, without actually having to go to war. A united nation would have the combined resources of all thirteen colonies, under a common command.
2. Combining the militias of thirteen separate colonies would be difficult. Members of a combined militia would have different loyalties. A colony far from the conflict would be less likely to send troops or resources. Worse, the non-invaded State(s) could be "flattered into neutrality" by vague promises from the foreign power. Or possibly induced to fight among themselves.
3. Small states get less respect on the world stage than large states. When the conflict is resolved, a large nation typically receives a more favorable settlement than a small one.

   > In 1685, the state of Genoa offended the king of France, Louis XIV. In an attempt to appease Louis, Genoa sent their chief magistrate and four senators to ask his pardon and receive his terms. They had to accept those terms for the sake of peace. It is unlikely a more powerful nation, such as Britain or Spain, would have had to suffer this indignity, or the associated risk of invasion.

4. European nations had already established territories on the North American continent. Many of them were or soon would be adjacent to existing States. There was some fear those European powers would be willing to attack those States, much as they had attacked their neighbors throughout the history of Europe.
5. Even in times of peace, a divided continent could be plundered by other nations.[17] Few small nations could build a credible navy, or field a capable army. Unable to defend itself, the natural resources of the new land could be taken by other nations without fear of meaningful reprisal.

[17] Of particular concern were the Atlantic fisheries, as well as navigation of the Mississippi river and the seaway to the great western lakes. Additional concerns were the resources for building a navy, such as high quality wood, iron, tar, pitch, and turpentine.

> "A nation, despicable by its weakness, forfeits even the privilege of being neutral." – *The Federalist 11*

However, if foreign governments saw a single, efficient and well administered government, with:

- Well-regulated trade,
- Well organized and disciplined militias,
- A capable navy,
- Discreetly managed finances, and
- A free and content population,

they would be more likely to seek our friendship. A large central government should be able to avoid international conflicts better than thirteen separate nation-states. Any disagreements that did arise were more likely to be handled peaceably.

2.2.2 Internal Conflicts

There was also some concern about the colonies going to war against each other.

> Ancient Greece was divided into multiple city-states (or polis). Some were monarchies, while others could be considered republics – that is, ruled by a council.
>
> These city-states would form pacts which broke down with regularity when one state gained an advantage over the other(s). The result was frequent war and exploitation.

The convention delegates feared this situation could repeat itself among the thirteen colonies. The likelihood of a war increases as more individual, armed nations are created. A single ambitious ruler can easily find personal motives to attack a neighbor.[18] These can include:

- Territorial disputes, especially over resource rich land,
- Empire building,
- Revenge for minor slights,
- Outcry of the people, and
- Impressing and/or placating a lover.

War often results when the ruling bodies of quarrelling states are not answerable to an independent authority. However, with a central government over the colonies, a different path can be followed.

> In the late the 1770's, the States of Connecticut and Pennsylvania were involved in a dispute "respecting the land at Wyoming." Settlers from both States occupied the land, and both States desired control of the resources. Three open conflicts occurred, referred to as the Pennamite-Yankee wars.[19] Under the Articles of Confederation, the States were obligated to submit their claims to the Federal Government. Connecticut was not happy with the ruling, but open warfare was avoided.[20]

[18] *The Federalist 6* notes there are more such instances of ridiculous wars than can be counted, and even discusses a few of them.
[19] "War" is perhaps an exaggeration. Armed conflicts occurred, but very few deaths were recorded.
[20] See Chapter 7 (under *The Judiciary*) for an example of a European court system reducing the prevalence of war.

> The new Constitution also gave the Wyoming territory an option to become a state in its own right. Otherwise, it risked becoming a vassal of an existing state.

Worse, without the restraint of a higher government, a larger state could invade, overwhelm, and plunder an adjacent smaller state. The history of Europe included many such battles that created no real wealth, nor added to the security of the continent, nor established long term stable borders.[21]

Even with honest leaders, as more treaties are formed between those nations, the chance of a treaty violation increases, real or imagined. America had already formed treaties with six nations, five of which were maritime and could harm her. And broad commercial ties were present with other maritime nations (e.g. Portugal, Spain, and Britain).

> The early history of the British Island had it divided into three nations, England, Scotland, and Wales. And they were almost constantly embroiled in quarrels and war with each other. Wales united with the English nation over the course of several centuries, although the formal date given is 1535. In 1706, Queen Anne sent a letter to the Scottish parliament listing the benefits of combining those two nations into a single nation. Negotiations for the union began that year, with the formal creation of the United Kingdom, or The Kingdom of Great Britain, in 1707.[22] The subsequent centuries have been relatively peaceful and profitable for the three nations involved.

Keeping thirteen separate colony-states would increase the chance of war between individual States. There was also a greater likelihood for war between those States and foreign nations. If only the Federal Government had the power to make war, the risk of war should be greatly reduced.

2.2.3 Commerce

The drafters of the Constitution felt commerce was the single most effective agent for increasing the wealth of a nation. Even in times of peace, trade between independent countries is hindered by tariffs and regulations. Preventing the taxation of goods traded between the States would significantly increase the commerce between the States.

2.2.4 The Cost of Supporting a Government

An additional concern involved the cost of running a government. It was thought that, if the Federation fell apart, the result would mostly likely be the formation of three separate countries, each comprised of several separate States. This would mean three federal governments for the people to support. A single, unified Federal Government should be less expensive to operate.[23]

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[21] The text from *The Federalist 8* reads, "…of towns taken and retaken; battles that decide nothing; of retreats more beneficial than victories; of much effort and little acquisition."

[22] To be fair, the union was very unpopular with the Scottish people. Scotland, however, was near bankruptcy, forcing the Scottish parliament to accept the proposal. The greatest single benefit they received from the union was free trade with England and all her overseas possessions.

[23] The possibility of breaking the colonies into three distinct countries is discussed in *The Federalist 13*.

3 Overview of the United States Constitution

This chapter contains a much simplified version of the U.S. Constitution. It is translated from the original "English," and is not all encompassing, but intended for reference. This gives context for the chapters that follow, where the reasoning behind this structure should become clear.

You are, however, encouraged to read the original text. It is surprisingly easy to read, compared with many texts from that era.

3.1 Branches of the U.S. Government

The government is divided into three branches, each with specific responsibilities. Each branch is intended, at least in part, to act as a check on the other two branches. This should keep one person or group of persons from becoming too powerful.

3.1.1 Legislative Branch (Congress – Article I)

The U.S. Congress is divided into two Houses: the House of Representatives and the Senate.[24] These groups are filled by elected Representatives from the States, and are in charge of "all *legislative* powers" (the making of laws) of the Federal Government.

Some of the shared rules required by the Constitution include:

- The States choose for themselves *when, where, and how* the Congressmen are elected. But Congress may change the time and manner of those elections, as they think necessary.[25]
- Congress shall meet at least once every year.[26]
- Each House has the authority to establish its own procedures of operation, and to determine punishments for absent and misbehaving members.[27] A member may be expelled by a two thirds vote of the corresponding House.
- Representatives and Senators:
    - Are "privileged from arrest", except for treason, felony, and breach of peace, while Congress is in session, or during travel to and from those sessions.[28]
    - May not hold an additional civil office while in his elected office.
    - May not take a pay raise until after the next election cycle for Representatives.[29]
- A simple majority is a quorum. That is, just over half the members of each House must be present in order for that House to take any action.
- Both Houses must keep a journal of their proceedings. These must be published from time to time, except for items involving national security.

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[24] A "bicameral legislature." This partially reflects the British parliament at the time, which had a House of Commons and a House of Lords. The differences, however, are critical.
[25] On the surface this is a very odd law. See Chapter 7 for the explanation.
[26] The original Constitution specified a date in December, but the 20th Amendment changed this to January 3.
[27] With limited exceptions, which are noted later.
[28] Supreme Court rulings on this phrase, over the years, make it virtually meaningless. The original intent was to prevent citizens from using "civil arrests" of congressmen to disrupt the legislative process.
[29] James Madison intended this to be part of the original Constitution, but it was omitted. It was revived as the original 2nd Amendment, but couldn't be ratified at that time. It became law in 1992 as the 27th Amendment.

- The Congressional Record (the journals) will contain the voting records of the Members of Congress, when requested by one fifth of the Congressmen present for the vote.
- Neither House may adjourn for more than three days without the consent of the other House.
- Neither House may meet at a place other than where both Houses are meeting.
- Congressmen are paid for their services out the Federal treasury, not the State treasuries.

House of Representatives

This body was intended to be closest to the people, and thus would be held most accountable for its actions.

- Each State must send a number of Representatives to the House. That number is proportional to the population of the State, except:
    - No State shall have more than one Representative for every 30,000 persons.
    - Every State shall have at least one Representative.
- Representatives must be at least 25 years old, must live in the State they represent[30], and must have been a United States citizen for at least 7 years.
- Representatives are elected every two years, *by the people*. Each State decides for itself who is permitted to vote, based on "Qualifications requisite for the Electors of the most numerous Branch of the State Legislature."
- All Representatives in the House face re-election at the same time.
- Impeaching a member of the U.S. government happens in the House. This is the formal indictment, or accusation. Impeachment is the first step in the process of removing the accused from office.[31]

Senate

The Senate balances the powers of the House.

- Each State shall be represented by two Senators.
- Senators must be at least 30 years old, must live in the State they represent, and must have been a United States citizen for at least 9 years.
- Senators are elected every six years, *by the State legislatures*.[32] These elections are rotated so roughly a third of the Senators face re-election every two years.
- The Vice President of the United States shall preside over the Senate. However, he may not vote on any issues, except when the vote is tied. Then he becomes the tie-breaking vote.
- The Senate has the power to try all impeachments. That is, the House must initiate the process (the impeachment), while the Senate performs the actual trial.
    - A conviction requires 2/3 majority vote.
    - If the President is being impeached, the Chief Justice must preside over the trial.

[30] Formally, "…when elected, be an Inhabitant of that State…" This specific wording is problematic now days.
[31] The impeachment process applies to the President, Vice President, and all civil officers, but only in cases of "treason, bribery, or other high crimes and misdemeanors." On conviction, it only removes them from office.
[32] See Chapter 7 for an explanation. This was changed to a popular vote of the people by the 17th Amendment.

- The Senate may only remove offenders from office. It cannot specify the punishment. However, the guilty party may still face a criminal trial (but not by the Senate).

Bills

That is, proposed laws. Law is the product created by Congress. The Constitution provides some specific guidance on the process that creates those laws.

- Both Houses may propose bills. However, all bills for raising money must originate in the House of Representatives.
- A bill that passes one House must then move to the other House.
- A bill must pass both Houses before being sent to the President (the Executive Branch) for final approval.
- The President may accept (sign) the bill, at which time it becomes law. Or he may reject (veto) a bill.
  - If rejected, he must document his objections, and return it to the House that proposed the bill. This is a "return veto."
  - If the bill is not returned to Congress within ten days (excluding Sundays):
    - It becomes law by default, *if the Congress is in session*.
    - If Congress is not in session when the ten day period expires, the bill dies. This is a "pocket veto".[33]
- Congress can override a Presidential veto by a two thirds majority vote in both Houses.

Powers of Congress

The Constitution gives the Congress of the United States certain powers and responsibilities:

- Impose taxes.
  - To pay debts.
  - To provide for the common defense and general welfare.
  - All taxes must be uniform throughout the United States.
- Borrow money.
- Regulate commerce among the States, with foreign nations, and with Indian nations[34].
- Establish rules of naturalization (that is, manage immigration).
- Establish uniform laws concerning bankruptcies throughout the States.
- Print ("coin") money[35] and provide punishments for counterfeiting.
- Establish standards for weights and measures.
- Establish the post office and postal roads.
- Provide for patent and copyright protections for inventors and writers.
- Provide for organizing and managing the military forces, including:
  - The ability to declare war.

[33] The full process is a bit more complicated.
[34] This is referred to as the "commerce clause".
[35] The word "coin" means both paper and metal coinage as we know them. Presumably there is also some authority to regulate what may and may not be used as legal tender (money).

- The granting of "Letters of Marque and Reprisal." These authorize private vessels to capture enemy ships, presumably in times of war.
- Make rules concerning the capture of enemy combatants.
- Raise and support armies. But funds allotted for the army must expire within two years.
- Provide for and maintain a Navy. Note that this is mentioned separately from the Army.
- Make rules governing the land and naval forces.
- Call up the militia to execute the laws of the Union, suppress insurrection, and repel invasions.
- Organize, arm, and discipline the militia.

Congress is also the governing authority for the District of Columbia. This was expected to be an area, not part of a State, where the Federal Government would reside. In addition, Congress has full authority over Federal military bases, dockyards, and "other needful Buildings".[36]

Direct Restrictions to Congressional Power

The Constitution also names actions that Congress may **not** do:

- The *Privilege of the Writ of Habeas Corpus* shall not be suspended. This (roughly) means a person who has been detained, such as in jail, must be lawfully arrested and charged, as with a court warrant.
- No Bill of Attainder or Ex Post Facto law shall be passed.
  - A "Bill of Attainder" refers to a legislature declaring a person guilty of a crime and punishing him without a trial.
  - An "Ex Post Facto" action involves creating a law today, and then arresting someone who violated that law yesterday. Actions performed before the law was passed may not be prosecuted. Literally, "out of the aftermath" or "from a thing done afterward."
- Taxes or fees ("duties") may not be collected on goods exported from any State.
- Preferential taxation may not be given to any State in the regulation of commerce.
- Goods exported from one State and imported to another may not be taxed.
- Titles of nobility may not be granted.
- People holding an "office of profit or trust" may not accept any present, payment[37], office, or title from a foreign king or prince.
- Direct taxes on the people are forbidden.[38] These included "capitation" (a head tax of sorts), an income tax, and property taxes. The ban on an income tax was removed by the 16th Amendment in 1913.

Limit of the States' Powers

The States are also explicitly prohibited from performing specific actions. Many of these reflect the limitations placed on the U.S. Congress. States may **not**:

- Enter into treaties, alliances, or confederations with foreign powers or with other States.

[36] See Section 7.6.
[37] The word used in the Constitution is "emolument". This includes payments, wages, tips, compensation, profit or gain - pretty much anything of value.
[38] An exception was included.

- Perform acts of piracy. The original text is "Grant letters of Marque and Reprisal." Again, this prevented the States from authorizing private vessels to capture enemy ships.
- Coin money. Although States can allow silver or gold coins to be used for payment of debts.
- Issue bills of credit. These may be thought of as interest bearing (usually) certificates. They may also be interpreted as paper money.[39]
- Pass a Bill of Attainder or an Ex Post Facto law.
- Grant titles of nobility.
- Charge fees ("duties") on imported or exported products.[40]
- Maintain troops or war ships in a time of peace. Note that a "militia" was not considered a standing army.
- Engage in or prepare for war in times of peace, unless they have been invaded or are in imminent danger of invasion. The consent of Congress is required.

3.1.2 Executive Branch (Article II)

In the United States, Congress has the sole authority to create Federal laws. However, it does NOT have the authority to implement and/or enforce those laws. That lies with the Executive Branch of the U.S. government. That is, the President.

To be eligible for the office of the President of the United States, you must be:

- At least 35 years old.
- A natural born citizen of the United States.
- A resident of the United States for at least 14 years.

The election process for the President may seem unwieldy and unnecessarily complex. However, there are *very* good reasons for this complexity, which will be discussed later. Under the original Constitution:[41]

1. Each State has one "Elector" (person who may vote for the Present) for:
    a. Each of its Senators (that is, two), plus
    b. Each of its Representatives (proportional to the State's population).
2. Each State legislature may choose for itself how to select its Electors.
3. The Electors may not be current Senators or Representatives, and may not currently hold "an Office of Trust or Profit under the United States".
4. Each Elector votes for **two persons** for President. At least one of these persons may not be a resident of the same State represented by those Electors.
5. The ballots are sent to the U.S. Senate for counting.

The Presidential candidate with the most votes becomes the President, *if those votes are a majority of the total votes*. If no candidate receives a majority vote, then the President is chosen by a vote in the

[39] It was 1830 before the courts decided just what a "bill of credit" really was.
[40] State import/export duties are allowed to cover the cost of inspection rules, with the approval of Congress. But any net profit must go to the Federal treasury. The "Consent of Congress" clause may be open to interpretation (see *The Federalist 32*).
[41] The 12th and 20th Amendments have adjusted the process, some of which will be described later.

House of Representatives. Under the original constitution, the person with the second most votes became the Vice President, with the Senate making the selection when no clear winner arose.

Before taking his office, the President must swear the following oath (yes, it's in the Constitution):

> "I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

The President serves a four year term, after which he must step down or be re-elected.[42] Currently a person may only serve ten years as the President (i.e., elected twice, plus some allowed carry-over if he replaced a previous President).[43]

The President does get paid. However, his salary may not be changed during his current term of office. He may also not accept any additional payments ("emoluments") from either the Federal or State Governments.

If the President becomes unable to perform his assigned duties (illness, death, impeachment, or other cause), the succession of power is specified by the Constitution. Currently, that succession involves the Vice President, followed by the Speaker of the House. The full process is considerably more complex, and was modified by the 12th, 20th, and 25th Amendments.

The President of the United States has two primary functions:

1. Chief Executive Officer of the government (lovingly known as the bureaucracy). The civilian duties explicitly assigned to the President include:
    a. Deliver the State of the Union address, which is a review of the current economic and political environment. The Constitution requires this "from time to time", but typically it happens towards the beginning of each Congressional session.
    b. Accept (sign) or veto laws that the Congress has passed.
    c. Make (negotiate) treaties with other nations. All treaties must be ratified by the Senate. Ratification requires the approval of two thirds of the Senators *who are present*.
    d. Appoint ambassadors, public ministers, consuls, and other officers of the United States. These require the "advice and consent" of the Senate. Some leeway is given to appoint minor officials without the consent of Congress.
    e. Fill vacancies in U.S. government positions that occurred while the Senate is not in session.[44] These appointments are temporary, and expire at the end of the next session of the Senate.
    f. Convene one or both of the Houses of Congress on "Extraordinary Occasions".
    g. If the Senate and the House disagree on the time to adjourn a session, the President can make that decision for them.

[42] The term of the Presidency is discussed in *The Federalist 71 and 72*, which we don't cover here.
[43] See the 22nd Amendment.
[44] This was expected to be used only when normal procedures failed. The President may not appoint Federal Senators; those positions are filled by the State executive officer and legislature. See *The Federalist 67*.

h. Receive ambassadors and other public ministers.[45]
i. Ensure the laws passed by Congress are enforced.
j. For each of the departments under him (i.e., the President's Cabinet), he may require a written opinion on topics relevant to each department.
k. Grant pardons for offenses against the United States, *except in cases of impeachment*.

2. Commander in Chief of the United States military.

    a. This includes the militia maintained by the States, *when they are called into the service of the Federal Government*.

Note carefully:

- The Commander in Chief is a civilian position.
- The authority to raise an army rests with Congress, NOT with the Commander in Chief.

These items are important.

3.1.3 The Judicial Branch (Article III)

The Continental Congress decided the new country needed a highest Court, which would have the final say in federally relevant legal matters. This resulted in the Supreme Court being the third branch of government. The Constitution also allowed for "inferior Courts" being established by Congress, as they were needed.

Judges for this court:

- Hold their offices "during good behavior." That is, until they resign or die. Or are convicted of (significant) criminal behavior.
- Receive compensation for their service. That compensation cannot be reduced as long as they remain in office.

The number of judges who sit on the Supreme Court is not specified by the Constitution. That number is set by Congress. Historically, it started out as five members, and has been as high as ten.

The Supreme Court has judicial power over *cases or controversies* involving:

- Disputes related to the U.S. Constitution,
- The laws of the United States (as opposed to nationally non-significant State laws),
- Treaties made by the U.S.,
- Ambassadors, ministers, and consuls of the United States,
- Cases of admiralty and maritime jurisdiction (essentially naval law in U.S. territorial waters),
- Controversies which involve the national government,
- Controversies between two States,
- Controversies between citizens of different States, and
- Controversies between citizens of a State, involving land grants in a different State.

[45] Presumably for formal and informal talks on issues concerning both countries. There is no mention of an entertainment budget, but one suspects that's part of the job.

The original Constitution also gave the Court jurisdiction over disputes between a State and the citizens of another State, or the State and citizens of a foreign government. These were removed by the 11th Amendment.

The terms "cases" and "controversies" are important here. These have been interpreted to mean the court may hear only tangible disputes. A plaintiff and a defendant must both exist, although one may be a government body (and exceptions exist). Hypothetical situations and advisory opinions are not addressed. The Constitutionality of a law may not be judged until someone files a complaint. This limits the Court's authority.

In controversies involving ambassadors, ministers, consuls, and States, the dispute can be taken directly to the Supreme Court. This is termed "original jurisdiction". All other controversies must first be heard by a lower court, although the Supreme Court holds the final appeal, or "appellate jurisdiction."

At this point, the Constitution gives some procedural guidelines, which might also be considered rights of those governed.

- The trial for all crimes will be decided by a jury, except for cases of impeachment.
- Trials will be held in the State in which the crime was committed.
- If the crime was not committed within a State, Congress is responsible for setting the place for the trial.

Next, the U.S. Constitution defines treason as:

- Waging war against the United States.
- Adhering to enemies of the United States.
- Giving aid and comfort to the enemy.

These last two items are not well defined, except possibly through case law, which we ignore here. They were added more to indicate what things are NOT treason. This prevents the government from declaring a random act as treason, and convicting a person of that crime.[46]

Only the U.S. Congress has the authority to set the punishment for treason against the U.S. However, the Constitution puts limits to that punishment. The text reads:

> "No Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the life of the person attained."

This statement originated in English law, which at one time allowed the Crown to take not only the offender's life, but also his property, title, and his descendants' right to inherit.[47] This effectively sentenced that person's dependents to death as well. The phrase in the Constitution limits the penalty for treason to the execution of the offender (*forfeiture* of life only).

[46] See *The Federalist 43*. Apparently one or more delegates had seen this tactic used by earlier governments.
[47] This was the "Corruption of Blood" phrase in English Law. It meant (roughly) the descendants (i.e. *blood* relatives) could also NOT inherit from any other members of the offender's family.

3.2 Finishing Acts (Articles IV through VII)

The final four Articles of the Constitution deal with legal fine tuning, which the founders felt was necessary.

3.2.1 Article IV

This article deals with relationships among the States, and between the States and the Federal Government.

- All "acts, records, and judicial proceedings" deemed valid in any State must be recognized as valid by the other States.
- A citizen of any one State has the "privileges and immunities" of the all the States. Loosely stated, a State cannot deny a citizen of another State any rights that are given to its own citizens.
- A person who is charged with a crime in one State, but who is found in another State, must be returned to the State where the crime was committed, *on request*. This means each State must establish extradition processes with all of the other States. Denying extradition is not an option.
- New States may be added to the United States, *with the consent of Congress*. However, dividing existing States, or combining of portions of existing States, requires the consent of both Congress and the States involved.
- Congress has the authority to make rules concerning the acquisition, use, and disposal of all territory of the United States.[48]
- Every State shall have a Republican form of government.[49]
- The Federal Government shall protect each of the States from invasions, and from domestic violence.

3.2.2 Article V

This Article discusses the process for making changes (Amendments) to the Constitution.

- Amendments must be proposed by either (a) two-thirds of both Houses of Congress, or (b) by the legislatures of two-thirds of the States.
- Congress must call together a convention for the proposed Amendments. There is no (apparent) limit to the number of additional Amendments that may be proposed during this convention.
- Whatever else happens during that convention, no State shall be denied equal representation in the Senate (*without its consent*).

3.2.3 Article VI

Again, some finishing items:

[48] A little thing called the Civil War ultimately decided this issue.

[49] Pure Democracies fail miserably, for predictable reasons. This will be discussed later. Monarchies were considered abhorrent from the start.

- All existing "debts and engagements" (e.g. treaties) of the Federal Government, under the Articles of Confederation, must be honored by the new government.[50]
- The Constitution, and all treaties and laws of the United States Government, are the supreme law of the land. State governments do not have the jurisdiction to override them.
- U.S. Senators and Representatives, members of the State Legislatures, all executive and judicial officers (Federal and State) must take an oath (or affirmation) to support the U.S. Constitution.
- "No religious test shall be required" of a person to serve in a public office in the United States. That is, your choice of religion may not be used for you, or against you, in allowing you to fill a position within the government.

3.2.4 Article VII

This states that the ratification of the U.S. Constitution requires the approval of nine of the then thirteen States (colonies).

A second paragraph gives the date of the completion of the document (17 September 1787), notes the unanimous consent of the States, and gives the names of the representatives to that Constitutional Convention.

3.3 Bill Of Rights

A consistent objection to the Constitution was a lack of protection for States and the people. Ratification required adding a "Bill of Rights", which limited what the government(s) could do to the citizens it ruled. These became the first ten Amendments.

3.3.1 Amendment I: Basic Freedoms

This Amendment ensured some basic freedoms:

- Freedom of Religion. "Congress shall make no law" concerning religion. You are free to worship God as you please, or to not worship Him at all.
- Free Speech. You are free to speak your mind as you see fit, without fear of reprisal.[51]
- Freedom of the Press. News media may print the news as they see fit, without government interference.
- Right to peaceably assemble.
- Right to petition the government for a "redress of grievances" - that is, to ask the government to fix problems. As long as you're peaceable about it.

3.3.2 Amendment II: A Well Regulated Militia

A well-regulated militia is necessary to the survival of a nation.[52] Therefore, "the people" have the right to keep, maintain, and use personal firearms.

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[50] After the Revolutionary War, the debts were substantial. Alexander Hamilton was largely responsible for putting the country on a sound financial footing after the Constitution was adopted.

[51] With limits, discussed in Chapter 6.

[52] It is unclear what was meant by a 'well-regulated militia". Popular interpretations range from some form of standing army, to the National Guard, to everyone who isn't a Congressman. The current definition can be found

3.3.3 Amendment III: Quartering of Soldiers

Private property (housing in particular) may not be used by soldiers in peace time, unless the owner gives his consent. In times of war, Congress must set the manner under which soldiers may occupy private residences.

3.3.4 Amendment IV: Secure in Your Possessions

This Amendment protects citizens ("the people") from unreasonable search and seizure of their property and papers.[53] Any such search requires a warrant, authorized by a judge, based on probable cause and supported by an oath or affirmation. That warrant must clearly describe the place(s) to be searched, and the person(s) and/or thing(s) to be seized.

3.3.5 Amendment V: Behavior of the State during Criminal Proceedings

This Amendment has several related concepts.

1. To arrest and try someone for a capital crime, in times of peace, there must first be a Grand Jury indictment.[54] Cases involving the military during times of war may be handled differently.
2. If the accused person is found innocent of a capital crime, he may not be tried again for that same crime.
3. In a criminal case, you may not be compelled to testify against yourself.
4. A person may not be put to death, or forfeit his liberty or property, without "due process of law." Generally this forbids lynching, ad hoc jailing, and unlawful property seizures, public or private.
5. Private property may not be seized for public use without fair compensation.

3.3.6 Amendment VI: Right to Trial, Criminal Cases

In all criminal cases, the accused has the right to a "speedy and public" trial.

1. An impartial jury must be provided.
2. The trial shall be held in the State and District where the crime occurred.
3. The accused must be informed of the charges against him.
4. The accused has the right to confront the witnesses against him.
5. The accused has the right to present witnesses in his favor.
6. The accused has the right to legal counsel (a lawyer) for his defense.

3.3.7 Amendment VII: Right to Trial, Civil Cases

In civil cases involving more than twenty dollars, the accused has the right to a jury trial.[55] Any "facts" determined by that jury cannot be reexamined (overturned) by another court.[56]

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in US Code Title 10, Subtitle A, Part I, Chapter 12, Section 246 (10 USC 246). Loosely, able bodied male citizens from 17 to 45 years old, and female members of the National Guard.

[53] "Papers" here presumably means private and/or personal information.

[54] A Capital Crime is one that involves the death penalty. A Grand Jury is a group a citizens who can investigate potential crimes, and recommend whether criminal charges should be made. An indictment is the formal (legal) criminal accusation, leading to a trial.

[55] The specific $20 limit is considered meaningless now days.

[56] In practice, some leeway is given when clear errors of fact or process have occurred.

3.3.8 Amendment VIII: Excessive Punishment

An accused person shall be protected from:

1. Excessive bail.
2. Excessive fines.
3. Cruel and unusual punishment.

In short, the punishment(s) should not exceed the severity of the crime. This may be considered a modern version of "an eye for an eye and a tooth for a tooth." [57]

3.3.9 Amendment IX: Non-Enumerated Rights

The Constitution lists specific rights guaranteed to the people. Any additional rights that are *not* listed are *not* automatically denied to the people.

3.3.10 Amendment X: Powers not Delegated

The Constitution does not cover every conceivable situation. Any powers not given to the U.S. government, and not prohibited from the States, are given to the States and to the people.

[57] Prior to Moses, the standard was often unlimited retribution. This statement discouraged "no punishment", but more importantly limited the revenge you could take. The Code of Hammurabi (~18th century B.C.) contained a similar law. Note that this precept was meant for judges, not for personal vengeance purposes.

4 Tyranny of the Tyrant

"Power corrupts. Absolute power corrupts absolutely." – Lord Acton in a letter to Bishop Mandell Creighton, 1887.

The designers of the United States government were concerned about protecting the safety, security, and liberty of the people.[58] The primary, obvious hindrances to these goals were first, the individual tyrant, and second, majority/mob rule. This chapter focuses on the handling of tyrants: those who subjugate the people according to their own desires.

4.1 Historical Perspective

Here, we describe some of the known ways that governments fail, or at least fail their people. The founding fathers were well educated and understood those failures. That knowledge would influence the design of the Constitution. A short discussion of significant historical events involving tyrannies is given below. The issues raised relate to both monarchies and republics.

4.1.1 Corruptible Men and Governments

Lord Acton's sentiment, "power corrupts", was reinterpreted by David Brin in 1985 as:

> "It is said that 'power corrupts,' but it is more true that power attracts the corruptible. The sane are usually attracted by other things than power."

Abigail Adams, John Adams wife, expressed the problem more directly:

> "I am more and more convinced that man is a dangerous creature and that power, whether vested in many or a few, is ever grasping, and, like the grave, cries 'Give, give.'"

Power has been characterized as addictive and dangerous, as much as any drug. Even under the best of systems, there will be some whose lives revolve around the need to control people. That control can be for the better, for the worse, or randomly directed with no other purpose than maintaining control.[59]

Political power differs from "influence" and from Common Law.[60] It involves the use of force to achieve an end. While a business can influence you, particularly financially, it cannot physically force its will. A government can forcibly seize your property and take your liberty. As Mao Zedong noted, "Political power grows out of the barrel of a gun." The founders understood the corruptible nature of men and accordingly feared the power of governments.

Consider the Greek city-states, mentioned earlier. These would shift between tyranny and anarchy[61] with a disturbing regularity:

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[58] Note that democracy is not on this list. The founders feared democracy nearly as much as tyranny. Next chapter.

[59] Thomas Jefferson did offer a ray of hope: "An honest man can feel no pleasure in the exercise of power over his fellow citizens." Letter to Scottish geographer John Melish, January 13, 1813.

[60] See section 6.7.

[61] Anarchy has multiple meanings, but here we use it to infer the lack of government and law enforcement.

> "It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy." – *The Federalist 9*

When the economy and/or government collapsed (anarchy), the Greeks would often find a "leader" who promised, given power, to solve their problems. Once in charge (monarchy), the new ruler often turned into a cruel tyrant. Throughout history, numerous other "kingdoms" have shown this tendency, which prompted Lord Acton's comment. Men in positions of too much power become tyrants.

Under the U.S. Constitution, elected positions can be open to any qualified candidate who wants the job.[62] But powerful positions tend to attract evil men like flies to honey. Whether dealing with the corrupt or the corruptible, the founders needed to control their influence.

4.1.2 War

Tyrants tend to be tragically egotistical. This predisposes them to war. Ambitious rulers will lead their people into battle for the glory of a victory, to enhance their empire, or to impress a lover. This pattern repeats itself in ancient civilizations from Mesopotamia, Greece, Israel and many others. It continued through the Dark Ages, the Renaissance, and into the modern era. Even as recently as World War II, from 1941 to 1945, "empire building" has been a prime source of armed conflict.

The founding fathers were well aware of this tendency.

> Thomas Paine's *Common Sense* (February 14, 1776) noted that the "republics of Europe are all (and we may say always) in peace. Holland and Swisserland are without wars, foreign or domestic".[63] However, "Monarchical governments, it is true, are never long at rest".
>
> *The Federalist 34* indicates that England spent about one fifteenth of its annual income to support the monarchy. The rest went to maintaining its armies and fleets, and to pay the interest on debts incurred during those wars.

One could easily conclude the primary job of a king was to wage war. This alone was enough to dissuade the creation of a monarchy in the new nation.

4.1.3 Biblical Kingdoms

One can also look to the Biblical kings of Judah (Israel) from about 1050 BC to 586 BC. These were all monarchies. Of the twenty two kings who reigned in Jerusalem, most were considered evil rulers. Only

[62] There are stories of a U.S. Congressman who, when asked to identify the three branches of government, got it wrong. This brings up the question of just what qualifies a person for the position.

[63] *The Federalist 6* notes Holland was at war with England and Louis XIV of France. The third Anglo-Dutch War ended in 1674, while Louis XIV died in 1715. The forth Anglo Dutch War occurred at the same time as the American Revolution. Holland enjoyed a stretch of *relative* peace in the early to late 1700's under the Dutch Republic. Although some sources indicate this "peace" was not what we would consider peace today.

seven were regarded as good rulers. Only "Asa was wholly true to the Lord all his days" (1 Kings 15.14).[64]

4.1.4 Revolutionary War

On a more immediate level, at the end of the Revolutionary War some officers wanted George Washington to become king. This was an event the Continental Congress feared, as many revolutions ended this way. The commander of the armed forces has a standing army that can impose such a decision. Instead, General Washington resigned his commission, turning down the offer by saying, "I didn't fight George III to become George I." He knew the dangers of perpetuating a monarchy. No matter how well intentioned, it would eventually turn evil. And he cared enough for the new country to want better for it.

4.1.5 Socialism

In modern times, Socialism demonstrates the abuses of the tyrant even more dramatically. Loosely, Socialism is a system where property and income are controlled by "the state". Private ownership is largely forbidden. This derives from the quote, "From each according to his ability, to each according to his needs."[65] Let us start with background material from a less modern example.

> The Pilgrims instituted a strict form of Socialism on landing at the Plymouth Colony in 1620. All goods produced were put into common storage, to be distributed among the colonists as needed. Effectively, the strong workers were not being rewarded for their hard work, while the "less energetic" were freely given the results of other men's labor. This left people with little motivation to work hard. The colony suffered two years of shortages and starvation. About half the colonists died. As one author lamented, "Socialism makes strong men lazy." The following spring, families were given land they could manage on their own. And they could save or sell their produce as they saw fit, essentially creating a free market economy. People now wished to work, because they were rewarded for their efforts. Production increased dramatically, and famine was no longer a problem for the colony.[66]

The Pilgrims were devoutly religious people, at least on the surface. If anyone could make Socialism work, it should have been them.

In more recent times, Socialism has been tried many times, most often with a tyrant at the top. These include Joseph Stalin (1878 – 1953) in the Soviet Union, Mao Zedong (1893 – 1976) in China, and Hugo Chavez (1954 – 2013) in Venezuela. The state controls the production and distribution of goods and services. *This is an enormous amount of power, which strongly attracts the worst kind of men.* In all

[64] Revised Standard Version. Regardless of your own religious affiliation, the writers of the Constitution were fully aware of this stretch of history. Note that the interpretations and numbers vary between authors.
[65] Popularized by Karl Marx in 1875 in his "Critique of the Gotha Program". Besides the problems listed here, it ignores the time, effort and resources required to develop those abilities, as well as people who will claim "needs" that are far from necessary.
[66] Other sources indicate the Jamestown settlement had a similar problem from 1607 to 1611.

cases, the switch to Socialism is soon followed by economic collapse, famine, and poverty.[67] A few major factors can come into play:

1) The people no longer have any motivation to work. You will (in theory) be taken care of, regardless of whether you work or not. Production of goods and services usually drops dramatically.
2) Despots find it easy to eliminate their opponents. Simply reduce or eliminate the distribution of food and goods to the regions where the opponents live. Even if sufficient food is available, a famine still results.
3) The leaders have near complete control of the economy. This allows them to plunder the available goods and services for their own benefit. One can debate whether they consume enough resources to affect the economy. But the irony is notable: in many cases, *the only remaining rich people are those who promoted Socialism as a path toward income equality*. Almost everyone else is poor, destitute, or dead.

Even with the best of leaders, Socialism still cannot provide needed goods and services. In a free market economy, manufacturers must respond to market signals and competition. They are rewarded for their good decisions and punished for their bad decisions. Where competition exists, the consumer decides how much he is willing to pay for goods and services. Such decisions are done on an individual level, every day, millions of times. Capitalism, *done properly*, allows this to happen.[68] Socialism tries to control it from a central bureaucratic structure. But bureaucracies are slow, unable to make complex decisions quickly, and lack the needed competition and reward/punishment mechanisms.

Socialism also stifles innovation. The innovator rarely receives a meaningful "return on investment" for the new products, ideas, and solutions that he works to create.

As a side note, at least a few authors suggest that Marx had to falsify some of his data in order to support his socialist theories.[69]

4.1.6 Theft

Under the Constitution, the States were responsible for most civil matters. However, a few problems clearly belonged to the Federal Government.

The axiom, "Thou shalt not steal" had been a well-established part of ethics for over 3000 years. Still, many governments found it necessary to institutionalize theft. Some examples from the Revolutionary War era:

- In the American colonies, the British governor could seize any home he liked for his residence. British troops could take up lodging almost anywhere they liked, without the consent of the owner.
- British forces could seize guns from colonial militia whenever the government felt threatened by the locals. In particular, guns would be taken from known "patriots,"

[67] *The Federalist 10* also has some unkind words for the "equal division of property." That was a rich man talking, but he was undoubtedly aware of the Pilgrims' experience.
[68] The most notable failures of capitalism happen when competition is stifled or prevented. A good system will generally involve free markets and fair trade.
[69] See "Intellectuals (from Marx and Tolstoy to Sartre and Chomsky)", Paul Johnson.

who favored the separation from Britain. This threatened the ability of townships to defend themselves when the need arose.

- During the war, British troops moving through the country would seize food and supplies from the Americans, with no promise of payment.

The Americans were predictably unhappy with such actions.

The founding fathers also considered intellectual property rights (patents and copyrights). Britain itself had recognized and regulated patents since the 15th century. However, in many societies, if you invented something new, or improved an existing item, a member of the ruling class could simply seize your invention and reap the profits for himself. This leads to a society where very little innovation occurs.

> "That unequaled spirit of enterprise, which signalizes the genius of the American merchants and navigators, and which is in itself an inexhaustible mine of national wealth, would be stifled and lost, and poverty and disgrace would overspread a country…" – *The Federalist 11* (in a slightly different context)

Clearly, the founders thought patents and copyrights had to be issued and protected. And in recent years, many authors have suggested *the American patent system was responsible for the largest growth of economic wealth in the history of the world*.

4.1.7 Speech

The American colonists were remarkably well educated. Much of that education came from debates over the issues of the day, both public and private. The free and honest exchange of ideas usually results in the best ideas rising to the top.

However, prior to 1776, British governors often tried to prevent the spread of hostile information and ideas. "Prior Restraint" laws were used, which represent court order(s) to stop the speech from occurring in the first place. Essentially, they assumed a crime would be committed before anything happened.

Another tactic governments have used, and some still use, to suppress free speech is "enforced disappearances." Political opponents simply disappear off the streets, to be jailed or executed in private.

The colonists abhorred such actions. They had to be prevented in the new country.

A related concern was a "state religion." Many governments of the past had instituted a preferred religion, which their citizens had to profess. The rulers felt a prescribed allegiance to God would help control the people. Even in the American colonies, many felt this would ultimately be necessary. However, such allegiances often led to bitter religious wars.[70]

[70] Examples include the Crusades (off and on, 1095 to 1303, focusing on Jerusalem, between Muslims and Christians), the 30 Years War (1618 to 1648 in Europe), and the Lebanese Civil War (1975 to 1990, between various groups of Islam). Many, many other examples can be cited.

4.1.8 Improper Representation

Historically, republics have found it difficult to maintain honest representation of the people. Many ways were found to skew that representation. Additionally, public officials may have had no motivation to perform their jobs. Examples include:

Pocket Borough

Members of the British Parliament used the pocket borough to their advantage in lawmaking.[71]

> In the 1700's, English townships were (typically) represented by two members in the House of Commons. A royal charter was required, but such charters were occasionally given to regions with little or no population. These were pocket boroughs.
>
> One notable example was Old Sarum in Wiltshire. This was an uninhabited hill owned by Prime Minister William Pitt the Elder (1708 – 1778). Despite having no residents, it was assigned two representatives. This gave Mr. Pitt a clear advantage in passing legislation. As proof of the value of a pocket borough, the Pitt family sold the land in 1802 for £60,000. The land and manor were worth only £700 a year, for an estimated market value of £20,000.

Bribery

The Federalist 23 notes that monarchs rarely have reason to betray their own regimes. As for republics, "…history furnishes us with so many mortifying examples of the prevalency of foreign corruption in republics." Elected officials too often betray their countries in exchange for material or social rewards.

> An example noted in *The Federalist 23* involved the Earl of Chesterfield.[72] In a letter to his court, he wrote of one party who desired a "major's commission" in exchange for a needed concession in treaty negotiations. Trading commissions for favors was fairly common in European history.

And:

> In 1660, the Swedish king died and passed his crown to his five year old son, Charles XI. The regency that ruled until Charles came of age was corrupt and self-serving, largely ignoring the interests of the country. England and France would openly buy favors from Swedish officials. That problem was resolved in 1680. In a single day, without violence or opposition, what had been the most limited monarchy in Europe became one of the most absolute and uncontrolled.[73]

4.1.9 Commander In Chief

One can infer from the above discussions that a country at peace would generally benefit from government by committee. With good design and some luck, the evil persons would be at odds with each other, reducing the damage they could do.

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[71] A pocket borough was mentioned in "The First Lord's Song" of *HMS Pinafore*, by Gilbert and Sullivan in 1878, which is a satire on the British culture of the day. Such boroughs were banned by the British Parliament in 1832.
[72] This example comes from Alexander Hamilton, and is labelled, "if my memory serves me right."
[73] Paraphrased from *The Federalist 23*.

However, in times of war, any country needs a single *Commander In Chief*, who can make decisions quickly and definitively. Few, if any, laws need to be passed right now. But the immediate threat of enemy action needs to be countered right now. The trick, of course, is to make sure that commander doesn't take over when the war is done.

This concern led to making the President the Commander in Chief of the military. It is strictly a civilian (non-military) position. This should ensure a civil authority has supremacy over the military.

4.2 Constitutional Constraints

As noted in *The Federalist 9*:

> "The science of politics, however, like most other sciences, has received great improvement."

The founding fathers felt they could, with some success, design a government that addressed the above concerns. And any Constitution that doesn't address these issues should be treated with the utmost suspicion.

The work of the Constitutional Convention has been described as follows:

> "The only solution is the one America's Founders tried to implement: (1) Have as little government as possible so that whoever gets control of it will not be able to do much damage, and (2) for production of essential goods and services use private organizations that cannot back their decisions with force." [74]

The following sections describe many of the design decisions that dealt with the failure mechanisms of earlier governments.

4.2.1 The Structure of the U.S. Government

The first and perhaps most important concern was to avoid concentrating too much power in the hands of too few people. This led to the creation of three branches of government, each meant to act as a check on the others. One evil person could do limited damage before another person would counteract him. At least in theory.

- The Legislative Branch (Congress) was given the primary responsibility to make laws. In addition:
  - Congress has the responsibility to monitor the "good behavior" of the President and the Supreme Court Justices (judges). Impeachment proceedings take place in the House, while the full trial is held by the Senate.[75] *This avoids making the same person(s) the accuser and the judge*. The Supreme Court was thought to be too small for such an important trial.
  - The Senate must give its approval for many actions of the President. This includes nominees for various executive positions, as well as the terms of treaties with foreign powers (see below).
  - The House of Representatives controls the budget. Being re-elected every two years, out-of-control House members could be removed from office in short order, by the people.

[74] From "Whatever Happened to Justice?" by Richard J. Maybury, Bluestocking Press, 2004. Chapter 27.
[75] Great Britain and many of the States used this model. See *The Federalist 65* and *66* for a full discussion.

- A host of additional duties are assigned to Congress, which (mostly) fit into the category of creating law.

- The Executive Branch (the Presidency) is responsible for administering the laws.[76] This function requires a bureaucracy, with a chief executive officer overseeing the work.
  - The President may veto (disapprove) laws passed by Congress. This is a check against Congressional over-reach. But Congress can over-ride a veto with a two-thirds vote in both Houses.
  - The President is also the Commander in Chief of the military forces. *It is a strictly civilian position.* This was meant to keep the military from becoming too powerful politically.
  - The President does NOT determine budget allocations. The founders thought it would be dangerous to have a single entity controlling both the army and the Federal purse.[77]
  - The President may negotiate treaties with foreign powers. However, the Senate must approve those treaties by a two-thirds majority vote. Again, the founders did not want this power resting with only one man or one organization.

    Hereditary monarchs, such as the King of England, could negotiate treaties on their own. But kings rarely negotiate a bad treaty, because they would have to live with the consequences for the rest of their lives.

    However, the Presidency is a temporary position. The founders feared an outgoing President could negotiate a bad treaty in exchange for "retirement benefits" from a foreign power. Requiring the approval of the Senate avoids this problem.[78] (See also the related comments in Chapter 7.)

  - When a new administration is formed, many executive positions must be filled. This includes the President's cabinet and the nation's ambassadors. Supreme Court judges must also be appointed from time to time, as older judges retire.

    Only the President may nominate persons for these positions. The founders felt a single *nominator* would be more efficient than a committee (such as the full House and/or Senate).[79]

    Each nomination requires the "advice and consent" of the Senate. This prevents the President from loading the government with personal favorites who might lack the credentials for the job (e.g., nepotism and cronyism). Or who might be biased in their performance.

    However, "inferior officers" may be filled directly by the President, the courts, or the heads of departments, as allowed by Congress. Having Congress debate every job opening in the government would be impractical.

[76] See *The Federalist 69* for an extensive comparison of the powers of the U.S. President and the King of England.
[77] See *The Federalist 38*.
[78] See *The Federalist 75*. Having the Senate negotiate treaties would be an inefficient process. The House would pose a similar problem, and their shorter election cycle would further complicate the process.
[79] See *The Federalist 76* and *77*.

Of particular note, nomination of a poor candidate would be solely the fault of the President. Rejection of a good candidate would be the fault of the Senate. This scheme prevents either party from dodging the blame. In contrast, a "selection by committee" process can hide responsibility.

- Additional duties assigned to the President reflect the executive tasks in any large corporation. This includes ensuring the laws of the land are properly executed, receiving foreign ambassadors, convening the Congress when circumstances dictate, and giving a summary report of the State of the Union (SOTU).

Note: the House of Representatives has no role in the approval of treaties, nor in appointment of judges and executives. It was felt this body was too "unstable" to aid in these decisions, due to its short election cycle. Harmful delays would be inevitable.

- The Judicial Branch (the Supreme Court and multiple inferior courts) ensures the laws passed by Congress, and the actions taken by the President, are consistent with the Constitution.[80]

  It is necessary to separate the power to make law, and to enforce law, from the power to pass judgement on those laws. Otherwise, the judgement of the courts will not be impartial. This requires a fully independent Federal Court system.

  The Judicial Branch was meant to be the weakest of the three. The other two branches can encroach on the power of the Judiciary, but the Judiciary lacks the ability to usurp the power of the other branches. It cannot make law, or enforce it. Judges can only render judgement.

This structure represents the ***full separation of power*** of the three branches of government.[81] No one branch can perform the function(s) of another. But they do have some control ("checks and balances") on each other. The President can veto a law passed by the Legislator, while the Judiciary can annul it altogether. The Legislature can impeach persons of the other branches, and remove them from office.

Tyrants are well known for dissolving legislative bodies. This could happen to disrupt the legislative process, to call new elections, or so the tyrant could assume that power for himself. King George III would do this to colonial legislatures, as stated in the Declaration of Independence. The President was denied this power.

In *The Federalist 73*, Alexander Hamilton notes that legislatures also have a tendency to absorb the powers of the other branches. This could be done slowly by the passing of small laws, or in a single major legal action. And a paper constitution gives no protection to the other branches. Both the President and the Judges were given the power to nullify the actions of an ambitious legislature.

Notice that the legislature is composed of many men, while the Executive Branch is headed by a single person. Hamilton provided the reasoning for this in *The Federalist 70*. He wrote:[82]

[80] See *The Federalist 78* through *83* for a discussion of the judiciary.
[81] See *The Federalist 47*. This structure was advocated in "The Spirit of the Laws", 1748, by Charles de Secondat, Baron de Montesquieu.
[82] The reasoning shown here is greatly abbreviated.

- The Executive Branch requires "energy". Loosely stated, this is the authority and ability to get things done quickly. The executive branch must also be held accountable for its actions.

  Some earlier governments (e.g. the Achaeans (Greeks) and Romans) had experimented with multiple "executive officers". In many (all?) cases, self-serving rivalries between them became more important than the good of the country. Even with good men, differences of opinion could bring the government to a halt. *Unity of purpose* is critical to the job. This requires a single executive officer.

  When something goes wrong, multiple executives often blame each other. It can become impossible to identify the true culprit. With a single executive, "*The Buck Stops Here"*, like it or not.[83]

- The Legislative Branch, however, has a great many members. Getting something done quickly is nearly impossible. That body is "*best adapted to deliberation and wisdom.*" For a legislature, making decisions quickly "*is oftener an evil than a benefit.*"

4.2.2 Restraint of the Military

A long standing problem for governments was having your general(s) take over. This is known as a "coup", from the French "coup d'état", or stroke of state.[84]

> The Bible lists a number of coups in the northern kingdom of Israel (notably Zimri, Omri, and Jehu). In more recent times, Napoleon Bonaparte (France, 1799), Francisco Franco (Spain, 1936), Muammar al-Qaddafi (Libya, 1969), Idi Amin (Uganda, 1971), and Augusto Pinochet (Chile, 1973) all rose to power through military coups.[85]

The founding fathers also wanted to prevent a military coup of the new government. To this end:

- The authority to raise an army and to declare war were given to the Congress. Not the military nor the President.
- On taking office, the President must take an oath to support and defend the Constitution.
- Congressmen, judges, judicial officers, and executive officers of both the Federal and State Governments must take a similar oath to support the Constitution. Note that State officers are included here. Their actions would affect the execution of the Constitution, particularly through the election of Federal Senators and the U.S. President.[86]
- While not a part of the Constitution, all members of the U.S. military must take a similar oath to the Constitution.[87] This differs from many armies, where an oath is taken to obey either your immediate superior, or to the commander in chief. This means an American soldier who violates the Constitution can be held liable, even for actions he was ordered to perform.

A second concern was the misuse of the military. As noted in the Declaration of Independence:

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[83] This was a sign that Harry S. Truman (33rd President) kept on his desk.
[84] Sometimes translated as "cut of state." The French "coup" is pronounced "coo".
[85] A full list would run into the hundreds.
[86] From Alexander Hamilton in *The Federalist 44*.
[87] Officers and enlisted personnel take somewhat different oaths. This also leaves an open question of how to "punish" a soldier who questions his orders, and it takes five years of arguing lawyers to determine the case.

> King George III had kept large standing armies in the colonies during times of peace. This was costly, and the colonists were expected to pay that price tag. The soldiers were often quartered in private establishments, without the consent of the owners.
>
> The British military was independent of and superior to the civil authorities. British soldiers were, at times, "protected from punishment for any Murders which they should commit" by mock trials.

Without any controls on the military, abuses of power were common. This led to some very specific Constitutional constraints.

- The Commander in Chief of the military is a civilian position. In times of peace, that military is still subject to civilian law.
- Troops could not be quartered in private houses or businesses in peace time, without consent of the owner.
- The Constitution allows for the presence of a standing army. However, the funding for the army must be renewed every two years. This meant the existence[88] of that army would be carefully debated on a regular basis.[89]

A "standing navy" is permitted by the Constitution. Many States were exposed to the Atlantic Ocean, where raiding pirates or invading armies could land. The founders felt a continual naval presence was needed to protect those borders.[90] And ships are expensive, take a long time to build, and require constant maintenance.

A standing army, however, was a different beast. It could be raised and trained faster, and could more easily be used to suppress the people. For this reason, a standing army was at least a little feared by the delegates. One State Constitution noted that a standing army "ought not to be kept up, in time of peace." For a legal document, this wording is a bit ambiguous, even wimpy. That legislature likely felt a standing army was a bad idea, but it would be unwise and unsafe to completely prohibit such an army.

4.2.3 States' Representation

The U.S. Constitution is quite specific about how the States will be represented.

- In the House, the number of Congressmen representing each State is proportional to the population of the State (with limits). This gives the larger States a greater voice in the creation of laws.
- In the Senate, each State has two and only two Senators. This gives the smaller States a proportionally greater voice in the creation of laws.

Bills must pass BOTH Houses before they can become law, which (in theory) evens out the balance of power between the large and small States.

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[88] Today's high-tech military requires continual training and hardware maintenance, and has since World War I. The debate no longer focuses on the existence of the army, but on where and how much money is appropriated.
[89] From *The Federalist 26*.
[90] See *The Federalist 41*.

This strict definition also eliminates the potential for pocket boroughs. Unfortunately, a modern day version, gerrymandering, is still a problem in the U.S.[91]

4.2.4 Limits on Governmental Power

A fair portion of the Constitution was devoted to limiting what the government can do. These items address specific actions that the founding fathers wanted to prevent.

Most of these actions could easily be performed either by a tyrant, or by the efforts of a tyrannical majority. Problems specific to an unrestrained majority are dealt with in the next chapter.

Legal Maneuvering

First, questionable legal maneuvers performed by earlier governments were explicitly forbidden.

- Arrests must follow proper procedure, including a court warrant. (Habeas Corpus)
- A legislature may not summarily declare someone guilty and arrest them. (Bill of Attainder)
- A person may not be arrested for an act that occurred before the corresponding law was passed. (Ex Post Facto)

King George III had a well-earned reputation for manipulating the legal system. As noted in the Declaration of Independence:

- He would not allow his governors to pass laws of pressing importance.
- He refused to pass some laws unless the affected people gave up their right to representation in the legislature.
- Legislative sessions were purposely held at inconvenient places, for the sole purpose of "fatiguing them [the representatives] into compliance" with his will.
- He dissolved legislative bodies when they opposed his will, and then prevented new legislators from being elected.

These led to certain restraints on the new government. The Federal Congress was required to meet at least once a year. The location of that meeting could not be changed on a whim. And election cycles and representation were explicitly defined for all Representatives and Senators.

Titles of Nobility

The American colonies were in a unique position of not having an aristocracy.[92] In Britain, the "Lords of the Realm" (nobles) were hereditary positions. They had a special status, with powers not derived from nor answerable to the people. Those positions were often abused. Consequently, the drafters of the Constitution chose to forbid the granting of titles of nobility. This reinforces the notion of all men being equal under the law, and prevents individuals from lawfully forcing their own will on others. It is unclear how well this has worked in practice, but at least violations are not a result of the system.

Emoluments

A "conflict of interest" arises when a person holds two positions that *might* have opposing goals. That person must choose one master over the other. If one master is the U.S. government, then the people

[91] Gerrymandering is discussed in Chapter 8.
[92] We prefer to think of America as having no commoners.

may not be getting their full rights. For example, an official may take a payment (i.e. an emolument, or bribe) for actions that are not in the best interests of the U.S. The Constitution forbids an employee of the government from taking payments from a foreign power (specifically a king or prince, although the concept can be applied much more widely). Additionally:

- Congressmen may not hold other positions in the Federal Government.
- The President may not receive *emoluments* from either the Federal or State Governments.

Jury Trials

A jury trial uses a panel of citizens to make decisions or determine the facts of a situation. This differs from a bench trial where a judge or panel of judges makes the decision. The use of a jury reduces the chance of one or two corrupt persons directing the outcome of a trial. Jury trials were part of the British legal system, but that right was often denied to the colonists. According to the Declaration of Independence:

> Colonists were, at times, taken to England to stand trial "for pretended offenses." The time and distances involved could prevent the accused from mounting an effective defense. For example, calling a witness for the defense could require months of travel. In other cases, colonists would be denied a jury trial altogether.
>
> Judges were dependent on the King or local governors for their positions and salaries. They could be fired, or their salaries changed, without notice. This left them vulnerable to coercion by a corrupt governor. Judges in colonial America were well-known for their bias towards the King.

The experience with the British led to specific requirements for criminal trials. The main body of the Constitution compels:

- A jury trial must be held for criminal offenses.
- The trial must take place in the State where the crime was committed.

Defendants have additional rights, as defined in the Sixth and Seventh Amendments (discussed later). The Constitution and the Sixth Amendment refer only to criminal trials. Civil trials are covered in the Seventh Amendment.

Note that any judge or juror can be biased for other reasons. This can include business or personal relations with the accused. In modern America, a judge is expected to *recuse* himself (excuse himself from the proceedings) if there is any reason he may be biased, or if a conflict of interest exists. Even the "appearance of a conflict of interest" can lead to serious problems for a judge.

Religious Tests

The Constitution forbids the use of "religious tests" as a qualification for positions in the government. This supports the sentiment against a state religion. If religious tests could be used, a section of the government could be filled with members of a particular sect. That sect could then effectively impose a state religion on the people.

Taxation of Commerce

The Constitution forbids the Federal Government from:

- Taxing goods traded between States.
- Taxing goods exported from States to foreign countries.
- Unequal (preferential) taxation among the States.

At first glance, these might seem curious. The States feared the Federal Government could use any or all of these actions to damage the economy of an "un-favored" State. For example, taxing the exports of cotton would unfairly burden the citizens of a Southern State that exported a lot of cotton.[93] In addition, the Convention delegates felt that free trade between the States would be one of the greatest creators of wealth in the new country.

Recall that direct taxes were also prohibited. Direct taxes included a head tax ("capitation"), an income tax, and a property tax. *The Federalist 10* indicates these had been tried by early governments, but had never raised enough money to justify their existence. This limited how the Federal Government could raise funds. However, protecting the States from unfair treatment took precedence. Duties on foreign imports were expected to make up a large portion of the Federal budget, because the States were forbidden from taxing imports. It was thought the U.S. government would find other sources of tax revenue that the new Constitution did not prohibit.[94]

4.2.5 Eligibility for the Office of President

The Constitution requires a President be a natural born citizen, a resident for at least 14 years, and at least 35 years of age. These were meant to improve the chances of electing a man with the needed patriotism, civic virtue, and judgement for the job. However, they were not without some debate.

Citizen

A natural born citizen would be more likely to show undivided loyalty to the United States. In particular, John Jay felt the Commander in Chief of the American military must be a natural born citizen. This restriction also prevents ambitious foreigners from seeking the office.

Note that the founders did not provide a solid definition for "natural born citizen." That was left to future generations to define, as the need arose.

Residency

It was generally thought a man should reside in the U.S. for a number of years before serving in the government. This would ensure he understood the conditions and issues that the people faced. It would also reduce the chance he might be under the influence of a foreign power.

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[93] This specific example was more relevant after the invention of the cotton gin (patented in 1794). The price of cotton dropped dramatically, leading to a massive increase in demand for cotton, as well as increased profits. In the southern States, there was also a corresponding need for more slaves to harvest that cotton.

[94] *The Federalist Papers 30-36* discuss Federal taxation authority rather extensively. *The Federalist 41* concedes that most imports were machinery, which would likely be built within the country in the future.

The actual terms of residency, and even a concise definition of "residency", were not provided. The number of years given came out of the debates. There is some evidence that the 14 years did not need to be continuous, but the wording in the Constitution avoids the issue.

Minimum Age

One notes that Senators have more power than Representatives, and the President has more power than Senators. As the duties of the job increased, so did the minimum age requirement. It was felt a man required a number of years in the real world before he would gain the needed knowledge, experience and wisdom to perform these jobs.[95] Also, in historical context:

> During the Constitutional Convention, there was little *public* debate about age limits, but some information survives. George Mason (62 years old), speaking about the age limit for the House, noted, "if interrogated [he would] be obliged to declare that his political opinions at the age of 21 were too crude and erroneous to merit an influence on public measures."
>
> Others felt that age limits would exclude many very capable men from the job. William Pitt the Younger served as British Prime Minister at age 24. Thomas Jefferson was 33 when he drafted the Declaration of Independence. Of the delegates to the Constitutional Convention, 12 were under the age of 35, including Alexander Hamilton. Later, David Farragut (1801-1870) took command of a naval vessel at age twelve.[96]

A separate argument asked if enough men would live beyond age 35 to have a pool of qualified candidates. Life expectancy was fairly short in that place and time.

Life was hard in those years, and many people matured quickly.[97] But George Mason ultimately won the argument. Age limits became an enduring part of the Constitution.

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[95] See *The Federalist 64*.

[96] Not precisely correct. He was a "prize master", assigned to take a captured ship safely to port. Though he was clearly in command. His first formal command was at age 24, the *USS Ferret*. He was promoted to Admiral at the end of the Civil War.

[97] Adolescence was not a widely accepted concept at the time. Education was dependent on your parents' ability to pay for it. Working for a living was common for teenage boys, possibly through apprenticeships or "wage labor." Jewish boys became men at age 13, and were (and are) held accountable for their actions.

5 The Tyranny of the Majority

"A democracy is two foxes and a hen voting on what to have for dinner." - Unknown

This chapter focusses on the second major hindrance to the well-being of a people. This is the ability of the majority (two foxes) to force their will on the minority (the hen). The writers of the Constitution understood the tyranny of the majority. However, they chose to generalize the problem to the conflict between *factions*.[98] This becomes a serious and difficult problem only when one faction becomes too powerful. *The Federalist 10* states it this way:

> "…the public good is disregarded in the conflicts of rival parties..."

And

> "…measures are too often decided, not on the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."

The Federalist notes some of the causes of faction, such as differing opinions on religion or politics.[99] Eliminating factions did not appeal to the founders. For that, one must either restrict the liberty of the people, or force the same opinion on everyone.[100] The first would thwart the purposes of the Constitution, and the latter was considered impractical and unwise. The only remaining option was to limit the effects of factions.

The "science of politics" had proposed some new ideas to counter the problem of factions. As paraphrased from *The Federalist 9*:

- The separation of power into distinct departments.
- The use of legislative checks and balances.
- The creation of courts with judges who hold their offices during good behavior.
- The representation of the people by elected agents.

These concepts had a distinct effect on the design of the new government.

5.1 Why not a Democracy?

So what is wrong with a pure democracy? The failures normally trace back to the corrupt and selfish nature of man. However, the actual mechanisms can vary. In its simplest form, one pundit described the problem as follows:

> "A democracy cannot exist as a permanent form of government. It can only exist until a majority of voters discover that they can vote themselves largess out of the public

[98] *The Federalist 10* defines a faction as: "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." It's easier to digest if read out loud. Today, factions might be better interpreted as "special interest groups."

[99] It was felt the most "common and enduring source of factions" was the unequal distribution of property.

[100] These both sound decidedly Orwellian (see George Orwell's *1984*).

> treasury." – Alexander Tytler (1747 – 1813), Scottish historian. Also attributed to Alexis de Tocqueville (1805 - 1859), French diplomat and sociologist.

Here, one can replace "majority" with "most powerful faction(s)" and have the same result. This pattern begins with uneducated, self-absorbed voters and the politicians who pander to them. And once it begins, it can be difficult to reverse.

When the minority realizes it is being abused, a number of things can happen, such as:

- Many members of the abused minority leave the country, voluntarily or otherwise.
- Others in the minority will stop trying and simply join the majority.
- Once the majority becomes too powerful, the remaining political opponents can be expelled, jailed, forced into effective slavery, or executed.

Some potential outcomes to this pattern include:

- If the people in the minority are the more productive workers, the economy can collapse when their numbers become too small. And/or,
- The minority rebels against their abusers, forcing a change in government. And/or,
- The government is taken over by a third party who promises to correct the problems.

A society can easily collapse before any of these options are fully realized. The third option, installing a monarch, is much too common. That person becomes a tyrant in the classical sense: he is all powerful, but may be a good or bad ruler.[101] Often the new government is more efficient than the anarchy that preceded it. But the people lose some or all of their liberties.[102] And even when a good ruler moves in, a bad tyrant eventually replaces him.

A modern and well documented example of this pattern involves pre-World War II Germany.[103]

> Germany "enjoyed" a democratic form of government after World War I. However, the French and British demanded ruinous war reparations from Germany. This left the country with an immense debt. *General government corruption and a great many socialist programs did not help.*[104] Massive inflation became a problem. Before WW I, the U.S. dollar was worth 4.2 German marks. By 1923, a dollar was worth 4.2 trillion marks. Paper currency was worth more as heating fuel than money. The economy improved towards the end of the 1920's, but the Great Depression in 1929 made things worse.
>
> By 1932, the German people were tired of poverty and corruption. There was also a general fear of the Communist party, fueled in part by Nazi[105] propaganda. Germany needed a change, and the people voted the Nazi party into office. Adolf Hitler was a charismatic speaker who promised the German people better times. He became Chancellor in January, 1933, and used his power to merge the offices of the President

[101] See Peisistratos (Athens) and Periander (Corinth), both considered to be good tyrants by some.
[102] This mirrors the consequences of Socialism, commented on earlier. Except the people do it to themselves.
[103] This discussion is *much* abbreviated. The full history can be worth reading.
[104] Socialist programs only work when enough people are still working to pay for them.
[105] National Socialist German Workers' party.

> and Chancellor. Subsequently he suspended individual and civil liberties, and forced parliament to give him the power to make laws without legislative approval. Hitler became an all-powerful dictator. *He used this power to persecute "non-Aryan" groups, including political opponents, gypsies, Jehovah's witnesses, Jews, and other ethnic minorities. During this time frame, a great many Jews were expelled from Germany, while many others left voluntarily.* Ultimately Adolf Hitler became one of the prime movers behind World War II.

Two major problems can be seen here. First, the high inflation rate and too many socialist programs indicate people were voting for themselves "largess out of the public treasury." Corrupt politicians were not being removed from office, or at least not replaced with honest men. Second, the treatment of minorities (albeit fueled by Hitler) demonstrated a tyranny of the majority.

Hitler himself became a cruel tyrant, while Germany became, effectively, a monarchy. To be fair to the German people, times were tough, and it can be difficult to recognize a tyrant prior to electing him.

The Roman Empire provides an example the founding fathers would have been familiar with:

> "Bread and Circuses" is a euphemism for food and entertainment given to a population in exchange for their votes. During the second century BC, it became difficult to provide Rome with an affordable food supply. Roman politicians created a "grain dole", along with cheap entertainment for the poorer citizens of the city. This improved living conditions for those people, but also subsidized the rich, because the poorer classes could now spend their money on more expensive products, such as wine and olive oil. These actions helped prevent social unrest, and gave the Emperor an image as a benevolent ruler. For the politicians, the dole became an effective tool for rising to power and keeping that power. Estimates of the number of recipients of the grain dole run upward of 250,000 people, out of a population of about one million. The dole cost roughly 15% of the state's revenue.
>
> This led to a sizable portion of the population who ignored civic matters. Their only concern was free food and entertainment.[106] The end of those subsidies in the fifth century AD was a major factor in the economic fragmentation of Rome.

To be fair, a bad outcome is not inevitable. History provides examples of regime failures that produced an improved government.

> John Lackland was born to King Henry II of England, the youngest of five brothers. He was not expected to inherit significant lands, but circumstances put him on the throne from 1199 to 1216. Historians have described him as a good administrator and an able general, but also petty and cruel.
>
> In 1214, King John attempted to regain lands in France that were formerly his. That venture failed, but still cost a substantial investment of resources. John returned to England in late 1214, only to have his Barons rebel a few months later. The ensuing tensions (not yet a full war) reached a stasis, and on June 15, 1215, John met with the

[106] One author noted that Rome imported foods and great riches on a daily basis, but it's only export was manure.

> Barons to work out an agreement. From these meetings the *Magna Carta* was born, which John was essentially forced to sign. It detailed a number of reforms to British government, including the rights of free men, rights of the church, protection from illegal imprisonment, access to swift justice, and limits to taxation. A council of 25 Barons were to monitor John's adherence to the document.
>
> Neither John nor his Barons took the agreement seriously, which led to the First Barons' War. John died in 1216, and nine year old Henry III was proclaimed king. William Marshal became the protector of young Henry and the de facto (default) head of the government. The civil war ended in 1217 with royalist victories. At this time, William Marshal resurrected an edited version of the Magna Carta, which became an important part of the British government in the future.
>
> The real victory, however, was that the sitting government did *not* revert to an absolute monarchy. Nor was it abolished. Instead, the power of the King was restricted, and the rights of free[107] men were established in British jurisprudence.

And

> The U.S. revolution was an armed rebellion against an abusive minority (the British government). But the ultimate outcome was unusual. A dictator did *not* assume power. Instead, the leaders of the day studied the failures of earlier governments, and crafted a new form of government to address those failures.

These were both unusual events in the course of history, requiring men unusually of good character.

A pure democracy comes with additional problems. Of particular concern is the cost of understanding complex issues. The common man will not always have the time or resources to learn about those issues, or acquire the background knowledge needed to understand them.

For these reasons, the Constitutional Convention produced a representative republic, rather than a democracy. The representatives are tasked with studying and understanding the issues. Only then can they write useful laws.

One should note that even in a republic, representatives must still be chosen. And this may involve a democratic process, with some lingering problems. Such as:

- Pork barrel politics[108] can persuade some or many voters into a taking bad course of action.
- Many politicians will cater to a public image, rather than the good of the people. Too often voters judge a politician's image, rather than abilities and integrity.

[107] The word "free" here is sadly relevant. Slaves, serfs and other "unfree" men were not included.

[108] Pork barrel politics involves bringing projects (i.e. money) into a representative's district. This can sway many voters into re-electing that representative, regardless of whether the money did any real good, or whether that representative is any good or not.

5.2 Mob Rule

A related but distinctly different problem is that of "mob rule", or *ochlocracy*. Roughly stated, this happens when a faction of the society uses fear, intimidation, and force to get what they want. A formal government might or might not be involved, but the demands of the mob will sidestep the rule of law.

> Lucius Aurelius Commodus was born to Marcus Aurelius on August 31, 161 AD. He became the sole emperor of Rome by 180 AD. Unfortunately, he showed little interest in running the empire. Those tasks were left to a succession of favorites. His reign was relatively free from the wars that marked his father's reign, but was instead filled with agitation, political intrigue, and conspiracies.
>
> Cleander was one of Commodus' favorites, and he eventually became Commodus' chamberlain.[109] Cleander set about gathering power for himself. Then he augmented his income by selling seats in the Senate, army commands, governorships and consulships (consuls were supposedly e*lected*) to the highest bidder.
>
> In the spring of 190 AD, a food shortage arose in Rome. The head of the Roman granary was able to set the blame on Cleander, rightly or wrongly. Subsequently, a mob arose demanding the head of Cleander. The Praetorian Guard was unable to suppress the riot, and Cleander fled. Unable to settle the crowds, Commodus gave in to their demands and had Cleander beheaded.[110]

The kind of mob action that ended Cleander's life is also a common theme in history, although the details will vary. Examples include the crucifixion of Jesus, the lynchings that were all too common in the American frontier, and Kristallnacht[111] in pre-World War II Germany. Most notably, *when a mob learns it has this kind of power, it tends to keep using it*.

5.3 Fixes under the Constitution

The men who drafted the Constitution were very well educated for the day. They understood these problems. Protections against majority rule and mob rule are discussed here.

5.3.1 Representation in the Legislative Branch

The founding fathers were concerned about how to equally represent States of different sizes.[112] Predictably:

- Delegates from the larger States wanted the representation to be proportional. This is, the number of Representatives from each State is related to the population of the State.
- Delegates from the smaller States wanted each State to have the same number of Representatives.

It is unlikely any of the delegates thought either option was a fully legitimate solution. Either would leave the country at risk from the tyranny of the majority or the minority. However, any good

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[109] It is thought that Cleander assassinated his predecessor, Saoterus.
[110] One might debate whether the "rule of law" was of any significance during Commodus' rule.
[111] This was an intensive attack on the Jewish people and their property on November 9-10, 1938. It was carried out in part by government subordinates and in part by civilians. Law enforcement looked the other way.
[112] This was briefly discussed in the previous chapter, but is reiterated and elaborated here.

negotiator brings out these issues so they can be discussed and understood before continuing. At some point, someone noted the two options were not mutually exclusive. This resulted in a *bicameral legislature* of the following nature:

- The legislature was divided into two Houses, to balance legislative power between the small and the large States.
    - In the *House*, representation is proportional. That is, the number of Representatives is (roughly) proportional to the population of the State. The House represents the interests of the people directly.
    - In the *Senate*, all States have equal representation: two Senators per State. Senators represent the States' interests.
- Bills had to pass *both* Houses to become law.
- Representatives in the House are elected by the people, every two years. This put them closer to the people, making it easier for the people to remove them from office. They are given specific responsibility for:
    - Taxation (money raising) bills.
    - Impeachments. That is, the indictment that leads to removing someone from office.
- The Senate was expected to have fewer delegates than the House.
    - A Senator wields correspondingly more power than a Representative.
    - Each Senator, individually, must understand more of the issues of the day than Representatives would. They need more time in office to learn the job. Hence the six year term.
    - In any one election year, one third of the Senators must again run for office, or retire. The turnover of delegates in the Senate is (theoretically) much slower than in the House. This makes the Senate a more stable ruling body than the House. As noted in *The Federalist 62*:

      > "It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow."

      Laws that were created or changed too quickly would be a problem.
    - Under the original Constitution, Senators were chosen by the State legislatures, not by the people. This was changed to a popular vote by the 17th Amendment.
    - The Senate becomes the judicial body that tries impeachments.

One should note carefully the proportional representation in the House, the equal representation in the Senate, and bills needing the approval of both Houses. This makes it difficult to get any new law through the government. However, it also helps counter the problems that result when a simple majority makes the laws. The larger States would be unable to trample the interests of the smaller States. Nor could smaller States unduly force the actions of the larger States.

This structure was similar to the English parliament, although the differences were significant.

- England had an aristocracy, which was represented by the House of Lords (the Upper House). The United States, however, lacked an aristocracy, and few people were interested in creating one. Having a House of Lords gave the wealthy a disproportionate power to enact or block laws.
- The communities ("commons") were represented by the House of Commons (the Lower House). This gave commoners (or perhaps more correctly, less affluent property owners) some representation. However, the use of pocket boroughs could sway the representation unfairly. Also, each borough received (at least initially) two votes in the House of Commons, so representation was not necessarily proportional to the population.[113]

It should be noted that wealth was spread more evenly in the colonies than in England, and the people were better educated. The consequences are still being discussed today. But the founders likely saw their fellow citizens as peers, rather than subjects. This in itself may have significantly affected the design of the new government.

5.3.2 Electing a President

How does one elect a President? The process involves a surprising difficulty.

- If you rely on a simple popular vote, the balance of power shifts to the large States. Candidates can focus their campaigns on a relatively few large cities around the country. This would be sufficient to win the majority. Smaller cities and even smaller States would be irrelevant in the process.[114] A candidate for President, given a choice between campaigning in a State with 4 million citizens, or a State with 40 million citizens, would almost certainly choose the larger State. And a President elected by a simple majority vote would be unlikely to respect the rights of those smaller, irrelevant States.
- If you give each State equal representation, the balance of power shifts to the smaller States. Their voters gain an unreasonably large voice in the outcome.

5.3.2.1 Electoral College

Building a fair and secure process was not (is not) easy. The Constitution describes the full process. Our concern here is with the first step, the Electoral College.[115] In its simplest form:

- Each State has one "Elector" for each of its Senators, and one for each of its Representatives.
    - Electors may not be current Senators or Representatives to the Federal Government.
    - They may not hold an "Office of Trust or Profit under the United States."
    - The Electors will ultimately vote for the President in the Electoral College.
- Each *State Legislature* decides how those Electors are chosen. Now days:
    - Each State holds a primary election for President. This is a popular vote of the people.

[113] At last check, modern British law requires redistricting every 8 to 12 years.
[114] As of 2010, the Los Angeles metropolitan region had a population of 18.1 million persons. The New York metropolitan area had 22 million persons. The State of Montana had roughly 991,000 persons. A 2.5% shift in the votes from those two larger areas would overwhelm the entire voting population of Montana.
[115] The process of choosing the President was modified by the 12th Amendment.

    - The State decides how its popular vote will be spread among its Electors. Common schemes are "winner take all" (the winner gets all the votes), and proportional (votes are proportioned according to how the citizens voted).
- Electors cast their votes, which are counted by the President of the Senate. If any one candidate receives more than half the votes, he becomes the President. If not, the House of Representatives chooses the new President.

In itself, this seems a bit messy. Why the complexity? Again, the two issues are *fairness and security*.

To be a *fully* fair process, a bicameral process might be better here, similar to the two Houses of Congress. That would provide greater representation to the larger States, but also protect smaller States from being neglected and/or abused. However, bills that fail to pass both Houses of Congress *can* be dropped. The office of the President *cannot* be left unfilled. The *semi-proportional* representation in the Electoral College ensured a President would be successfully chosen, while at least partially protecting the interests of both the larger and the smaller States.

Some pundits have compared this process to a professional sports playoff series. The winning team must win a majority of the games played. Whoever scores the most overall points in the series is irrelevant.

Securing the process meant guarding it from undue influence by foreigners or ambitious citizens.[116] The Electors were meant to be selected by the people, and they could not be current Federal employees.

> Consider letting a known body, such as the Senate or the House, choose the President. This would provide foreign agent(s), for example, the opportunity to influence the votes of the Senators and/or Representatives prior to the election.
>
> But if the Electors are unknown citizens prior to the election, there would be fewer opportunities to corrupt them.

5.3.3 Electing the Vice President

The Vice President presides over the Senate, a position that carries substantial power. The founders originally chose the second place finisher in the Presidential race as the Vice President. However, this led to problems.

> In the first two Presidential elections, George Washington was the unanimous choice for President. The only real choice was the selection of a Vice President. The process was adequate for those elections. But George Washington stepped down after two terms, and trouble began with the advent of partisan politics.[117]
>
> In the 1796 election, John Adams of the Federalist Party won the Presidency, and Thomas Jefferson from the Democratic-Republican Party was selected as Vice President. These two men were at odds on many issues, and could not work together. For example, during the French Revolution, John Adams favored a pro-British foreign policy,

[116] See *The Federalist 68*.
[117] Partisan politics is (roughly) voting the party line, rather than the interests of your constituents.

while Jefferson favored the French. From this experience, it became clear that these two positions had to work together to make the government work.

An initial fix had the Electors vote for the party, rather than the positions. This scheme created a major problem when the votes were tied, which happened in the 1800 election. A better solution was needed.

The 12th Amendment modified a number of steps in the process. Most important, Electors vote for the President and the Vice President on separate ballots. This has allowed Presidential candidates to effectively choose their preferred Vice Presidents prior to the election.

The 12th Amendment also corrected a second, more obvious flaw in the Constitution. The Vice President is first in line for succession to the Presidency. Therefore, he needs to meet the same age, residency, and citizenship requirements as the President.

6 Bill of Rights

"Liberty is not something a government gives you. It is a right that no government can legally take away." – A.E. Samaan

The finished Constitution was a unique experiment in government. Its design would help prevent the kind of problems that led to the failure of earlier governments. However, many people felt the Constitution did not adequately protect the people from governmental abuse. George Mason (Virginia) proposed that a "Bill of Rights" be included, listing and guaranteeing civil liberties. James Madison (also Virginia) disagreed. He felt the State Constitutions would be sufficient. In addition, listing specific rights might imply the government had the power to violate other, unlisted rights.

Proposals for a Bill of Rights initially failed in the Constitutional Convention. However, adoption of the Constitution required that nine of thirteen States ratify it. And opposition was focused largely on the lack of guaranteed civil rights. Ultimately, the Constitution was adopted only with the provision that a Bill of Rights be added.

The desired civil liberties were eventually added as Amendments to the Constitution, becoming the Bill of Rights.[118] Most of these rights were originally written to protect the people from the Federal Government. However, in recent years the Court has interpreted these Amendments as limiting the States' powers as well.[119]

Very brief explanations are given for these ten Amendments. Here, we only wish to provide general justifications for why these Amendments were written. These fall far short of the full judicial interpretations that have evolved over the last 200 years.

6.1 Amendment 1 - Free Speech

Many rulers, past and present, would detain and/or execute citizens for criticizing the government. But in any area of endeavor, the best thinking only comes out in the open and critical exchange of ideas. Free Speech concerns led to the First Amendment to the Constitution.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

This means you are free to speak your mind, within limits, without fear of government reprisal. This right, of course, comes with responsibility. Courts have consistently ruled against the freedom to yell "fire" in a crowded theater, where there is no fire. Exceptions also exist in cases of pornography, national security issues, slander, libel, "fighting words", and misleading advertisements. Freedom of

[118] It should be noted that the first two proposed Amendments were not ratified by the 13 Colonies. Those do not appear in modern day versions of the Constitution. However, the original, unratified 2nd Amendment was ultimately passed as the 27th Amendment in 1992.

[119] Expanding a Federal law, in this case the Bill of Rights, to also apply to State proceedings is called *incorporating* the law.

Speech does not protect you in cases involving fraud and other criminal activities, or when encouraging others to commit a crime. The Fifth Amendment also gives you a limited right *not* to speak.

The Supreme Court has ruled this Amendment implicitly ensures the *right of association*. This gives you the right to join or leave groups voluntarily, as you please. An association may also accept or decline members as they see fit (within limits).

Note carefully the Freedom of Religion clause. Freedom to worship was assumed; this clause gives you the right to *exercise* your religion. It also produced a curious consequence. Many thought this one phrase would lead to a drop in church attendance. However, it did just the opposite. As near as could be measured, church attendance rose during the years after the Bill of Rights was ratified.

6.2 Amendment 2 - Right to Bear Arms

The confiscation of guns was unacceptable to the founding fathers. It left whole communities defenseless against attack by Indians, outlaws, and, of course, the British.

> "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

While society has evolved with regards to guns, the underlying problems remain. For example:

- In World War II, it was found that young men who hunted birds with some regularity already knew how to "lead" a target. They were much easier to train as gunners on ships and bombers.
- Today, the common phrase is, "When seconds count, the police are only minutes away." The need to protect one's self, family, and property from outlaws has never gone away.

Much controversy surrounds this Amendment. However, countries that ignore the need to defend oneself eventually find themselves with a severe outlaw problem.

As mentioned before, the term "militia" is not well defined in the Constitution. However, *The Federalist 29* notes that having "an excellent body of well-trained militia" would make it easier to quickly form and deploy an army. And if the Federal army were to become a threat to the States, it was felt the State militias would be able to resist them.[120] The founders thought a body of armed citizens could act as a safeguard against the government's misuse of military power.

6.3 Amendment 3 - Quartering of Troops

In 1765, the British government passed the Quartering Acts. These required that:

- The colonists must pay the cost of keeping British soldiers in the colonies.
- If the available barracks space was inadequate, the soldiers would be housed in (almost) any available space. This could include ale houses, livery stables, and inns.

[120] See *The Federalist 46*. The aggregate size of the States' militias was expected to far exceed the size of the Federal army.

After the Boston Tea Party (1773), the Acts were modified. Troops could now be quartered (housed) wherever necessary, including private homes. This was one of the intolerable acts mentioned in the Declaration of Independence. It lead to the passage of the Third Amendment to the Constitution:

> "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

Not so curiously, this has been the least controversial Amendment to the Constitution.

6.4 Amendment 4 - Search and Seizure

By the early 1600's, British common law required the government to issue a warrant before agents could intrude on private property. This restriction concerning searches and seizures was further enhanced in 1765 by the court case Entick versus Carrington.[121]

In the Americas, however, British law provided no protection against unlimited searches and seizures. Only a "general warrant" was required. These allowed officers to search suspected places without evidence of a crime, seize people who were not named in the warrant, and arrest named people without evidence of a crime.

A crisis occurred shortly after the death of King George II in 1760.[122] In a five-hour hearing before a British court, Massachusetts lawyer James Otis argued against many colonial policies, including the use of general warrants. The court ruled against Otis. John Adams (also from Massachusetts), in the court at the time, later considered this the spark that started the American Revolution.

This led to the Fourth Amendment to the Constitution.

> "The right of the people to be secure in their possessions, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by Oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized."

Ultimately, this Amendment protects the privacy of the citizens. A warrant must be issued before a search/seizure can begin, and it must be based on "probable cause". That is, some evidence or witness must clearly indicate a crime has been committed. The warrant must identify what is to be searched and/or seized. However, a multitude of exceptions exist. For example, some leeway is given to police officers who have good reason (i.e. probable cause) to believe you have committed a crime. Also, objects in plain view normally give up the right to the "expectation of privacy." [123]

6.5 Amendment 5 - Criminal Proceedings and Due Process

Historically, many governments would resort to extreme measures to get a conviction. Such misuse of the judicial system allows the ruling class to falsely condemn people solely for personal gain. The

[121] The warrant in question lacked probable cause, and the government agents seized far more than necessary.
[122] This required the renewal of all writs, which would expire six months after the king's death. A writ may be thought of as a general order, assigning a specific action to a person or governmental agency. A warrant is one type of writ, a subpoena is another.
[123] This may vary among the States.

founders felt many of these actions were poor treatment for free men. This led to the Fifth Amendment of the U.S. Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

This is a rather windy single sentence. However, each clause was inserted for a very good reason.

The Grand Jury

For serious crimes (e.g., murder), the State must hold *grand jury* proceedings to determine the facts in the matter. To go to trial, that jury must return an indictment against the accused.

Two primary reasons are given for this. First, during grand jury proceedings, all testimony is secret. This means the names of the people involved are not dragged through the mud until there is enough evidence to merit an actual trial (the *petite jury*). Note that many of the Constitutional protections provided in petite jury trials cannot be invoked in grand jury trials.

Second, the grand jury consists of regular citizens who decide if an indictment is warranted, instead of the State. This acts as a check against governmental abuse of power.

As of this writing, the specific processes involved will vary from State to State. Not all States require grand juries for criminal indictments.

Double Jeopardy

In the past, governments would resort to trying a defendant multiple times until they got a conviction. This was expensive for both the government (…who, by the way, is spending someone else's money…) and for the accused. It also greatly increased the chances for getting that conviction.

The double jeopardy clause:

- Prevents repeated prosecution for the same crime from disrupting a person's life,
- Prevents the continued prosecution after a conviction, and
- Does not allow more than one punishment for the offense.

Self-Incrimination

When a prosecutor can extract "self-incriminating" evidence from a witness, it opens up the process to cruel and unjust interrogation methods. These include torture and threats to family and friends. In such cases, you can no longer tell who is really guilty, and who just can't handle the stress.

> In England, the shift away from self-incriminations began in the late 1600's. English officials could demand a person take an *ex official mero* oath, which meant swearing guilt or innocence, often without first hearing the charges. Persons refusing to take the oath were considered guilty. Suspected political enemies would be pressured to take

> the oath, and then compelled to name their associates. Coercion and torture were common tools in this process. This ultimately led to *The Humble Petition of Many Thousands*, presented to Parliament in 1647, which requested an end to self-incrimination in criminal cases.

The founders felt the use of self-incriminations would lead to more abuses than solutions. They included this right in the Bill of Rights. Be forewarned, though, that a bevy of interpretations surround this clause.

Due Process

The concept of "due process" was first codified in the English Magna Carta of 1216.

> Prior to written constitutions, monarchs could do whatever they wanted. The monarch decided what the law was and how to implement it. A person could be pulled off the street and convicted without having any idea he was violating the law. The Magna Carta (as revised in 1354) required the State to adhere to certain laws and processes before depriving an accused person of his property or life.

The founders were undoubtedly aware of frontier justice and lynch mob hangings, and felt they were things to be avoided.

The U.S. Supreme Court has interpreted this clause to include the following: [124]

- Procedural Due Process. Procedural law deals with the processes the State must follow when it attempts to restrain or prosecute a person.[125] For example, gathering evidence, getting a warrant for an arrest, and performing a trial. Fair and impartial procedures must be defined and used in all such actions.
- Substantive Due Process. This term is not well defined, at least by a layman's standards. The goal is to ensure the laws do not have an unfair impact on people. This can involve enumerated (Constitutional) or non-enumerated rights which are not strictly procedural. In this context, one often sees the phrases "natural rights" and "fundamental rights," which originated as common sense notions of fairness. Examples include the right to pursue a livelihood, purchase goods, marry, raise your children as you see fit, and live without unnecessary government interference.
- A prohibition against vague laws. If the defendant cannot reasonably know he is violating the law, then his prosecution under that law is neither fair nor impartial.
- Incorporation of the Bill of Rights. The original Constitution applied only to the Federal Government. Over time, the Court has expanded (incorporated) most of these rights to cover the laws and actions of the States.

The Fourteenth Amendment also addresses many of these and related issues.

[124] We don't normally discuss the more recent interpretations of the Constitution, but these seemed important.
[125] Formally, any actions that might deprive someone of their right to life, liberty, or property.

Eminent Domain (Takings Clause)

As with Due Process, monarchs have a long and storied history of simply taking what they want.[126] However, an early version of the Magna Carta prevented the seizure of private lands without at least a proper hearing. This ultimately grew in scope and became part of English common law.

On drafting the Bill of Rights, James Madison felt one of the primary duties of a government is to protect the property of its citizens. But nothing in the Constitution prevented the government from seizing private property for its own use. Nor did any of the States request this clause be added to the Bill of Rights. In hindsight, this should have been a troubling situation.

> *"Now what liberty can there be where property is taken without consent?"* – Samuel Adams, 1722-1803

Hamilton inserted the Takings Clause to (largely) correct the problem. The Constitution gives the government the power of Eminent Domain. That is, the government ultimately owns your property, and may seize that property for public use. However, such an action requires a just and equitable payment to the property owner.[127]

6.6 Amendment 6 - Right to Trial

The Constitution itself guarantees the right to a jury trial in the State where the offense occurred.[128] The Sixth Amendment stems from two additional concerns:

- Dubious legal maneuvers by previous governments during jury trials. These were often badly biased against the accused, making it easier to get a conviction. In many cases, they were designed to give the appearance of justice without providing the substance. Historically, despots have had an affinity for that kind of justice.
- The chaotic nature of the "frontier trials", often found in the young country. Justice could be a "do-it-yourself" affair. Lawmen, lawyers, and constables were not professionals, but merely performing each service as needed. The judicial processes could be slipshod, up to and including shouting matches. In smaller towns, everyone knew everyone else, and potential jurors may already have had opinions about guilt or innocence.

The goal was to provide a framework for the judicial process that was fair for both the accused and the victims. The full Amendment reads:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

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[126] See, for example, the story of Naboth's vineyard in the Bible. 1 Kings 21 verses 1 through 16.
[127] Sadly, much legal effort has been spent in the last 200 years trying to determine what is meant by the terms "for public use" and "just compensation." Legal wrangling has watered down this clause.
[128] Described in Chapter 4, Section 4.2.4.

Again, this is long winded with many separate clauses. And all have good reasons for them. But note that any or all of these rights can be waived when special circumstances arise. Also, jury trials are required only for crimes involving more than six months of imprisonment.[129]

The Right to a Speedy Trial

This prevents the government from simply putting you in prison for an extended time. Such as the rest of your life. A trial must be provided in a timely manner. The current interpretation is "within one year."

The Right to a Public Trial

Private trials are a breeding ground for all kinds of state sponsored misbehavior. Procedures and protected rights can be violated. A public trial lets the general population see what kind of justice their government provides. Exceptions do exist, such as for national security issues.

The Right to an Impartial Jury

An unjust prosecutor, given the power, can fill a jury with people who are biased against the defendant. Such people would be at least tempted to find you guilty just because they don't like you. Justice demands better.

The Right to a Local Venue

The British would at times haul a colonial defendant back to England for trial. A trial held at such a remote location can make things hard for the accused. For example, calling a witness for the defense could involve months of travel. And such an expensive trip was unaffordable for most people in the colonies.

Also, cultures and cultural values will vary at different locations in any large country. The laws may vary from State to State, or even city to city, in a similar fashion. A local venue (location) improves the ability of a jury to make judgements (not everything is cut and dried) based on local customs.

The Right to Know the Accusation

In any trial, the defendant cannot prepare a proper defense if the charges are not well defined and communicated to the accused. The current interpretation of this is rather strict. If there is any ambiguity in either the law or the charges, the case may be dismissed.

The Right to Confront the Witnesses

This right allows the defense to cross-examine the witnesses against the accused. He can thus challenge the testimony and credibility of those witnesses. Without this, a prosecutor could solicit only evidence against the accused, omitting any favorable testimony. The confrontation clause applies to both spoken and physical evidence.

This clause also relates to hearsay evidence. This happens when a witness testifies to what someone else said about an incident. When hearsay evidence is allowed, the accused has no opportunity to

[129] By current judicial interpretation, not by a literal interpretation of the Constitution.

challenge the person who made the original observations. Hearsay is not generally allowed in trials (with some exceptions).

As one might guess, this clause can be a problem when the accused might want revenge against the witnesses.

The Right to Witnesses for the Defense

This is called the "Compulsory Clause." It ensures the defense can call witnesses in its favor. Again, without it, the prosecution can present only the accusations, while suppressing favorable testimonies. The phrase "compulsory process" means witnesses can be compelled to testify by the use of a court-ordered subpoena.

The Right to Counsel

In any "civilized" society, criminal prosecutions can become complex affairs. In the U.S., for example, the average citizen will not know what is and is not admissible evidence. The Bill of Rights added to the complexity. It was not reasonable to expect the common man to understand all of the nuances of the process. The founders wanted to make sure defendants had access to legal counsel. This helps ensure the proper procedures will be followed and the defendant's rights will not be violated.

6.7 Amendment 7 - The Right to a Jury Trial

The text of the Seventh Amendment reads:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Article III of the Constitution guarantees the right to a jury trial for *criminal* acts (see Chapter 4.) This Amendment contains two clauses that the founders felt were important. So what prompted this Amendment?

> In the 18th century, American courts used American jurors to try cases under British law. But Americans had no representation in the British government. In many cases these jurors felt the laws, especially taxation laws, were unjust. At times, the juries would "nullify" (refuse to enforce) the British laws. This unsettled the British, who then denied American citizens the right to a jury trial.

First, the Amendment expands the right to a jury trial to include *civil* actions[130]. The founders felt the jury trial was an important right in any civilized society. However, a jury trial can be expensive and time consuming. The twenty dollar limit discouraged the use of jury trials for relatively trivial matters. Now days, that specific limit is largely ignored, or a considerably larger dollar amount may be used. Even so, most civil actions in America are heard by judges, not juries, under State law.

[130] The Federalist 83 discusses civil jury trials extensively. Note that it was written before the Bill of Rights.

The second clause prohibits later court actions from overturning any "findings of fact" reached by a jury. Under British law, a judge could reinterpret any of a jury's conclusions that he disliked. This often gave him sufficient wriggle room to fully ignore a jury's verdict.

Current common law allows some leeway in overturning a jury's findings. This can be important when new evidence is found after a case has ended, or obvious errors in process have been revealed.

However, the founders viewed the jury's ability to nullify a law as an important part of the American Revolution. They chose to keep that power as part of the new government.[131] The jury, in essence, became a last check on the judicial system. This can be important when the State steps out of line with an unreasonable law or prosecution. It also gives the jury a final opportunity to prevent a serious miscarriage of justice.[132]

Common Law

The phrase "common law" was not well defined in the Bill of Rights. Originally, common law was based on two common sense notions, common to almost all religions and nations.[133]

1. Do all you have agreed to do, and
2. Do not encroach on other persons or their property.

The first of these is the basis for contract law; the second is the basis for tort law and some criminal law. Common law grew from there, according to the customs of a society. It was eventually supplemented with statute law, which must be formally declared by a legislature.[134]

In time, common law, or case law, came to mean law declared by judges, rather than legislatures. This includes law handed down through precedent (previous rulings). Common law can be especially important to a young country, which has not yet developed a full body of statute law. Ultimately, this gave the Judicial Branch limited freedom define its own law.[135] For the Seventh Amendment, "common law" has been taken to mean the precedents and procedures for *jury cases*.

In 1791 every State had its own body of common law. Which one should apply? The Supreme Court, in time, decided this "common law" phrase should reference the common law in England at the time of the adoption of the Bill of Rights.

An offshoot of this is that the Seventh Amendment was never incorporated. That is, it applies only to cases under Federal jurisdiction, but not to cases under the jurisdiction of a State. This action (or more

[131] Some delegates objected to this clause, as it could conceivably result in debts being nullified on a large scale.
[132] After one such acquittal, a juror reportedly confided (paraphrased), "We think he's guilty, but we weren't letting the state get away with this." Trial judges react poorly to this kind of thinking, rightfully so, as there is no real check against a corrupt jury. But it's more in line with the desires of the founding fathers.
[133] Taken from "Whatever Happened to Justice?" by Richard J. Maybury, Bluestocking Press, 2004.
[134] Common law was intended to make logical sense. This differs from statue law, which reflects what the current body of legislators want, and might not make sense. Common law and statute law are both distinct from "constitutional law", which reflects the written constitution of the country.
[135] In the colonies, this originally meant English common law. However, it leaves a question on how much leeway judges should have to make law. And today there is considerable sentiment that many judges have vastly overstepped their authority.

properly, lack of action) allowed each State to keep its own common law. Fortunately, most State Constitutions include these same protections for their citizens.

6.8 Amendment 8 – Bail, Fines, And Punishment

This Amendment reads:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

A worrisome power of the new Federal Government was the power to create Federal crimes and the punishments for them. Abraham Holmes (Massachusetts) feared that an institution like the Spanish Inquisition would be recreated.[136] Patrick Henry (Virginia) thought the Federal power could easily become a weapon of oppression. Earlier despots could simply get rid of political opponents by imposing a life sentence for a minor offense. Or they could bankrupt an enemy by setting an unreasonably large fine.

These three short clauses were meant to keep the government from imposing punishments that were too harsh for the crime(s) committed. They also prevent using excessive punishments for ulterior goals.

Note that the adjectives "excessive" and "cruel and unusual" are not well defined. While the intent of the Amendment is clear, how these three clauses are implemented has been left to the wisdom of each generation. For example, the death sentence was once considered a fair and proper punishment for murder. But many States today consider death to be "cruel and unusual" for any manner of crime.

6.9 Amendment 9 – Non-enumerated Rights

The original Constitution did not include a Bill of Rights. It was felt the new, limited government should have only the powers that were explicitly granted to it by the Constitution.[137] In addition, a Bill of Rights was not needed because most State Constitutions already included a Bill of Rights. Also, listing specific rights might backfire: judges might give those unlisted ("non-enumerated") rights to the Federal Government.

Because of the vocal Anti-Federalist opposition, James Madison (Virginia) pledged to add a Bill of Rights after ratification. Madison felt he could handle the possible loss of freedoms posed by the enumerated rights. This led to the Ninth Amendment.

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

This Amendment has rarely been used in judicial proceedings. Even so, much effort has been expended to interpret what was mean by "rights … retained by the people." That still remains unclear.

6.10 Amendment 10 – Rights Reserved to the States and the People

A (very) old joke states:

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[136] The Spanish Inquisition was created at the end of the 12th century to identify heretics among Jewish and Islamic converts to Catholicism. Its later purpose was to maintain the religious orthodoxy of the day. The Inquisition had a reputation as being a cruel and intolerant institute, but scholars are reassessing that belief.

[137] This view might seem laughable in today's political environment. But see *The Federalist 84*.

> "In England, whatever is not explicitly forbidden is allowed. In Germany, whatever is not explicitly allowed is forbidden."

This joke demonstrates one of the problems concerning the Bill of Rights. What should one do with "unassigned" rights? Leaving *that* interpretation to future generations did not seem like a good idea.

The Tenth Amendment is something of a companion to the Ninth Amendment. It was intended to clear up the ambiguity of unassigned rights. The Amendment states:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The States were jealous of their power to make laws as they saw fit. Many of the Anti-Federalists feared the new government would usurp that power. This Amendment was written to ensure any powers not explicitly assigned to the Federal Government would remain with the States.[138] It was also hoped this would limit the size and power of that Federal Government.[139]

[138] Except those restrictions that are specifically cited in the Constitution.

[139] Many people think this failed because of work-arounds devised by the government. For example, the *Commerce Clause* allows the Federal Government to regulate interstate commerce, which can be broadly interpreted. Also, specific project funding can be withheld from uncooperative States. This has been done with education and highway dollars. On the other hand, the interstate highway system might not exist without both Federal money and control.

7 Other Tyrannies

"The fault, dear Brutus, is not in the stars, But in ourselves…" – Cassius, to Brutus, in Shakespeare's "Julius Caesar"

The founders encountered some additional difficulties in the design of the U.S. Constitution. These were discussed in detail, and ultimately found their way into the document. Some are related to tyranny, while others simply involve the proper design of a government.

7.1 Restrictions on the States

Article I of the Constitution restricts the States in many ways. These generally fall into two categories.

7.1.1 Protecting the People

The Constitution prohibits the Federal Government from performing specific actions that threaten the welfare of a free people. In 1788, it was uncertain if those actions would be automatically prohibited in the States.[140] Consequently, the founders listed them explicitly in the Constitution. These include:

- The States may not pass a Bill of Attainder or an Ex Post Facto law.
- Titles of nobility may NOT be granted.
- Fees ("duties") may not be charged on goods imported or exported by the States.

These have already been explained in reference to the Federal Government (See Chapter 4). And the reasoning remains the same for the State governments.

7.1.2 Consolidation of Authority

Other actions were taken because they really needed to be performed by a single, Federal authority. These include the following:

The States may not:

- Enter into treaties, alliances, or confederations with foreign powers or with other States.

  This power was allowed by the Articles of Confederation. For the Constitution, it was felt the Federal Government should have the sole authority over the dealings with other nations. However, an 1840 ruling did allow the States to form agreements and compacts with foreign nations, which Congress could authorize.

- Perform acts of piracy. The original text is "Grant letters of Marque and Reprisal." Again, this kept the States from authorizing private vessels to capture enemy ships.

- Maintain troops or war ships in a time of peace. This effectively prohibits full time soldiers under State control. Note that a "militia" was not considered a standing army.

[140] However, most State constitutions already prohibited these actions.

- Engage in or prepare for war in times of peace, unless they have been invaded or are in imminent danger of invasion. The consent of Congress is required.

Three of these four items are war-time activities, or involve the preparation for war. As mentioned in Chapter 2, only a strong Federal Government would be able to effectively wage war with the more powerful nations. Also, the more armies you have in the country, all under separate authorities, the more likely the States would start warring with each other. Removing the States' authority to raise armies or conduct wars would prevent these problems.

The States may not:

- Coin money.
- Issue bills of credit.

Prior to the U.S. Constitution, each colony could coin/print its own money. Separate currencies had to be exchanged in every interstate market action. It was also a notable problem when a traveler needed to know what the money his pocket would buy.[141] Foreign commerce was similarly affected.

Paper money had also been introduced, and it proved to be a problem. Unlike precious metals, the paper itself has no intrinsic value. One could never be sure the paper would be honored. In addition, paper money is cheap and easy to print. Governments can and do print excess paper "dollars" to pay their debts, which is the primary cause of inflation. ***Monetary inflation could itself be listed as a separate tyranny***. As more money enters circulation, each individual dollar has less value. No wealth has been generated, so more dollars are chasing the same amount of goods and services. This was a big problem in pre-World War II Germany (the Weimar Republic, 1919 to 1933). Governments can fall when inflation becomes too extreme for the people to handle.

It was felt the coining of money should be the responsibility of the Federal Government. Interstate commerce would not require exchange rate calculations, and the value of that money would be more consistent across the country.

States were allowed to make "gold and silver Coin a Tender for Payment of Debt." Precious metals do have intrinsic value, and are continually in limited supply. This makes them a practical medium of exchange, unlike paper money. And it would be decades before Federally created money could reach the frontiers of America. Such areas required some form of money, and often relied on the local government or a private mint for the needed coins. Purity and weight standards were supposed to apply, but could not be trusted.

"Bills of Credit" were not well defined by the Constitution. They may be considered a form of borrowing money using paper certificates. Or possibly the printing of paper money itself. Under the Articles of Confederation, there were many problems when States issued paper currency. The founders elected to remove that power from the States.

[141] One might mention here that most of the delegates to the Constitutional Convention had to travel across State lines to get there. They would be very familiar with the problems.

Regulation of Commerce[142]

Commerce was thought to be the greatest generator of wealth in a nation. However, to be effective, commercial trade must be *fair*. Congress gave itself the right to regulate commerce:

- Between the States and foreign nations. Prior to the Constitution, States could freely make commercial agreements with foreign nations. Some States would pass unfair laws that hampered the international trade efforts of other States. Also, national treaties could be "frustrated by the regulations of the States."
- Among the States. When a landlocked State wanted to do business with Europe, it had to ship its goods through a sea port. If the port State could place duties on those goods, the landlocked State could be at a serious competitive disadvantage with other States. This kind of imbalance had to be avoided.
- Between the States and the Indian nations. The legal status of the Indian nations had not been settled at the time of the Constitutional Convention. It was felt this clause would help resolve problems in the future.
- Define standards for weights and measures. Distance, area, volume, weight and time are often used to measure what your customer is receiving for his money. These must be well defined and uniform across the nation.
- Establish uniform rules of bankruptcy. Previously, each State had its own bankruptcy laws. This caused problems when the persons or properties involved were spread across multiple States. Both creditors and debtors could unfairly exploit the differences.

Naturalization

- Naturalization is the process that grants a person citizenship of a country. In the U.S., every State must acknowledge the rights of the citizens of every other State. If the requirements for citizenship varied from State to State, a person's residency status could be ambiguous. This made uniform rules of naturalization necessary[143].

7.2 Election of Congress

The Constitution presents some oddities relating to the election of the members of Congress. Again, the chosen solutions were introduced for good reasons.

7.2.1 The House of Representatives[144]

The founders intended the House to be closest to the citizens, having "a common interest with the people." They also expected the people would hold them accountable.

Representatives are selected:

[142] See *The Federalist 42*. The first three items listed here are the Commerce Clause of the Constitution.
[143] While not mentioned in the Federalist Papers, a State with simple naturalization processes could import and naturalize immigrants quickly, thus unfairly augmenting its delegation in the House of Representatives.
[144] See *The Federalist 52 and 53*.

1. **By a popular vote of the people in each State.**

   Representatives are responsible for the purse strings (bills for raising money). This was considered a significant power. As such, they had to be most answerable to the people. If the taxes become too high, the people can "vote the bums out" directly.

2. **Every two years.**[145]

   > In England, the king often had significant control over when parliament would meet, and when elections were held. This power was often abused. There could be very long recesses between sessions. If the existing legislature was biased in his favor, elections could be many years apart. This meant the king could act without the interference of parliament, and sometimes without their approval.

   The founders believed that frequent elections were necessary for "binding representatives to their constituents." To prevent abuses of this nature, that frequency also had to be well defined.

   At the time, two of the colonies held elections every other year, others yearly, and some every six months. There were no clear advantages to any of these arrangements. So why two years?

   - It was felt the problems faced by a Federal Government would be more complex than those faced by a State government. Representatives would need more time in office to properly understand and address these issues.
   - In the case of a disputed election, it could take longer than one legislative session to resolve the dispute. A single year in office means a "stuffed ballot box" could fully serve its purpose, even when election fraud is exposed.

   Two years was thought to be enough to get the job done, while still holding the Representatives accountable to the people.

3. **Voters ("Electors") had to have the same qualifications (e.g., age and residency requirements) as the Electors of the most populous House of the State government.**

   > During the middle 18th century, the colonies all had republican forms of government. That is, elected legislatures. Each colony had its own requirements for voters, and for the people elected to office.

   The colonial governments were familiar with their own voter qualifications. Those had worked well for years. The founders decided each colony knew its own people better than the Federal Government would. If a person were mature enough to vote for State legislators, he would be mature enough to vote for Federal Representatives. They chose not to enforce a uniform Federal mandate on voter qualifications.

4. **No more than one Representative for every 30,000 persons.**
   The number 30,000 was taken from a study of British Parliamentary representation in the late 18th century.[146] That number is not really relevant today. The total number of Representatives was

[145] A popular proverb at the time was, "Where annual elections end, tyranny begins."
[146] See *The Federalist 56*.

capped at 435 by the Apportionment Act of 1911. After each census, every ten years, States are assigned Representatives according to their population. Each State chooses for itself how to set Congressional district boundaries.[147]

Many people questioned the initial number of Representatives. They felt the sixty-five members of original House would be too few to be effective. But this number was expected to grow rapidly as the country expanded.

James Madison also expected too many members would become a problem. In *The Federalist 58*, he stated, "…the more numerous an assembly may be… the greater is known to be the ascendency of passion over reason." Also, "the larger the number, the greater will be the proportion of members of limited information and of weak capacities." [148] He felt that with too many Representatives, the House itself would revert to a kind of democracy, rather than a republic. These thoughts were based on his knowledge of history and experiences in public service. The notion of capping the size of the House was not unexpected by the founders.

7.2.2 The Senate

In the original Constitution, Senators were selected by the State legislatures.[149] This served two goals. First, the founders wanted the States to have a voice in the Federal Government, and this would hopefully form a convenient link between the two systems.

Second, they wanted the two Houses of Congress to be populated by "different modes of election". The Representatives and Senators should be "as little connected with each other" as possible. This reduced the ability of a single faction to easily control a large portion of Congress.

7.2.2.1 The Vice President Presides over the Senate

The founders decided to create the office of Vice President, and put him in charge of running the Senate. This is curious, because the Senate could easily choose a leader from among its members, much as the House does. Where is the need for a Vice President?

Note that the Vice President is (normally) a non-voting member of the Senate, who controls its activities. That control is a very powerful asset. If that chairperson is a sitting Senator, then:

a) If he is not allowed to vote, his State loses half of its representation in the Senate.
b) If he is allowed to vote, his State gains a significant power advantage over the other States.

The solution was to let the people elect a Vice Present to lead the Senate. But he cannot vote, except to break a tie vote.[150]

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[147] Although Federally mandated restrictions apply, such as the Voting Rights Act of 1965.
[148] In a sense, this reflects the modern statement, "None of us is as stupid as all of us." (From *Despair, Inc.*)
[149] See *The Federalist 51 and 62*. This was changed to a popular vote of the people by the Seventeenth Amendment. Recent arguments suggest an additional purpose for the original design. State legislatures were responsible for ensuring the Senators were *working for the State*. The popular vote effectively allows the Senators to work for themselves, or for outside entities.
[150] See *The Federalist 68*. At least one colony used this system, with an elected Lieutenant Governor.

7.2.3 Times, Places, and Manners of Congressional Elections

The Constitution allows each State to choose how, when, and where it will hold elections for Senators and Representatives. Curiously, the Federal Congress has the power to change the "how and when" parts of this, but not the "where."

This may appear to be an unwarranted intrusion into the States' rights. Alexander Hamilton explains this clause in *The Federalist 59 and 60*. The founders were concerned that if one or more States refused to hold these elections, it would leave the government unable to function.

This was not a significant concern for the Senate. A quorum needs only a simple majority of the Senators. Each State has two Senators, and only one third of the Senators are elected every two years. Fully half the States would need to rebel in this manner, over a course of six years, to shut down the government. If this happened, the government was probably failing, anyway.

However, in the House, the larger States had the larger proportion of the Representatives, elected every two years. A few of those larger States could stop all legislation by simply not electing Congressmen.

This clause gives the Federal Government the primary authority for regulating Federal elections. If only the States had this power, ambitious State leaders might try to threaten the Federal Government by subverting the election process.[151]

But note the Federal Government only has the power to regulate the time and manner of an election. The *where* is the State's responsibility. The founders were concerned that a corrupt Congress might place the elections where more people of a favored faction lived. Travel hardships would tend to favor that faction. Protecting the country against this danger became a duty of the States.

7.3 Salary and Job Actions

Under the Constitution, how does one set the wages of the President, Senators, Representatives, and Judges? It was noted earlier that under British rule, judges were dependent on the British king and/or governors for their jobs and their salaries (Chapter 4). As you would expect, this biased their judgements towards the King, a situation the founders wanted to avoid.[152] Therefore:

> Salary and job actions taken by the House, the Senate, or the President must not influence the judgements, decisions, or actions of the courts or the President.

At least as little as possible. And note carefully where these powers come from:

- Appointments are the shared responsibility of the President and the Senate.
- Impeachments are the direct responsibility of the House, with the trial taking place in the Senate.
- Salaries are money related, so one normally thinks of the House of Representatives; but they also need the consent of the Senate.

The founders addressed the fears associated with salary and job actions using the following restraints:

[151] Interference from foreign governments was also a concern.
[152] See *The Federalist 73*.

- The salary of the President is fixed at the time he takes office. It may not be increased or decreased during his current term in office. Nor may he accept other pay from the Federal or State Governments.
    - A President serves four years between (potential) salary actions. This was thought to be short enough that mid-term pay increases would never be needed.
- Congressional salaries can change only after an election of Representatives (every two years). This prevents Congressmen from voting pay raises for themselves and then retiring to a desert island. Before they can accept that salary change, they must face the judgement of the people who elected them. As noted before, Madison intended this to be part of the original Constitution. Failing that, it was proposed as an original Amendment to the Constitution, but it wasn't ratified at that time.

    Congress passed the Salary Grab Act in 1873 on the day before President Grant's inauguration.[153] It doubled the salaries of the President and Supreme Court Justices, and increased their own salaries by half. The increases were retroactive to the beginning of the just completed term. Public reaction was vitriolic. In response, Ohio ratified the proposed Amendment. A similar pay action occurred in 1978, prompting Wyoming to also ratify the proposal.

    In 1982, Gregory Watson, a student at the University of Texas at Austin, wrote a paper suggesting this Amendment be ratified. His paper got a "C" grade. Watson responded by running an effective nationwide campaign to finally ratify this Amendment. It became the 27th Amendment in 1992, 202 years after its proposal. To date, 46 States have ratified the Amendment. In 2017, the University changed Watson's grade to an "A".

- Judges "hold their offices during good behavior." That is, they cannot be easily fired. A judge's salary may not be decreased as long as he stays in that office.
    - A judge's term of service can easily last for several decades. Congress was permitted to raise his pay, as the economy could change considerably during that service.
- Impeachments are the only way to forcibly remove the President or a Judge. But impeachments are limited to "treason, bribery, or other high crimes and misdemeanors." You can't impeach a guy because you don't like him.

In *The Federalist 78*, Hamilton gives a second reason for appointing judges for open ended terms. Legal systems, even in the late 1700's, were regrettably complex. They require a comprehensive knowledge of the law. It was felt there might be too few people trained and available to take these positions. So you want to keep the judges you have. The non-diminishing salary added an enticement to take the job.

7.4 Treaty Approvals

The President may negotiate treaties with foreign powers. This brings up two curious items in the Constitution.

[153] "Salary Grab Act" is the popular name. The pay increases were attached to an appropriations bill. The Congressional raises were soon repealed. Subsequent elections were hard on the offending Congressmen.

First, the Senate must approve those treaties before they go into effect. The curious requirement here is "…provided two thirds of the Senators *present* concur." In *The Federalist 75*, Hamilton notes a problem with legislative "super-majority" requirements; the majority can be held hostage by a hostile minority. The minority faction can kill the issue simply by not showing up to vote.[154] This was considered acceptable for some issues, but not for treaty negotiations. The problem was solved by requiring a super-majority of only those Senators present. Boycotting the vote gains you nothing.[155]

Second, the President was given the power to convene either House of Congress, as needed. It is possible that a national emergency might require this. However, the immediate concern was the approval of treaties. This allows the President to convene the Senate, and only the Senate, for a treaty action that cannot wait for the next session of Congress.[156]

7.5 The Judiciary

Every society needs courts to mediate disputes. This is particularly true of a Constitutional Republic. Without some means of enforcing the terms of the Constitution, it is little more than a piece of paper.

In addition, such a court was expected to dramatically reduce the risk of internal wars.

> In *The Federalist 80*, Hamilton notes the creation of the "Imperial Chamber", or *Reichskammergericht*, by Maximillian in 1495. This was the high court of the Germanic realm, to which all disputes of the empire could be brought. Prior to its creation, Germany was wracked by "dissensions and private wars". The provinces were required to bring their differences to court, thereby greatly "appeasing the disorders and establishing the tranquility of the empire."

In the U.S., The Federal Judiciary is composed of a Supreme Court and a number of other "inferior" courts, as established by Congress. The Supreme Court has the final authority on all cases. Once they rule on an issue, there is no appeal to a higher authority.

7.5.1 Why a Supreme Court?[157]

Many people questioned the need for a *distinct* "court of final appeal."

> In Great Britain, at that time, the court of final authority was a branch of the House of Lords. Many earlier governments, as well as some of the colonies, also used that model. This costs less overall than having a separate judiciary. And the legislature would be most familiar with the intent of the laws they passed.

However, this model violates the principle of separation of power. Giving a law making body the power to judge its own work comes with serious risks, such as:

- If a specific law is in question, the legislature was responsible for creating that law. Could it be trusted to judge that law impartially?
- A corrupt legislature, after willfully passing a corrupt law, would be unlikely to correct that error.

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[154] Examples from history were noted, but not discussed in any detail.
[155] Note that Congressmen may vote "Yes", "No", or "Present" on issues. The "Present" vote can be used for many reasons, but it effectively adds that Congressman's vote to the quorum, without effecting the yes/no ratio.
[156] See *The Federalist 77*.
[157] This section and the next are taken from *The Federalist 81*.

- Legislators were elected for limited terms of service. A legislator who is about to leave office might return a prejudiced decision in return for "retirement benefits" by one of the disputing parties. Judges elected for life would be less likely to accept a bribe.
- Legislators are elected by the people (or by the States), and are not typically chosen for their ability to handle the complexities of law. They may not understand the full consequences of their judgements. Judges are explicitly trained in the law.

The founders, predictably, preferred a full separation of power between the legislature and the courts.

Functionally, this means the legislature cannot overrule a decision given by the courts. All it can do is create a new law for future cases.

7.5.2 Inferior Courts

A single Supreme Court would undoubtedly be overwhelmed with the number of cases it would see. This would only get worse as the country grew. To ease this burden, the Constitution allows the creation of "inferior courts", which can hear cases involving Federal issues.

In cases involving foreign representatives ("ambassadors, other public ministers, and consuls"), the Supreme Court has original jurisdiction.[158] This was done out of respect for the foreign governments, and to speed the judicial process. Cases involving the States are also sent directly to the Supreme Court.[159] These tend to be cases that could have political consequences if they were to drag out longer than necessary.

All other Federal issues must be heard first by the Inferior Courts (i.e. District Court, then a Court of Appeals). Only then can they move to the Supreme Court.

A second question involved the need for *Federal* inferior courts. Each State's "court of final appeal" could be used instead. However, that scheme presented a number of potential problems:

- A State court's first loyalty might be to State law, rather than Federal law.
- If a State appointed its judges for set terms, rather than for life, they would be vulnerable to pressure from State officials.
- One could not rely on the Federal laws being applied uniformly throughout the nation.

7.5.3 Law and Equity

Article III, Section 2 of the Constitution begins with, "The Judicial Power shall extend to all Cases, in *Law and Equity*, arising under the Constitution…" The word "Law" is self-evident: the expressed, written rules and regulations created by governments. But what is the meaning of "Equity"?

At that time, several States recognized a distinction between Legal Jurisdiction and Equitable Jurisdiction.

> A court of equity can, for instance, judge "…what are called hard bargains. These are contracts in which … there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law. Yet there may have been some undue and

[158] "Original jurisdiction" here means the Supreme Court can take the first hearing of a case.
[159] Keep in mind these were proud and fiercely independent delegates making these laws.

unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate."

– Alexander Hamilton in *The Federalist 80*, slightly paraphrased.

Very loosely, the Court of Equity[160] wants to do the right thing, even when a strict interpretation of the law does not support that ruling. It was felt the Supreme Court would need the authority to act as a Court of Equity, especially when dealing with foreign governments. A legally correct but ethically poor decision against a foreigner could easily lead to war. However, this authority was meant to be used only rarely, and only under special circumstances; only *elected* officials should be allowed to make law.

7.6 The District of Columbia

Any government requires an array of office structures. This includes halls for legislators to meet in, court rooms for the judiciary, and office space for the bureaucracy. Land would be set aside for those facilities in a capitol district (i.e. Washington D.C.). This district was to be fully owned by the Federal government, *and not be part of any State*. Other Federal assets, such as forts, arsenals, and dockyards, would also be fully owned by the Federal government, and not under State jurisdiction.

A number of reasons for this are given in *The Federalist 43*:

- If the governing district were within a State, that State's government, national representatives, and business interests would have too much influence on the national legislature. The other twelve States would not accept this.[161]
- Improvements made to that land are paid for by every State. These should be owned by the Federal government, and not under the control of any one State.
- The founders did not think they could rely on the States for the security of the nation.[162] And in truth, an effective *national* defense requires military bases be independent of State control.

[160] The concept of a Court of Equity is discussed in *The Federalist 80* and *83*.

[161] When it came time to select a site, banking interests in New York and Philadelphia were a notable concern. Numerous theories try to explain the location. However, it was more central to the country, and less vulnerable to attack by sea than New York. It was also close to Mount Vernon (George Washington chose the site).

[162] The Pennsylvania Mutiny of 1783 made this point. A band of soldiers, having not been paid by Congress, besieged Congress while it was in session. The State of Pennsylvania did nothing.

8 Discussion Points

"Reading, analysis, and discussion are the way we develop reliable judgement, the principle way we come to penetrate covert movements behind the facade of public appearances. Without the ability to read and argue we're just geese to be plucked." – John Taylor Gatto (1935 – 2018), "The Underground History of American Education", Volume 1, 2017.

In any legal system, there will always be people seeking to find or create exceptions and loopholes for their own purposes. This chapter examines possible deficiencies in the Constitution, many of which the founding fathers could not have anticipated. The following items are presented as topics for discussion, rather than hard fact. However, before beginning a discussion, there are some ground rules:

1. A healthy debate exchanges *ideas*.
    a. Adjectives are not arguments.
    b. Insults add nothing to a debate.
    c. Bringing out ideas and relevant facts can be infinitely more important than "winning."

2. No (or *very* few) ideas should be summarily dismissed:

    > *"Some of Marshall's most sparkling moves look at first like typographical errors."* – Napier. One chess master complimenting another on his use of the surprise move.

    In this context, "brainstorming" does not mean putting up ideas and knocking them down. It means generating as many ideas as possible, and carefully identifying the good and bad points of each.

    Also, in a learning environment, developing the *ability to formulate new ideas* can be far more important than the quality of the ideas themselves.

3. Always research and keep in mind any relevant facts.

    > *"People cannot make intelligent decisions if they don't know the facts of the matter."* - Unknown
    >
    > Or, as stated in *The Federalist 53*, *"No man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate."*

    You can be the most moral, ethical, caring person in the world, but if you don't know and understand the facts, you can do a lot of damage.[163]

[163] But bear in mind politicians must often make decisions before all the relevant facts are known.

4. Problems, especially in the social sciences, don't always have a right answer. Don't be afraid to end a discussion without a solution.

Two additional points. First, don't be afraid to develop your own discussion questions. Second, some of these questions may seem biased towards a particular opinion.[164] Try to identify those biases, and give suggestions for restating the question without the bias.

8.1 Men of Good Character

Patrick Henry objected to the Constitution on multiple grounds. First, he felt the unlimited ability to impose taxes would lead to a bloated, overly powerful central government.[165] A second objection was that the Constitution did not hold the elected representatives accountable.

> "This, sir, is my great objection to the Constitution, that there is no true responsibility and that the preservation of our liberty depends on the single chance of men being virtuous enough to make laws to punish themselves." – Patrick Henry

Ultimately, Thomas Jefferson replied that, yes, the success of the Constitution relied on voters electing men of good character.

One can (and should) debate the character of the elected Representatives and Senators. It is not difficult to find past examples of "men of poor character" in the U.S. Government. The current system puts this responsibility on the voter. But as Germany discovered between the World Wars, identifying the man of poor character, who should *not* be elected, can be difficult.

Some discussion questions:

1. How do you judge the character of an individual?
2. For how long should a person be held accountable for acts of youthful indiscretion?
3. How much blame should be placed on the media (newspapers, television, and social media) and those who control the media? This could be for wrongfully accusing a good man, or for supporting a man of poor character.
4. One pundit remarked that a capable, moderately dishonest man can be a better public servant than a fully honest, inept person. Discuss this premise. Consider both negative and positive points.

8.2 Campaign Contributions

Congressmen, both State and Federal, depend heavily on campaign contributions in order to get re-elected. This gives large donors an advantage in getting the attention of their representatives, and having their specific agendas passed.

It is relatively easy to find examples of inappropriately large campaign donations. For example, one author noted that, "Statewide, trial lawyers provide almost 85 percent of the funding for the Texas

[164] We have tried to avoid this, but it happens. Being able to recognize bias is important.
[165] This seems to have been a fairly accurate prediction.

Democratic Party." [166] It is unlikely those donations would be ignored when Congress votes on a tort reform (liability law) action.

As of this writing, the U.S. Supreme Court has ruled that Federal campaign contributions are a form of free speech.[167] This makes them protected and largely untouchable. And in truth, there is a large gray area between "honest support for an elected official" and "payment for services rendered." Again, the current system gives the voter the responsibility for making that judgement.

1. Why was the ban on emoluments limited to "King, Prince, or foreign State?" Should it have been? Should this concept be expanded to include excessive campaign funds from local donors?
2. How can one distinguish legitimate contributions from payments?

8.3 Voting Blocks (Coalitions)

A voting block is a group of people motivated by a common concern. On a specific issue, or a number of related issues, they tend to vote together. Such blocks are important in the U.S., due to the structure of Congress. It is difficult to push a law through both Houses. Assembling a voting block can make the process workable.

However;

> *"If everyone is thinking alike, then somebody isn't thinking."* – George S. Patton, Jr.
>
> General Patton led the 7th army in the Mediterranean theater, and later the 3rd army in France and Germany, during World War II. A certain level of diversity in thinking is required for any enterprise to be successful.[168] During war time, tactics and deception can be as important as fire power. Patton needed ideas from his staff, and as many as they could generate quickly. But if all of his officers were uniformly thinking alike, most of them would be redundant and useless.

A potentially similar situation arises when every member of a political party consistently votes the same. The risk is that those Congressmen are no longer representing their States. Their allegiance may have shifted from their constituency to an external controlling agency, such as their party, lobbyists or donors. This gives that controlling agency a position of enormous power; a situation the founders wished to avoid.

And as one pundit noted, always voting the party line saves the Congressman "from the painful job of thinking." [169]

1. Would this be acceptable in your Representative? If so, when?
2. What signs might you expect to see if a Congressman is no longer representing his district or State?

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[166] San Antonio Express-News, 25 October 2011. Guest Commentary by Sherry Sylvester, spokesperson for Texans for Lawsuit Reform. https://www.mysanantonio.com/opinion/commentary/article/Tort-reform-foes-love-Democrats-2236264.php

[167] The actual ruling is considerably more complex. Plus, local and State laws may still apply to local elections.

[168] A word of caution: too much diversity in *ethics* can be a disaster. Another discussion point.

[169] John Kenneth Galbraith. If you haven't done so yet, this would be a good time to review the lyrics from *The First Lord's Song*, from *HMS Pinafore* (Gilbert and Sullivan, 1878). Note especially the fifth stanza.

3. What danger(s) can arise when members of different branches of government start acting as a single voting block?

8.4 Gerrymandering

For the House of Representatives, each State is divided into distinct districts. Each district elects its own Representative to the House. By contrast, Senators face a full, State-wide election.

Gerrymandering[170] is the process of setting the Congressional district boundaries to the advantage of one party or another. If you know where the bulk of the Republican or Democratic (in the U.S.) voters live, you can adjust the boundaries so more Representatives of your favored party are sent to the House. This would give that party an unfair advantage in writing or blocking bills.

This problem is evident today. For example, some districts are unusually long and narrow, with oddly placed narrow strips somewhere towards the middle. While possible, it can be difficult to believe such a district is a natural separation of voters.[171]

1. Brainstorm some ideas on how to carve reasonable districts from a State map. What factors are important, and which can (or should) be ignored?[172]

8.5 Aging Congressmen[173]

The founder's originally felt that elected representatives would be working folk. They would serve a few terms (at most), and then return to their jobs. However, many of today's Congressmen are career politicians. Some are as reluctant to leave their office as Julius Caesar or Adolf Hitler. One should also note that under the existing seniority system, longevity works in your favor. The longer you remain in office, the more power you have.

With people now living into their eighties and nineties, some will almost certainly grow senile in office.[174] But with so much power amassed, those who profit from a Congressman's power may be reluctant to usher him out of office. They may even work to conceal his condition, keeping him in office. This brings up the danger of a nation led by old, senile men and women.

1. How might one identify senility in a sitting Congressman?
2. What other health problems, typically associated with age, would be detrimental to the performance of a Congressman?
3. What mechanism(s) could keep individuals from serving long enough to become incapacitated? Term limits have been suggested, but these would also force highly capable "men of good character" to retire before their time.
4. Should one even attempt such actions? An easy solution might also be a violation of (medical) privacy. Identify or build some additional reasons both for and against this idea.

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[170] The word comes from Massachusetts governor Elbridge Gerry, whose 1812 redistricting contained a district that resembled a salamander.

[171] Mountain ranges and/or river boundaries *can* do this sort of thing, but not very often.

[172] Only recently have useful mathematical models been developed that can measure the degree of Gerrymandering. See the November 2018 issue of Scientific American.

[173] *The Federalist 79* includes a short discussion of the "facilities of the mind", in the context of judicial appointments.

[174] Be honest. We have all had our suspicions about one Congressman or another.

8.6 Pork Barrel Politics

Members of Congress are often judged by their ability to deliver funds to their constituents. A common system for this involves putting pet projects into the budget that benefit only their districts. Such actions have come to be called "pork barrel" politics. The term originated in the early 1800's, when householders would keep salted pork in a barrel. This represented that family's larder.[175] The Congressman was effectively "filling his constituents' pantry."

A more refined definition was provided by "Citizens Against Government Waste." A project must be:

- Requested by only one chamber of Congress.
- Not specifically authorized.
- Not competitively awarded.
- Not requested by the President.
- Greatly exceeds the President's budget request or the previous year's funding.
- Not subject to Congressional hearings.
- Serves only a local or special interest.

This manner of allocating funds has some obvious dangers. First, there is no review or debate about the merit of the expenditure. Second, Congressmen "not of good character" can use such expenditures to pay off their supporters. Ultimately, this is buying votes. But perhaps most troubling, it represents an unwarranted drain on the Federal treasury. Too many such outlays can, in time, bankrupt the Federal Government.

1. What are the ethics of asking the entire country to pay for a project that only benefits your own district? What if the project is functionally necessary, but too expensive for the district to fund?
2. If one banned these types of expenditures, could the full Congress effectively debate every small project that came along?
3. How would one distinguish the worthy projects from the pork barrel projects?
4. Over the long term, would it be more efficient to have local and State agencies fund such projects?

8.7 Eminent Domain

Eminent Domain is the power of government to seize private property for public use. The Constitution explicitly gives the Federal Government the final authority over all lands within the country. However, the "takings clause" of the Fifth Amendment requires that the Federal Government provide "just compensation" for the property taken.

The most notable seizures have been real estate (land) holdings. Typically these are used for roads, government buildings, and public utilities. However, the power can extend to other assets, such as contract rights, trade secrets, patents and copyrights. Any of these can be critical in times of war; combat activities and the production of war materials may require such assets.

[175] A larder was a cool place for storing perishable foods, prior to the development of refrigeration.

In the United States, prior to the end of the twentieth century, such seizures were meant for use only by the government. However, some more recent "takings" have moved from "public use" to "public benefit". For example, a tract of single family houses could be condemned to build a shopping mall.[176]

1. While a shopping mall may be a great benefit to the general public, the land has been forcibly transferred from one private owner to another. The new private investor(s) stand to gain financially from the mall. What are the ethics involved?
2. Many cities are concerned with redevelopment and revitalization of "blighted" areas. This can raise the standard of living for many or most of the residents, at the expense of others.
    a. Should eminent domain ever be used as a last resort in such cases?
    b. How about as a first resort?
    c. Are there ways to transfer the property without hurting those evicted from that property, or without using eminent domain directly?
3. Besides the "fair value" of the asset, there are often other costs associated with the seizure. For example, moving off the property that was seized. The government is NOT required to reimburse the property owner for these costs. Should this also be required?
4. Brainstorm some ideas on how to decide whether a seizure of private property is appropriate or not. How large is the gray area between the two extremes?

8.8 When Something Goes Wrong

All of human activity is subject to mistakes, errors, and blunders. When something of this nature happens:

1. When is it important to identify the person(s) who made the error?
2. When does identifying those person(s) become a waste of resources?
3. Imagine scenarios where this decision would be easy, and where it would be difficult.

Alexander Hamilton commented in *The Federalist 70*,

> "…in a republic … every magistrate ought to be personally responsible for his behavior in office…"

In the U.S. government, circa 2015, civil servants had extensive protection against "wrongful termination." This was meant to protect those employees from political pressure. However, even for blatant offenses, it can be very difficult to fire a government worker. The full process can require up to two years of reviews and appeals.

Contrast this to the private sector, where you can be terminated with little or no cause.

4. How does this affect the efficiency of the Executive Branch of the Federal Government? What are the costs involved?
5. If someone wanted to downsize the government, how would it be done?
6. Who would hold the "review and appeal" officials accountable for their work?

[176] See "Kelo versus the City of New London", 2005. Private parties had the city condemn private property in order to redevelop the land. Increased tax revenues were a primary "public use" justification. Many pundits consider this an example of Tyranny of the Majority, and a dangerous precedent. It has also be called the most hated decision of the Supreme Court in recent history. Many States have banned this practice.

7. Brainstorm some ideas on how to protect civil servants from political firings, while still holding them responsible for the work they do.
8. How do such "over-protections" get implemented in the first place?

8.9 Government Sponsored Charity

In "The Life and Times of David Crockett" (Philadelphia: Porter and Coates, 1884), Edward S. Ellis relates an incident concerning government sponsored charity. Congressman Crockett voted for giving government dollars to victims of a local fire (Georgetown, Wash. D.C.). He justified this vote by his concern for those victims, and the U.S. treasury being "full and overflowing." One of his constituents, a farmer named Horatio Bunce, took him to task on that vote. Some of the issues involved:

a) The government treasury should have no more than enough for its legitimate purposes.
b) The power of collecting and spending money *at pleasure* is the most dangerous power a man can have, particularly when collecting that money reaches every man in the country, no matter how poor he is.
c) This practice will open a wide door for fraud, corruption and favoritism on the one hand, and for robbing the people on the other.
d) The people of Washington (D.C.) will no doubt "applauded you for relieving them from the necessity of giving by giving what was not yours to give."
e) "The people have delegated to Congress, by the Constitution, the power to do certain things. To do these, it is authorized to collect and pay money, and for nothing else. Everything beyond this is usurpation, and a violation of the Constitution."

Congressman Crocket noted that many of his fellow law makers were very wealthy men. They would easily spend a week's pay on a dinner party when it suited their purpose. Many of them gave eloquent speeches in favor of the expenditure. However, none would donate a week's pay to the charitable cause they advocated. A more recent pundit responded with the following comments:

"Principles are beliefs and ideals you hold onto even when they become inconvenient or expensive."

"A politician is a man who shows how magnanimous he is by giving away someone else's money."

1. Discuss these issues in light of what you have learned about the Constitution, and the actions of the modern U.S. Congress.
2. Prior to the 20th century, charity in the United States was performed largely by private organizations and individuals. Great pains were often taken to ensure people in need were supported, but not enabled.[177] How confident are you the Federal bureaucracy will enforce the same kinds safeguards? Why or why not?
3. A "welfare safety net" is meant to support people who come upon hard times. Few people in modern America would oppose this concept. However, such systems often grow without any apparent restraints. Why? What actions could be taken to prevent this growth?

[177] In this context, "enabling" is protecting someone from the consequences of a destructive behavior, instead of forcing them to learn from those consequences.

8.10 Bill of Rights

In *The Federalist 84*, Hamilton argued against a Bill of Rights. He felt the government could not do anything the Constitution does not explicitly allow. For example, there is no need to safeguard Freedom of Speech, because the Constitution does not authorize the government to restrict the Freedom of Speech.

On the other hand, in *The Federalist 73*, Hamilton noted the "… propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments …"

1. Where are these two beliefs compatible, and where are they not?

8.11 Additional Discussion Ideas

The following quotes may also be good starting points for further discussions.

> *"I also wish that the Pledge of Allegiance were directed at the Constitution and the Bill of Rights, as it is when the President takes his oath of office, rather than to the flag of the nation."* – Carl Sagan (1934 – 1996), Scientist, Astronomer, and Academic

> *"Can any of you seriously say the Bill of Rights would get through Congress today? It would not even get through committee."* – F. Lee Bailey (1933 -), Lawyer

> *"Civil wars happen when the victimized are armed. Genocide happens when they are not."* – A.E. Samaan

> *"Government is not reason, it is not eloquence; it is force! Like fire, it is a dangerous servant and a fearful master."* – attributed to George Washington, 1732 – 1799

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