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## CHAPTER I

# Constitutional History from the Beginning to the New Deal

### A. Before the Constitution

The first human inhabitants of what is now the United States were, of course, Native Americans, who had extensive forms of political organization; the Iroquois League, for example, had already been organized by the 16th century. The earliest European settlements were by the Spaniards, in Florida in the mid-16th century. But the developments that most clearly played a role in American constitutional development occurred in the English colonies.

The first permanent English colony was Jamestown, founded in Virginia in 1607. This was a commercial venture, established by the Virginia Company of London, which had been granted a royal charter to establish settlements along much of what is now the eastern seaboard of the United States. At first, the colony was governed by a president and council appointed by the king; after a few years, the Company took over the power of appointment. In 1619—the same year in which enslaved Africans were first brought to Virginia—the Company attempted to encourage greater migration by establishing the first true representative legislature in the Americas, known as the House of Burgesses. The Company failed in 1624, and King James I made Virginia a royal colony, with a governor appointed by the king. A few years later, the House of Burgesses was reconstituted, and it retained legislative power over the colony almost without interruption until independence.

In 1620, a group of Separatists from the Church of England who had gone to the Netherlands to escape religious persecution decided to move as a group to the New World. The Separatists joined in England with a group to

whom they referred as “Strangers,” who did not share their religious orientation but were drawn to America for other reasons. Together with seamen and servants, they all sailed from Plymouth on the *Mayflower*. The Virginia Company of London had given this group—who ultimately became known as the Pilgrims—a patent to settle in the northern part of the vast area that was then known as Virginia. Eventually, though, they decided to settle further north, in what is now Plymouth, Massachusetts.

While they were still in the harbor, dissension arose. According to a later account by a Separatist leader named William Bradford, some of the Strangers suggested that because the settlement would be outside of the authorized territory, “when they came a shore they would use their own libertie; for none had power to command them.” According to Bradford, the rest of the group believed that if these potential dissenters were persuaded to agree affirmatively to a system of governance, that accord “might be as firme as any patent, and in



There were, as best we can tell, 41 signers of the compact. All told, there were 102 passengers on the *Mayflower*, 74 male and 28 female; approximately 18 of the females were adults, all but one of those being wives of male passengers.

some respects more sure.” Eventually, if the sources are to be believed, all or virtually all of the adult males on board—other than some seamen and perhaps a couple of servants—signed what became known as *The Mayflower Compact*; what cajolery was necessary to reach this result, we do not know.

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## The Mayflower Compact

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1620

In the name of God, Amen. We whose names are underwritten, the loyal subjects of our dread Sovereign Lord King James, by the Grace of God of Great Britain, France and Ireland, King, Defender of the Faith, etc.

Having undertaken, for the Glory of God and advancement of the Christian Faith and Honour of our King and Country, a Voyage to plant the First Colony in the Northern Parts of Virginia, do by these presents solemnly and mutually in the presence of God and one of another, Covenant and Combine ourselves together into a Civil Body Politic, for our better ordering and

preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony, unto which we promise all due submission and obedience. In witness whereof we have hereunder subscribed our names at Cape Cod, the 11th of November, in the year of the reign of our Sovereign Lord King James, of England, France and Ireland the eighteenth, and of Scotland the fifty-fourth. Anno Domini 1620.



Was the Mayflower Compact a legitimate source of legal authority? Did it accomplish anything that could not have been accomplished without it? Was it binding on anybody who did not sign it—in particular on (a) any adults who were given an opportunity to sign but did not? (b) adults who were present but not given an opportunity to sign? (c) children who were on board? (d) unborn descendants of those on board? What did the reference to “equal Laws” mean?

The Mayflower Compact was considered the cornerstone of the governance of the Plymouth Plantation colony until it merged with Massachusetts Bay in 1691.

While we will not work through each of the American colonies, it is worth examining one more to emphasize how distinct were their several paths to statehood. William Penn was the son of an admiral who was close to King Charles II, but he was a convert to Quakerism whose agitation landed him twice in jail. In 1681, after his father’s death and with persecution of Quakers accelerating, he and the King reached a remarkable deal: The King granted Penn a huge tract of land in America (with the consent of the prior owner, the King’s brother, the future King James II), making him the largest private landowner in the world. In return, Penn promised to pay the Crown one-fifth of all the gold and silver mined there—a bad deal for the King, because there was none—and to release the King from a debt of £16,000 that he had owed Penn’s father. Moreover, Penn held out the hope, appealing to the King, that English Quakers would now make a mass migration to the new world. As sole proprietor—with all the powers that would ordinarily belong to the Crown except for the power to declare war, subject to the proviso that the laws had to be in harmony with those of England—Penn drew up a “Frame of Government” in

1682. This was a remarkably far-sighted document, not only providing a form of representative government but also including protection of liberties, including absolute freedom of worship. Penn replaced the first Frame three times over the next two decades; his last iteration, issued in 1701, served as the constitution of Pennsylvania until independence. William Penn and his successors were

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## IN SIGHTS

As British political theorist and parliamentarian Edmund Burke later wrote, "The settlement of our

colonies was never pursued upon any regular plan; by they were formed, grew, and flourished, as accidents, the nature of the climate, or the dispositions of private men happened to operate."

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known as the Proprietors of the province, or colony; John Penn, one of William's grandsons, also served as governor in the years leading up to independence.

There were significant differences among the colonies in demography and religious orientation. For example, Puritans dominated the largest early migration to Massachusetts Bay; New York had a large

Dutch population because the Netherlands had been the first colonial power; and settlers from many countries in northern and western Europe, as well as Quakers, tended to go to Pennsylvania because it was famously receptive. There were large economic differences as well. The typical farm in the north was a small one, often worked by a single family; large plantations dominated the south. And of course the most significant difference between north and south was that the southern economy was heavily and directly dependent on chattel slavery; although slavery was not prohibited anywhere in the colonies until after they declared independence, it was far more important and widespread in the south than in the north.

And yet there were significant political similarities among the colonies. Most of them had been founded as either corporate or proprietary colonies, but unlike Pennsylvania most became Crown colonies by the middle of the 18th century, with governors appointed by the English monarch. Governance followed the English model. Typically, a colony had a council, which was appointed by the governor and acted in part as a court, as well as an elected assembly. There was an ongoing contest for power between the governor and the assembly, but the assembly—with the power of the purse and the ability to make laws for the colony—grew steadily in strength. "By the 1760s," two noted constitutional

historians have written, “the assemblies represented the colonists far more responsibly than Parliament spoke for the English people.”

In the first half of the 18th century, Parliament rarely legislated on the internal affairs of the colonies. It did pass laws attempting to tie the colonies’ trade to the mother country, but these were often ignored. And the Board of Trade reviewed colonial legislation that might impinge on imperial mercantile policies. It vetoed hundreds of such statutes, but left thousands alone. The overall policy of the English government to the colonies was later characterized by Edmund Burke as one of “wise and salutary neglect”—but with Britain paying for defense of the colonies.

In 1754, representatives of seven northern colonies met at the Albany Congress, a brainchild of Benjamin Franklin, to discuss matters of common interest, including relations with the Indian tribes and defense against the French. The Congress unanimously approved a plan outlined by Franklin, proposing a government made up of a President-General appointed by the crown and a Grand Council chosen by the colonial assemblies. The general government would raise money from the colonies, which would be represented in the Council in proportion to their contributions, and would take responsibility for Indian relations, military preparedness, and other matters of common concern. The proposal was roundly rejected both by the colonies and by the British government.

The Seven Years War (1756–63) between France and Great Britain established British domination throughout eastern North America. While the colonists fought alongside the British, the conflict drastically changed the trans-Atlantic relationship. Smuggling had become more than an irritant to the British. More significantly, imperial authorities felt that the colonists should pay a fair share of the immense cost of the war; the American view tended to be that Britain had fought for its own interests and should bear the burden, especially given that the colonies were not represented in Parliament.

The first significant conflict arose over the petition of customs officers in Massachusetts for open-ended “writs of assistance,” which would give broad



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In general, the colonies thrived; they had a total population of about a quarter million in 1700, and about 1.17 million by 1750 (when the population of Britain was about 6.5 million); the population continued to grow briskly in succeeding decades.

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search authority. James Otis, who had been Advocate-General of the colony, resigned his position and led the fight against granting the authority. A young John Adams was present and took detailed notes when Otis argued against the writs in proceedings before the Superior Court of Massachusetts in 1761; Adams later termed the speech “the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there, the child Independence was born.” According to Adams’s notes, Otis’s speech contained this arresting passage: “As to acts of parliament. An act against the Constitution is void; an Act against natural Equity is void; and if an act of Parliament should be made, in the very words of this petition, it would be void. The Executive Courts [i.e.,

the courts of justice, as opposed to a legislature or “general court”] must pass such acts into disuse.”



**FOR  
DISCUSSION**

What do you suppose Otis meant by his reference to the Constitution? On what basis would a court be justified in con-

cluding that an Act of Parliament ran counter to it, or to “natural equity”?

The British Parliament passed a Sugar Act in 1764, imposing a tariff on molasses imported from the French sugar islands. New England merchants were affronted by the idea

of paying any tax. Soon after, Parliament passed a Currency Act in an attempt to prevent the issuance of paper money; this led opponents in Massachusetts to establish the first known Committee of Correspondence, an attempt to rally and coordinate opposition across the colonies. Transient though it was, this may be considered to be the first significant step towards union among the colonies; in the following years, committees of correspondence, with participants appointed by the colonial legislatures, became a more established and significant feature of the colonial political scene.

In 1765, Parliament passed a Stamp Act, requiring revenue stamps on legal documents and printed matter. This law generated widespread disobedience in the colonies. The Massachusetts Assembly sent a circular letter to its counterparts in the other colonies, suggesting that they “consult together on the present circumstances of the colonies.” Representatives of eight colonies and of various counties in New York gathered in October in New York for what has been labeled the Stamp Act Congress. Officials in England recognized the significance of this gathering, but too late to do anything about it. After two weeks, the Congress issued a Declaration of Rights and Grievances, though the individual delegates were unwilling to sign it. The Declaration

objected to the Stamp Act—which indeed soon became unenforceable as a result of colonists’ unwillingness to comply—but went far beyond. It included the following passages:

1st. That his majesty’s subjects in these colonies, owe the same allegiance to the crown of Great Britain that is owing from his subjects born within the realm, and all due subordination to that august body, the parliament of Great Britain.

2d. That his majesty’s liege subjects in these colonies are entitled to all the inherent rights and privileges of his natural born subjects within the kingdom of Great Britain.

3d. That it is inseparably essential to the freedom of a people, and the undoubted rights of Englishmen, that no taxes should be imposed on them, but with their own consent, given personally, or by their representatives. . . .

4th. That the people of these colonies are not, and from their local circumstances, cannot be represented in the house of commons in Great Britain.

5th. That the only representatives of the people of these colonies are persons chosen therein, by themselves; and that no taxes ever have been, or can be constitutionally imposed on them, but by their respective legislatures.



**FOR  
DISCUSSION**

In a 1764 pamphlet called *The Rights of the British Colonies Asserted and Proved*, Otis argued that, in addition to having their own legislatures, the colonies should be “represented in some proportion to their number and estates in the grand legislature of the nation,” and that doing so “would firmly unite all parts of the British empire in the greater peace and prosperity, and render it invulnerable and perpetual.”

This idea of expanding the British Parliament to include direct representation for the colonies seems not to have gained significant support on either side of the Atlantic. Indeed, as you can see, the Declaration of Rights and Grievances of the Stamp Act Congress rejected it out of hand. Why do you suppose Otis’s idea did not gain more traction?

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Parliament repealed the Stamp Act but simultaneously asserted, in the Declaratory Act of 1766, that it “had, hath, and of right ought to have, full

power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America . . . in all cases whatsoever.” Soon Parliament passed a broader set of levies known as the Townshend duties, which generated widespread protests in the colonies, especially because part of the revenue was to be used for the salaries of judges and other colonial officials—who had previously been dependent on appropriations by the assemblies. Ultimately, most of these duties were repealed; the one on tea, however, remained. A period of relative calm followed, broken by passage of the Tea Act of 1773, which raised the duty on tea modestly but was designed to give the financially distressed East India Company a monopoly over tea imported to North America. There followed the Boston Tea Party, in which a band of locals boarded ships in Boston harbor and dumped huge quantities of tea into the water. Parliament responded by passing the Coercive Acts—often referred to by colonists as the Intolerable Acts—which closed the port of Boston, concentrated power in the hands of royal officials, and allowed soldiers and others accused of certain crimes to be remanded to England for trial.

In the spring of 1774, members of the Virginia House of Burgesses—which had been dissolved by the governor after protesting Parliament’s Boston Port Act—met at the Raleigh Tavern in Williamsburg and issued a call for a Continental Congress. Delegates from twelve colonies attended the Congress, which met in September and October in Philadelphia. Some of the delegates had been sent by their respective assemblies; in other cases, the committees of correspondence or hurriedly assembled conventions had chosen them. The



Henry’s proposal was considered a radical one. Why, do you suppose?

Congress rejected a proposal by Patrick Henry that the delegates vote as individuals; they were instead instructed representatives of their respective colonies, and voted by delegation.

Despite rejecting a proposal for a plan of Union that resembled the Albany Plan of nearly two decades before, the Congress took four bold measures.

First, it endorsed the Suffolk Resolves, a set of resolutions adopted in Suffolk County, Massachusetts (which includes Boston). Ridden to Philadelphia by the designated horseman, Paul Revere, the Resolves declared that the Intolerable Acts were “gross infractions of those rights to which we are justly entitled by the laws of nature, the British constitution, and the charter of the

province” and called for a provincial government free of royal control until such time as the Acts should be repealed. Second, the Congress adopted another Declaration of Rights and Grievances, which contained ominous language saying that “Americans cannot submit” to the “grievous acts and measures” taken by the British government, but that “for the present” they were resolved only to pursue peaceful measures. Third, in accordance with that Declaration, the Congress adopted Articles of Association, a detailed plan for boycotting British goods. Finally, and perhaps most significantly, the Congress agreed that there should be a Second Continental Congress if, as the delegates expected, circumstances required. Invitations were sent to several British colonies that had not been represented at the First Congress: Georgia, Quebec, Saint John’s Island, Nova Scotia, East Florida, and West Florida. None of these sent delegates to the Second Congress except, belatedly, Georgia, which had not sent delegates to the First Congress in part because it was hoping for British cooperation on its Indian frontier.

The situation further deteriorated in the spring of 1775. The royal governor of Massachusetts sent troops to capture military supplies that the Massachusetts militia had stored in Concord. They exchanged fire with a few militiamen at Lexington, were repelled by a larger force in Concord, and harassed all the way back to Boston. Militia companies from the New England colonies gathered around Boston and laid siege to the British troops there.

The Second Continental Congress met in Philadelphia, beginning on May 10, 1775. George Bancroft, the great 19th century historian, vividly described the status of the Congress:

Whom did they represent? and what were their functions? They were committees from twelve colonies, deputed to consult on measures of conciliation, with no means of resistance to oppression beyond a voluntary agreement for the suspension of importations from Great Britain. They formed no confederacy; they were not an executive government; they were not even a legislative body. They owed the use of a hall for their sessions to the courtesy of the carpenters of the city; there was not a foot of land on which they had the right to execute their decisions; and they had not one civil officer to carry out their commands, nor the power to appoint one. Nor was one soldier enlisted, nor one officer commissioned in their name. They had no treasury; and neither authority to lay a tax, nor to borrow money.

They had been elected, in part at least, by tumultuary assemblies, or bodies which had no recognised legal existence; they were intrusted with no powers but those of counsel; most of them were held back by explicit or implied instructions; and they represented nothing more solid than the unformed opinion of an unformed people.

And yet the Congress responded to the situation by taking on many of the functions of a government; indeed, unlike its predecessor, it remained in session practically continuously (though not always in Philadelphia) until it was succeeded six years later. In June, it constituted the Continental Army, based on the militia companies surrounding Boston. To affirm that the struggle was not a regional one, Congress appointed George Washington—a Virginian who had been a delegate to the First Continental Congress—as commander-in-chief. A week later it authorized the issuance of paper currency, to be backed up by each of the states. This currency helped finance the war, but eventually it became virtually worthless, in part because of effective counterfeiting by the British.

On July 6, 1775, Congress adopted a Declaration of the Causes and Necessity of Taking up Arms, drafted by the relatively hawkish Thomas Jefferson and the more dovish John Dickinson. The Declaration, which referred to “the united colonies of North America,” was in large part a historical narration and another list of grievances. Among these were the extended use in customs cases of courts not following the common-law model of trial by jury; provisions for remand of those accused of certain crimes to England; dissolution of Virginia’s House of Burgesses; the closing of Boston; and, most prominently, the assertion by Parliament—none of whose members had been chosen in the colonies—of complete legislative power over the colonies, in the Declaratory Act of 1766. The Declaration professed loyalty to the King—for the time being:

[W]e mean not to dissolve that union which has so long and so happily subsisted between us, and which we sincerely wish to see restored.—Necessity has not yet driven us into that desperate measure . . . .

The previous day, reflecting both its ambivalence and its respect for Dickinson, Congress had unanimously adopted the so-called Olive Branch petition, which emphasized the ties the colonists felt with the mother country “with all devotion that principle and affection can inspire.” But the King refused to accept the petition, in part because the Americans—having been rebuffed in their attempt

to persuade Quebec to join them—had instead made an ill-fated invasion of what would eventually become Canada. The King issued a proclamation that the colonies were in a state of “open and avowed rebellion.”

From then the momentum to independence grew, spurred in large part by Parliament’s passage in December 1775 of the Prohibitory Act, which provided that American ports should be blockaded and declared that American ships were to be treated as enemy vessels subject to forfeiture, and by publication the next month of Thomas Paine’s pamphlet *Common Sense*. On May 4, 1776, Rhode Island’s legislature declared independence. On May 15, the Virginia Convention—a sort of rump legislature—instructed its delegates to Congress to propose independence. Several delegations were under instructions that precluded them from voting for independence, but over the next several weeks the situation rapidly changed.

In June, Congress voted to postpone a decision on independence for three weeks, but meanwhile to appoint a committee to draft a statement explaining the decision to declare independence, if in fact Congress took that step. The Committee reported back its draft, of which Jefferson was the principal author, on June 28. On July 1, Congress, as a committee of the whole, approved Virginia’s resolution for independence—nine states in favor, two (Pennsylvania and South Carolina) against, one (Delaware) divided equally, and one (New York) abstaining because it had not yet been authorized to vote for independence. The next day, the resolution was presented to Congress itself. Vote switches in the Pennsylvania and South Carolina delegations and the arrival of Caesar Rodney, a pro-independence delegate from Delaware, just as the vote was starting, led those three delegations to favor independence; New York continued to abstain. After debate, the Congress adopted a modified form of the committee’s draft declaration on July 4. Among the passages deleted was a long, passionate castigation of the slave trade; Jefferson—the draftsman, a slave holder, and often rather hypocritical—resented the excision. There has been considerable debate about who, if anybody, signed the Declaration on July 4. It is clear that at least some signatures (including those of the New York delegation, which had finally received new instructions) were not added until August 2.

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## Declaration of Independence

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1776

In CONGRESS, July 4, 1776

The unanimous Declaration of the thirteen united States of America

When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and

equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.



Here and below, note that "united" is not capitalized even though "States" is. What's the significance of that?



On what basis do the signers of the Declaration believe that "the Laws of Nature and of Nature's God entitle" the people of America to political status, as a people, separate from and equal to that of Great Britain?

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,

In this paragraph, the Declaration is making, at least in part, a series of descriptive statements. Do you believe they are accurate?

What did the signers mean in saying that "all men are created equal"? Why did they regard that proposition as a "self-evident" truth? Who was included within the term "men"?



—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers

in such form, as to them shall seem most likely to effect their Safety and Happiness.

Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn that mankind are more disposed to suffer, while evils are sufferable, than to right

themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected, whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the



Do you agree with this assertion of the right to abolish government? Who are "the People" for this purpose, and how are they to decide whether the conditions warranting such a transformation are present?

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mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock Trial from punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing Taxes on us without our Consent:

For depriving us in many cases, of the benefit of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences:

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation, and tyranny, already begun with circumstances of Cruelty & Perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these united

Colonies are, and of Right ought to be Free and Independent States, that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.—And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

JOHN HANCOCK

[There follow the signatures of 55 other delegates, organized by delegation, though the names of the delegations are not included.]

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### *Questions for Consideration After Reading the Declaration*

- (1) Assuming that a *Declaration* of Independence was necessary to achieve independence, this document is much more than that; it appears to be an attempt at persuasion. Who is its intended audience?
- (2) Assuming one accepts the legitimacy of the Declaration, how many independent nations resulted? If one, what was its name?
- (3) The Declaration certainly makes King George III out to be a bad king and a bad guy. But Massachusetts probably could have stated an impressive sounding list of complaints against George W. Bush or Donald J. Trump, and Idaho could probably have done the same with respect to Barack Obama or Joe Biden. Does the Declaration make a persuasive case that it is "necessary" for the American colonies to "dissolve" the political bands that have connected America to Great Britain? Do you believe the Declaration is a complete statement of the reasons that actually motivated the decision to assert independence?
- (4) In 1789, Franklin wrote, with reference to the Albany Plan discussed on pp. 5:

On Reflection it now seems probable, that if the foregoing Plan or some thing like it, had been adopted and carried into Execution, the subsequent Separation of the Colonies from the Mother Country might not so soon have happened, nor the Mischiefs suffered on both sides have occurred, perhaps during another

Century. For the Colonies, if so united, would have really been, as they then thought themselves, sufficient to their own Defence, and being trusted with it, as by the Plan, an Army from Britain, for that purpose would have been unnecessary: The Pretences for framing the Stamp-Act would not then have existed, nor the other Projects for drawing a Revenue from America to Britain by Acts of Parliament, which were the Cause of the Breach, and attended with such terrible Expence of Blood and Treasure: so that the different Parts of the Empire might still have remained in Peace and Union.

Was he right? Would that have been a good thing or a bad one? Is it imaginable that as late as the 21st century a nation in North America would be independent of Great Britain but remain in close political association with it?

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Rather soon after the Declaration, each of the states adopted a constitution. But what of the “united States”? On June 12, 1776, a day after appointing the committee that drafted the Declaration, Congress appointed another committee to draft a plan for a confederation of the prospective states. Not until November 1777 did Congress approve a draft of Articles of Confederation to be sent to the states for ratification. Beginning in July 1778, as states approved the Articles, their respective Congressional delegations signed them. The last holdout, Maryland, did not approve until February 1781, because of disputes with other states over western land claims. Its delegates signed the Articles on March 1, 1781, and at that point the Continental Congress became the Congress of the Confederation.

Here is the text of the Articles, edited down somewhat.

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### Articles of Confederation

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To all to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting.

Articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts-bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

Article I. The Stile of this Confederacy shall be “The United States of America.”

Article II. Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.

Article III. The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

Article IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with, treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

Article V. For the most convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislatures of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year. . . .

In determining questions in the United States in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress, and the members of Congress shall be protected in their persons from arrests or imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

Article VI. No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, Prince or State; nor shall any person holding any office of profit or trust under the United States, or any of them, accept any present, emolument, office or title of any kind whatever from any King, Prince or foreign State; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any King, Prince or State, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessel of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defense of such State, or its trade; nor shall any body of forces be kept up by any State in time of peace, except such number only, as in the judgement of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation

of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted. . . .

Article VIII. All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.

Article IX. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may



The Articles go into great detail, omitted here, on the process of congressional adjudication in disputes between states.

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arise between two or more States concerning boundary, jurisdiction or any other causes whatever; which authority shall always be exercised in the manner following. . . .

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States—fixing the standards of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated—establishing or regulating post offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces, in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated “A Committee of the States”, and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction—to appoint one of their members to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money, or emit bills on the credit of the United States, transmitting every half-year to the respective States an account of the sums of money so borrowed or emitted—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding. . . .

The United States in Congress assembled shall never engage in a war, nor grant letters of marque or reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to

the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of the majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy. . . .

Article X. The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of the nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled be requisite.

Article XI. Canada acceding to this confederation, and adjoining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

Article XII. All bills of credit emitted, monies borrowed, and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

Article XIII. Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State. . . .

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### *Questions for Consideration After Reading the Articles*

- (1) Did adoption of the Articles constitute the United States as a nation? What portions of the Articles themselves might lead you to answer this question affirmatively? What portions might lead you to answer negatively?
  - (2) However you might answer the first question, clearly the Articles were at least a significant step on the path toward nationhood. What portions do you regard as their greatest accomplishments? What were their most significant limitations and weaknesses?
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The United States had some notable achievements during the period of the Confederation Congress. The war was brought to a successful military conclusion with the battle of Yorktown in October 1781 and to a successful diplomatic conclusion by the 1783 Treaty of Paris, which was ratified the next year. The treaty recognized not only American independence but also American control over a large body of land, bounded on the south by the Ohio River and on the west by the Mississippi, beyond the accepted borders of the states. One by one, reluctantly, the states gave up their claims to this land, which had been a source of considerable conflict among them. The territory therefore belonged to the United States as a whole. The Land Ordinance of 1785 devised a system of public surveying for this land, dividing much of it into townships six miles square. The Northwest Ordinance of 1787 provided a mechanism for this large area—which covers all the modern states of Ohio, Michigan, Indiana, Illinois, and Wisconsin, as well as part of Minnesota—to be organized into territories that would eventually become states. The ordinance also contained a guarantee of various civil rights, including trial by jury and religious tolerance. And it prohibited slavery in the territory (though indentured servitude was allowed).

But there were serious problems as well. Congress was not in complete control of foreign policy; Georgia skirmished with the Spanish, who had regained control of all of Florida after the Revolution, and some states fought and made treaties with Indian tribes. Congress was unable to pay the national debt, including debts to veterans. The Continental currency had become virtually worthless, in part because Congress was able to raise far less money from the states than it demanded or believed it needed. Economic depression led to a wave of foreclosures, and so too to considerable resistance on the part of debtors, which briefly erupted into violence in western Massachusetts in 1786, in Shays's Rebellion. State legislatures passed various forms of debtor relief

measures, including moratoria on foreclosures and the issuance of inflationary paper money. States also passed various sorts of protective legislation—for example, favoring their own citizens' vessels and limiting access to their ports—that effectively created a continuous trade war.

## B. Adoption of the Constitution

In January 1786—at least in part at the instigation of James Madison, who had already taken some local initiatives on interstate cooperation—the Virginia Assembly issued a call for the states to send delegates to a convention to “consider how far a uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony.” Five states sent a total of twelve delegates to the convention, which was held in September at Annapolis, Maryland. The delegates recognized that the poor turnout limited their ability to attain any substantive accomplishments. But at the suggestion of Alexander Hamilton, a delegate from New York, they adopted a resolution recommending the calling of a second convention, which would be able to “devise such . . . provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union.”

The Annapolis resolution was presented in February 1787 to Congress, which soon after called for delegates appointed by the states to convene in Philadelphia on May 14 “for the sole and express purpose of revising the Articles of Confederation” and proposing “such alterations and provisions therein” as would “when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.” George Washington agreed to attend as a delegate from Virginia, which boosted the convention's credibility. Ultimately twelve states sent delegates—Rhode Island refused to do so—but because of travel difficulties the Convention did not have a quorum for business until May 25.

At the outset, the Convention unanimously elected Washington as its president. Madison came to the sessions early, sat near the front, and took extensive notes. These remain perhaps the most important record of the proceedings, which were conducted in secret. The Convention nearly broke up more than once, and some delegates departed in protest over the proceedings. In July, Hamilton was left as the only member of the New York delegation; under the rules of the Convention, the state needed at least two delegates to