

**I. The Articles of Confederation and Peace**

- A. The Articles of Confederation were sufficient for the United States to fight a war with England, albeit with considerable help from the French treasury, navy, and army.
- i. In 1784, it agreed to form 14 new states from the lands more or less west of the Appalachian mountains
  - ii. In 1785, it surveyed and began selling the new land
  - iii. In 1787, it determined a process through which new organized territories could become states.
  - iv. See Johnson, 1997: 187-8.
- B. On the other hand, the Articles were not sufficient to solve other problems that many felt were important for the central government, especially those involving national debt and defense.
- i. Essentially the congress lacked the power to perform its stated functions.
    - { It could not , for example, raise money for the common defense and general welfare under article VIII, because states would not always send in their required contributions.
    - { The congress could not resolve disputes between the states, because some states would refuse to follow its rulings.
  - ii. The “Articles” were not a self-enforcing agreement.
    - { “For the current expenses of the government in that same year \$9,000,000 were needed. It was calculated that \$4,000,000 might be raised by a loan, and the other \$5,000,000 were demanded of the states. At the end of the year \$422,000 had been collected, not a cent of which came from Georgia, the Carolinas, or Delaware. Rhode Island, which paid \$38,000, did the best of all according to its resources. Of the Continental taxes assessed in 1783, only one fifth part had been paid by the middle of 1785.” (Fisk, 1896: 58)
    - { \ " the delinquency of each state simply set an example of disobedience for all the others to follow; and the amendment, had it been carried, would merely have armed Congress with a threat which everybody would have laughed at.
    - { So manifestly hopeless was the case to Pelatiah Webster that as early as May, 1781, he published an able pamphlet, urging the necessity for a

federal convention for overhauling the whole scheme of government from beginning to end.” (Fisk, 1896:57)

{ [A very interesting pro federalist overview of the history between 1783 and 1789 is developed in a short book by John Fisk "The Critical Period of American History 1783-1789," published in Boston by Houghton Mifflin and Co in 1896. It is available on the web at:  
<http://www.ecn.bris.ac.uk/het/fiske/The%20Critical%20Period%20of%20American%20History%201783.rtf> ]

{ Other amendments were proposed by Morris, Hamilton, and Madison among many others (Johnson, 1997: 184-6).

- C. Although many amendments were proposed, none could achieve the unanimous agreement of the states required under the Articles of Confederation.

{ In the end, the Philadelphia convention of state commissioners agreed to use the 9/13 rule that had been specified for important under the Articles as their procedure for adopting the new constitution.

{ Thus, one of the most important decisions reached in Philadelphia was to amend the amendment procedure!

{ (Had this rule been adopted earlier, the more decentralized structure of the Articles of Confederation might have lasted far longer, and been modified gradually, rather than whole cloth.)

- D. Although the state governments were doing relatively well, there was concern that the union would disintegrate, that boundary disputes would escalate to civil war, or that the confederation would be conquered by an outside force and so many pressed for a new constitutional convention.

- i. The implicit solution was a “meeting of commissioners” appointed by the states at Annapolis (Maryland) in 1786, to discuss “trade and commerce of the United States” and other important matters...
- ii. The commissioners recommended may be said to have somewhat exceeded their charge by recommending that another meeting be held in Philadelphia to “render the constitution of the Federal Government adequate to the exigencies of the Union...”

**II. The Constitutional Convention in Philadelphia**

- A. The meeting in Philadelphia was clearly regarded to be an important meeting, and each state sent many of their most experienced men (largely lawyers) to the convention. 55 men participated in the deliberations (Keyssar, 2000). Most had served in the Continental Congress (42), many were college graduates (26) many had

participated in the drafting of their new state constitutions. They were experienced serious men. (Johnson, 1997: 186-8).

i. The work was completed in four months.

{ There were 560 roll call votes.

{ (The records of the convention were supposed to be destroyed, but a few participants disobeyed that agreement and saved their notes, the most complete of which are those of James Madison.)

ii. Washington presided over what was clearly a new constitutional convention.

B. Madison's notes suggests that the business of the convention began on the third day when Mr. Randolph then opened the main business.

i. He expressed his regret, that it should fall to him, rather than those, who were of longer standing in life and political experience, to open the great subject of their mission.

ii. But, as the **convention had originated from Virginia**, and his colleagues supposed that some proposition was expected from them, they had imposed this task on him.

iii. He then commented on the difficulty of the crisis, and the necessity of preventing the fulfillment of the prophecies of the American downfall.

C. Randolph observed that in revising the federal system we ought to inquire

{ (1) into the properties, which such a government ought to possess,

{ (2) the defects of the confederation,

{ (3) the danger of our situation

{ and (4) the remedy.

i. The Character of such a government ought to secure:

{ (1) against foreign invasion:

{ (2) against dissensions between member of the Union, or seditions in particular states:

{ (3) to procure to the several States, various blessings, of which an isolated situation was incapable:

{ (4) to be able to defend itself against encroachment,

{ and (5). to be paramount to the state constitutions.

ii. He then proceeded to enumerate the defects:

{ (1) that the confederation produced no security against foreign invasion; congress not being permitted to prevent a war nor to support it by their own authority-

{ Of this he cited many examples; most of which tended to show, that they could not cause infractions of treaties or of the law of nations, to be punished: that particular states might by their conduct provoke war without control; and that neither militia nor draughts being fit for defense on such occasions, enlistments only could be successful, and these could

{ (2) that the federal government could not check the quarrels between states, nor a rebellion in any, not having constitutional power nor means to interpose according to the exigency:

{ (3) that there were many advantages, which the U. S. might acquire, which were not attainable under the confederation-such as a productive impost- counteraction of the commercial regulations of other nations-pushing of commerce ad libitum-etc etc.

{ (4) that the federal government could not defend itself against the incroachments from the states.

{ (5) that it was not even paramount to the state constitutions, ratified, as it was in may of the states.

iii. Randolph next reviewed the danger of our situation,

{ [He appealed to the sense of the best friends of the U. S.-the prospect of anarchy from the laxity of government every where; and to other considerations.

iv. He proposed as conformable to his ideas the following resolutions, which he explained one by one.

D. Randolph went on to propose what is often called the Virginia Plan (which is often attributed to James Madison). Again, from Madison's notes: Randolph proposed as conformable to his ideas the following resolutions, which he explained one by one:

{ 1. Resolved that the Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, "common defense, security of liberty and general welfare.

{ 2. Resolved therefore that the rights of suffrage in the National legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.

{ 3. Resolved that the National legislature ought to consist of two branches.

{ 4. Resolved that the members of the first branch of the National legislature ought to be elected by the people of the several States every for the term of to be of the age of years at least, to receive liberal stipends by which they may be compensated for the devotion of their time to public service; to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch, during the term of service, and for the space of after its expiration; to be incapable of reelection for the space of after the expiration of their term of service, and to be subject to recall.

- { 5. Resolved that the members of the second branch of the National legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual legislatures, to be of the age of years at least; to hold their offices for a term sufficient to ensure their independency; to receive liberal stipends, by which they may be compensated for the devotion of their time to public service; and to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term of service, and for the space of after the expiration thereof.
- { 6. Resolved that each branch ought to possess the right of originating Acts; that the National legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States, contravening in the opinion of the National legislature the articles of Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof.
- { 7. Resolved that a National Executive be instituted; to be chosen by the National legislature for the term of years to receive punctually at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time of increase or diminution, and to be ineligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.
- { 8. Resolved that the Executive and a convenient number of the National Judiciary, ought to compose a Council of revision with authority to examine every act of the National legislature before it shall operate, and every act of a particular legislature before a Negative thereof shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National legislature be again passed, or that of a particular legislature be again negatived (vetoed) by of the members of each branch.
- { 9. Resolved that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National legislature, to hold their offices during good behavior; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear and determine in the first instance, and of the supreme tribunal to hear and determine in the [last] resort, all piracies and felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachment of any National officers, and questions which may involve the national peace and harmony.

- { 10. Resolved that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of Government and Territory or otherwise, with the consent of a number of voices in the National legislature less than the whole.
- { 11. Resolved that a Republican Government and the territory of each State, except in the instance of a voluntary junction of Government and territory, ought to be guaranteed by the United States to each State.
- { 12. Resolved that provision ought to be made for the continuance of Congress and their authorities and privileges, until a given day after the reform of the articles of Union shall be adopted, and for the completion of all their engagements.
- { 13. Resolved that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National legislature ought not to be required thereto.
- { 14. Resolved that the Legislative Executive and Judiciary powers within the several States ought to be bound by oath to support the articles of Union.
- { 15. Resolved that the amendments which shall be offered to the Confederation, by the Convention ought at a proper time, or times, after the approbation of Congress to be submitted to an assembly or assemblies of Representatives, recommended by the several legislatures to be expressly chosen by the people, to consider and decide thereon.

Randolph concluded with an exhortation, not to suffer the present opportunity of establishing general peace harmony, happiness and liberty in the U. S. to pass away unimproved.

- E. It is interesting to note how much of this first proposal survived the negotiation process, and also the wide range of subtle revisions that were adopted on its way to completion by the Philadelphia convention.
- i. The convention did not adopt the new constitution, nor even recommend that states should accept it recommendation.
  - ii. Instead, they recommended that every state elect its own convention to consider the document (essentially as an all or nothing offer) as a whole.
  - iii. If approved by 9/13 of the states, it would become the law of the land.
- F. [Fairly detailed discussion of the federal convention debates from the various undestroyed notes can be found at:  
<http://odur.let.rug.nl/%7Eusa/D/1776-1800/federalist/antixx.htm> ]
- G. After four months of debate and compromise, all except three of the members present (Randolph (!), Mason, and Gerry) then proceeded to sign the instrument.

Whilst the last members were signing it Dr. **FRANKLIN** looking towards the Presidents Chair, at the back of which a rising sun happened to be painted, observed to a few members near him, that Painters had found it difficult to distinguish in their art a rising from a setting sun. I have said he, often and often in the course of the Session, and the vicissitudes of my hopes and fears as to its issue, **looked at that behind the President without being able to tell whether it was rising or setting: But now at length I have the happiness to know that it is a rising and not a setting Sun.**

- H. The Philadelphia convention had been called to “revise” the Articles of Confederation rather than to replace it, and Madison, Gorham and King, who were also members of the Congress, went to NYC to lobby for the new arrangements.
- I. In the end, the Congress decided to submit the Constitution to the states for action, and made no recommendation for or against it.

### III. The Ratification Debates: The Federalist and Anti-Federalist papers as Political Dialogue and Political Theory

- A. Since the question was a yes-no matter, two parties emerged. One, the federalists, lobbied in favor of the new constitution; the other, the anti-federalists lobbied against it.
- i. What is of interest for political science and for American history is that a good deal of new political theory was developed to justify and to critique the proposed constitution.
- { The debate took place for the most part through the mass media of the time--e.g. news paper editorial pages.
  - { Several states were initially opposed to the constitution, because they did not like the idea of transferring more sovereignty to the central government.
  - { Some felt that the new constitution did not protect “states rights” or “citizen rights” as clearly as it should have. For example there was no mention of religious tolerance or free speech in the version being circulated.
- ii. A good deal of this argumentation on the pro-constitution side has been collected into a volume called the “Federalist Paper.”
- { The Federalist Papers are sometimes used as a source of constitutional interpretation even today, because it articulate what the “founding fathers” had in mind at the time the constitution was written down and adopted.
  - { The Federalist papers very carefully develop the arguments (theory) supporting the new institutions.

{ Although much of the basic architecture of the new constitution: elected president (governor), bicameral legislature, and independent court system had been part of state constitutions for years, the arguments ignored for the most part colonial precedents and focused more on the pure logic of constitutional design and other historical cases.

{ It was the first effort to try such an architecture on a large scale, without the “proven” foundations of English common law and the English courts.

- B. Several states’ conventions adopted the new constitution unanimously (Delaware, New Jersey, and Georgia).

- i. Pennsylvania ratified with a 2/3 majority, Connecticut with a 76% majority and Maryland with an 85% majority. South Carolina ratified with a 2/3 majority.
- ii. Relatively close votes occurred in Massachusetts (55%, subject to the proviso that a Bill of Rights be added) and New Hampshire (55% subject to the proviso of a Bill of Rights), making 9 states.
- iii. However, two of the most populous states, NY and VA had not ratified. Finally, by a narrow margin of 10 votes VA ratified (55%) and NY followed with an even narrower margin (52%) and the proviso that a Bill of Rights be added.
- iv. Unanimity of the states was achieved when North Carolina (70%) and Rhode Island (51.5%) adopted it as well.
- v. [Note that this was sufficient to formally and **lawfully amend** the Articles of Confederation--without the 9/13s rule--but would they have achieved unanimity without that rule?]

- C. The Continental Congress **passed a resolution on September 13 1788 to put the new Constitution into operation.**

{ Note that although both the Annapolis convention and the Philadelphia convention has somewhat exceeded their mandates from the Congress, in the end the process was done lawfully, with fairly direct consultation of the electorate in a convention elected for the purpose (perhaps 60-80% of men in the states)

{ Note also that the final document combines idealistic (liberal or enlightenment) rhetoric with very practical compromises between the interests represented at the convention--the large and the small states, the north and the south, slaveholders and abolitionists.

{ As was evident in the negotiations at the national convention in Philadelphia and in the individual state conventions, there was broad support for the idea of a more centralized state, but less broad support for the particular details adopted.

- D. Excerpts from the Federalist Papers:

- i. Madison 39, **Definition of a Republic:** The first question that offers itself is, whether the general form and aspect of the government be strictly republican? It is evident that no other



form would be reconcilable with the genius of the people of America; with the fundamental principles of the revolution; or with that honourable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.

- ii. What then are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitutions of different states, no satisfactory one would ever be found. ....
- iii. If we resort for a criterion, to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, 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 behaviour.
- iv. It is essential to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favoured class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honourable title of republic.
- v. It is sufficient for such a government, that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified;
- vi. Madison 47, **Definition of Tyranny and Division of Powers**: No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.
- vii. The reasons on which Montesquieu grounds his maxim, are a further demonstration of his meaning. " the legislative and executive powers are united in the same person or body," says he, " can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Again, " the power of judging joined with the legislative, the life and liberty of the subject
- viii. The King would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.
- ix. If we look into the constitutions of the several states, we find that, notwithstanding the emphatical, and in some instances, the unqualified terms in which this axiom has been laid

down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.

- x. New Hampshire, whose constitution was the last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments; and has qualified the doctrine by declaring, " the legislative, executive, and judiciary powers, ought to be kept as separate from, and independent of each other, as the nature of a free government will admit; or as is consistent with that chain of connexion, that binds the whole fabric of the constitution in one indissoluble bond of unity and amity."
- xi. Madison 63, **the Senate**: The equality of representation in the Senate is another point, which, being evidently the **result of compromise** between the opposite pretensions of the large and the small States, does not call for much discussion.
- xii. If indeed it be right, that among a people thoroughly incorporated into one nation, every district ought to have a proportional share in the government,
- xiii. and that among independent and sovereign States, bound together by a simple league, the parties, however unequal in size, ought to have an equal share in the common councils,
- xiv. it does not appear to be without some reason that in a compound republic, partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation. But it is superfluous to try, by the standard of theory, a part of the Constitution which is allowed on all hands to be **the result, not of theory, but "of a spirit of amity, and that mutual deference** and concession which the peculiarity of our political situation rendered indispensable."

#### E. Selections from the Anti-Federalists

- i. Patrick Henry Speech (June 5, 1788): "The question turns, sir, on that poor little thing — the expression, We, the people, instead of the states, of America. I need not take much pains to show that the principles of this system are extremely pernicious, impolitic, and dangerous.
- ii. Is this a monarchy, like England — a compact between prince and people, with checks on the former to secure the liberty of the latter? Is this a confederacy, like Holland — an association of a number of independent states, each of which retains its individual sovereignty? It is not a democracy, wherein the people retain all their rights securely.
- iii. Had these principles been adhered to, we should not have been brought to this alarming transition, from a confederacy to a consolidated government. We have no detail of these great considerations, which, in my opinion, ought to have abounded before we should recur to a government of this kind.
- iv. Here is a resolution as radical as that which separated us from Great Britain. It is radical in this transition; **our rights and privileges are endangered, and the sovereignty of the states will be relinquished: and cannot we plainly see that this is actually the case?**

- v. **The rights of conscience, trial by jury, liberty of the press, all your immunities and franchises, all pretensions to human rights and privileges, are rendered insecure**, if not lost, by this change, so loudly talked of by some, and inconsiderately by others.
- vi. Dissent of the Minority of the Convention in Pennsylvania (December 12 1787)
- vii. It was not until after the termination of the late glorious contest, which made the people of the United States, an independent nation, that any defect was discovered in the present confederation. It was formed by some of the ablest patriots in America. It carried us successfully through the war; and the virtue and patriotism of the people, with their disposition to promote the common cause, supplied the want of power in Congress....
- viii. the Continental convention met in the city of Philadelphia at the time appointed. It was composed of **some men of excellent characters; of others who were more remarkable for their ambition and cunning**, than their patriotism; and of some who had been opponents to the independence of the United States. The delegates from Pennsylvania were, six of them, uniform and decided opponents to the constitution of this commonwealth. The convention sat upwards of four months. The doors were kept shut, and the members brought under the most solemn engagements of **secrecy**. Some of those who opposed their going so far beyond their powers, retired, hopeless, from the convention others had the firmness to refuse signing the plan altogether, and many who did sign it, did it not as a system they wholly approved, but as the best that could be then obtained, and notwithstanding the time spent on this subject, it is agreed on all hands to be a work of haste and accommodation.
- ix. Whilst the gilded chains were forging in the secret conclave, the meaner instruments of despotism without, were **busily employed in alarming the fears of the people with dangers which did not exist**, and exciting their hopes of greater advantages from the expected plan than even the best government on earth could produce....
- x. [After explaining the events leading to the ratifying convention, the minority delegates determined to explain themselves to their constituents.] **We entered on the examination of the proposed system of government, and found it to be such as we could not adopt, without, as we conceived, surrendering up your dearest rights.** We offered our objections to the convention, and opposed those parts of the plan, which, in our opinion, would be injurious to you, in the best manner we were able; and closed our arguments by offering the following propositions to the convention.
- { 1. The **right of conscience shall be held inviolable, and neither the legislative, executive nor judicial powers of the United States shall have authority to alter, abrogate, or infringe any part of the constitution of the several states, which provide for the preservation of liberty in matters of religion.**
- { 2. That in controversies respecting property, and in suits between man and man, trial by jury shall remain as heretofore, as well in the federal courts, as in those of the several states.

- { 3. That in all capital and criminal prosecutions, **a man has a right to demand the cause and nature of his accusation, as well in the federal courts**, as in those of the several states; to be heard by himself and his counsel, to be confronted with the accusers and witnesses; to call for evidence in his favor, and a speedy trial by an impartial jury of his vicinage, without whose unanimous consent, he cannot be found guilty, nor can he be compelled to give evidence against himself; and that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.
- { 4. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.
- { 5. That **warrants unsupported by evidence**, whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are grievous and oppressive, and shall not be granted either by the magistrates of the federal government or others.
- { 6. That the people have a-right to the freedom of speech, of writing and publishing their sentiments, therefore, the freedom of the press shall not be restrained by any law of the United States.
- { 7. That the people have a **right to bear arms** for the defence of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up: and that the military shall be kept under strict subordination to and be governed by the civil powers.
- { 8. The inhabitants of the several states shall have liberty to **fowl and hunt** in seasonable times, on the lands they hold, and on all other lands in the United States not inclosed, and in like manner to fish in all navigable waters, and others not private property, without being restrained therein by any laws to be -passed by the legislature of the United States.
- { 9. That **no law shall be passed to restrain the legislatures of the several states from enacting laws for imposing taxes, except imposts and duties upon goods imported** or exported, and postage on letters shall be levied by the authority of Congress.
- { 10. That the house of representatives be properly increased in number; **that elections shall remain free; that the several states shall have power to regulate the elections for senators and representatives, without being controled either directly or indirectly by any interference on the part of the Congress**, and that elections of representatives be annual.
- F. [Its quite interesting to see how many of the Pennsylvania's minority's concerns regarding rights were explicitly addressed in the Bill of Rights--the first 10 amendments of the Constitution.

**IV. An (Almost) Modern Constitution**

- A. "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."
- B. The architecture of the constitution provides for a bicameral legislature (in Article 1: Senate and House of Representatives), an independently elected president (in Article 2), and a federal court system.
- i. Each branch of government has some veto power.
- { Each chamber of Congress can veto proposals of the other
  - { The President can, in turn, veto any bill sent him by the two chambers of Congress.
  - { (The Congress can, in turn, over ride this veto via a 2/3 super majority in both chambers of the legislature, Section 7)
  - { The supreme court, as we will see, obtain the power to veto legislation that it deems to be unconstitutional.
  - { (The Supreme Court can only indirectly be vetoed by "packing" the court. Its independences was assured by lifetime appointments and income guarantees (article 3, section 1).).
- ii. In the original documents, only the House of Representatives was directly elected by citizens. The senate was appointed by state legislatures and the president was indirectly elected by selecting state "electors."
- { Although many state and colonial governments had long used elections to select a "lower chamber" with veto power over taxes and legislation, they had much less experience with fully elected governments.
  - { State upper chambers were often selected by county and town governments or were appointed by the governors or lower chambers.
  - { Until 1760, most governors were appointed by the Crown or proprietors rather than elected, except in Rhode Island and Connecticut.
  - { Only a few of the new State constitutions included directly elected governors (NY, Massachussets). Most governors were appointed by their state legislature (Virginia, New Jersey, New Hampshire, Pennsylvania, North Carolina, South Caroline).
- iii. All representatives to the House were subject to elections every 2 years (article 1, section 2), and 1/3 of the senate was also selected every 2 years (article 1, section 2. Senators had terms of 6 years.) Presidents were elected every 4 years (article 2, section 1).
- iv. Representatives were to be paid for their services and were free from arrest during their attendance at the session of their respective Houses, and going and returning from same (Section 6)
- C. The powers of the Congress are explicitly enumerated in section 8.
- { It was felt by many that this list of 18 powers completely defined the scope of the central government and therefore no "bill of rights" were needed.
- D. Election law remained under the control of the States.
- i. Most states included explicit requirements for suffrage in their new constitutions. Most required significant holding of land (or wealth) to qualify for suffrage: a country voter had to own 25-50 acres and a town voter a 1/acre of land. [A hectare includes about 2.5 english acres.]
- ii. Women, Indians, and blacks were often explicitly excluded from suffrage as were atheists and, in some cases, those who practiced the wrong form of Christianity.
- iii. In a few cases, the property requirements were simply extended to all, and in a few cases simply paying taxes (NY) or being the son of a taxpayer was sufficient (GA).
- iv. Overall, however, electoral participation was larger than it had every been outside of the colonies, with estimates varying from 40-90% of men participating.
- { A men's suffrage movement during the next half century would cause most such restrictions to be eliminated.
- E. Slavery was not dealt with in the Constitution. Instead the issue of slavery was postponed.
- { (Section 2) "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."
  - { The word "slave" does not appear in the constitution. But this clause in Section 9 was evidently was meant to allow the possibility of regulating the slave trade: "The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importations, not exceeding 10 dollars for each person."
- F. Section 9 also prohibited royal titles: "No title of nobility shall be granted by the United States: And no person holding any office or profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state."

G. States were prohibited from exercising certain powers in section 10. Section 10 assured internal free trade and made treaties and money the exclusive domain of the federal government.

- i. Every state in the union is guaranteed a “republican form of government” (see Madison above) and the federal government will protect each against invasion (article 4).
- ii. And, Congress had the power to admit new states (article 4).

H. The Constitution itself did not include a bill of rights, but rather a description of how new legislation would be adopted by the federal government

## V. The Bill of Rights

A. A bill of rights was negotiation rather rapidly by the new Congress and sent to the States for ratification, given that several states ratifications of the constitution were conditioned on passage of such a bill.

{ Ten amendments were approved as a block in 1789 and eleven states had ratified them by the end of 1791.

{ (Note that this was after the famous French declaration of the rights of man in 1789, which of course was after the US Declaration of Independence, and the Dutch Act of Abjuration)

- i. 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.
- ii. 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.
- iii. 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.
- iv. The right of the people to be secure in their persons, 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, and particularly describing the place to be searched, and the persons or things to be seized.
- v. 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.

vi. 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 defence.

vii. 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.

viii. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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

x. 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.