

CHAPTER 2 THE CONSTITUTION

Narrative Lecture Outline

The Constitution was designed to last—it is the oldest operational constitution in the world—thousands of amendments have been proposed but only 27 have passed the rigorous process to become part of the Constitution. Ten of those were passed very early on as a promise to opponents of the Constitution to get their votes to approve the document, those ten are known as the Bill of Rights. The most recent amendment passed in the early 1990s.

The process is long and difficult. For example, the amendment to extend voting rights to virtually all people over the age of 18 was first proposed in 1942 but only attained passage in 1971. This amendment made citizenship broader and more comprehensive than ever before. In fact, much of the expansion of the electorate was achieved through constitutional amendment including voting rights for women and minorities. The record, however, is held by the Madison amendment. It was proposed in 1789 and stated that Senators and Representatives could not raise their own pay during a session. An election must occur before any pay raise can take effect. This amendment was resurrected by a student in an American Government class at the University of Texas during research for a term paper and finally passed in 1992. (He got a “C” on the paper.)

Why has the Constitution been amended so rarely and worked so well? Perhaps it has been so successful because people are basically satisfied with our system of government or because it was the result of compromise and therefore vague and flexible? Well, in order to find out the answers, we need to look at a little history and the document itself.

The Origins of a New Nation

Colonists came to the New World during the 1600s for a variety of reasons including to escape religious persecution, to find plentiful land, and to seek a new start in life. Traveling in the seventeenth century was full of hardships so only the hardiest, most adventurous, or most desperate attempted sea voyages of several weeks or more! This made the colonists an independent and cantankerous lot with an ocean between them and their rulers. King James I actually ended up encouraging their independent mindedness by allowing the colonists to establish colonial assemblies such as the Virginia House of Burgesses. The colonists were allowed significant liberties in terms of self-government, religious practices, and economic organization.

By the mid 1700s, ties to the Crown had weakened substantially due to distance and new traditions. Each of the 13 colonies had its own constitution and liked its freedoms.

Trade and Taxation

The British followed a national policy of mercantilism—that is, they wanted to control trade and amass large quantities of gold and silver through a national monopoly on trade. England tried to control and regulate trade in the American colonies but these regulations were often difficult to enforce and colonists tended to ignore or circumvent them.

The French and Indian War (or Seven Years War—1756 to 1763) brought on more English oversight and tougher laws on trade. The American phase of the war was fought on what is now the U.S.-Canadian border due to conflicts between the British and French Empires over control. The Treaty of Paris ended the war and left the British in control of most of North America. The colonists thought this would open up even more cheap land for them. The British had other ideas. The Crown decreed in 1763 that there would be no further westward movement of British subjects. They didn't want to pay to defend settlers against Indians.

The British Parliament also sought ways to pay for the war that infringed on what the colonists saw as their rights. The Sugar Act of 1764 taxed sugar, wine, coffee and other products commonly exported to the colonies. The colonists resented these taxes and began to cry "no taxation without representation!" Major protests waited until the passage of the Stamp Act in 1765 that required all documents (newspapers, deeds, magazines, etc.) to pay a stamp tax. In the same year, the Parliament passed the Mutiny (Quartering) Act that forced colonists to either provide barracks for British soldiers or house them in their homes. The colonists were outraged. Violent protests began. The Sons of Liberty were organized by Samuel Adams and Patrick Henry to act out against the Crown.

First Steps Toward Independence

The Stamp Act Congress in 1765 was the first step toward a unified country. Nine of the 13 colonies attended this meeting in New York City, and they drew up a detailed list of violations the Crown committed against their fundamental rights.

In 1767, Parliament enacted the Townshend Acts that imposed duties on many products including tea. The Sons of Liberty started a boycott that prompted the British to send troops to Boston eventually leading to the Boston Massacre. In 1772, still irked by the taxes on tea, Samuel Adams suggested the establishment of Committees of Correspondence to enhance communication among colonists. By 1774, 12 colonies had formed such committees.

Despite such resistance, Parliament passed another tax on tea in 1773 granting a monopoly to the East India Company. The colonists responded by dumping tea into Boston Harbor in the "Boston Tea Party." King George flew into a rage and announced that it was time to force the colonies to fall into line, and he persuaded Parliament to pass the Coercive Acts or the Intolerable Acts. These laws allowed Britain to blockade Boston harbor until the colonists paid for the "Tea Party" and allowed 4,000 more soldiers to be quartered in Boston.

Each of these acts added to resentment on both sides of the Atlantic. The colonists felt pushed around and unrepresented. The King and Parliament saw their power flaunted and ignored. Worse, the colonists were costing them money by forcing them to send troops and implement an increasing number of laws in the colonies. The issue ceased to be simply taxes and became control over the political and economic life of the colonies. All but one colony agreed to send delegates to a new continental congress to communicate with the King from a united position.

The First Continental Congress

The Continental Congress met in Philadelphia in September and October 1774 and consisted of 56 delegates from every colony except Georgia. Their intent was to find a solution to the problem—they wanted to find a compromise. They were not yet thinking of open rebellion. They called for colonial rights of petition and assembly, trial by peers, freedom from a standing army, and the selection of representative councils to levy taxes. If the King did not agree, the Congress would meet again in May 1775.

The Second Continental Congress

King George refused the demands of the Continental Congress. A second Continental Congress called their meeting for May 1775, but before they could meet fighting broke out at Lexington and Concord, Massachusetts.

The Second Continental Congress convened on May 10, 1775, and its members were united in their hostility toward Britain. King George sent 20,000 more troops. The Revolutionary War had begun. Thomas Paine forcefully argued for independence for the colonies in his pamphlet *Common Sense* in January 1776.

The Declaration of Independence

Virginia was the first colony to call for independence. Six of the 13 colonies had instructed their delegates to vote for independence, but the Second Continental Congress suspended its sessions to allow delegates to go home to their colonies and consider the issue carefully: demanding independence was treason and punishable by death!

At the same time, committees were formed to consider Virginia's proposal. One of the committees began work on a declaration of independence. Benjamin Franklin, Robert Livingston, John Adams, Roger Sherman, and Thomas Jefferson were tasked with wording the document. On July 2, the colonies voted for independence (except New York which abstained). On July 4, the Congress adopted the Declaration of Independence penned by Thomas Jefferson.

The primary author of the Declaration of Independence was Thomas Jefferson. In it, he used stirring language to explain the reasons for the colonists' desire for independence. He drew heavily on the work of many theorists including John Locke. As a matter of fact, the phrase about man's inalienable rights to "life, liberty, and the pursuit of happiness" is very close to Locke's phrase "life, liberty, and property." Locke's right to rebel against unjust rulers is also a key component behind the Declaration of Independence.

Jefferson believed strongly that government should be based on consent and therefore followed in the footsteps of social contract theorists. He, and the other members of the committee, felt that Britain had violated the rights of the colonists and could no longer be considered legitimate and therefore a new government was in order that could gain the consent of the governed.

Of course, Britain did not agree. British General William Howe demanded that the colonists revoke their declaration. When they refused, the Revolutionary War began. While the war was being waged, the Congress worked to fashion a new government for the colonies.

The First Attempt at Government: The Articles of Confederation

Britain did not (and does not) have a written constitution. The colonists wanted a constitution—a written document that defines rights and obligations and puts limits on government. This had never been done before and was accomplished during a war against the largest military power in the world.

The colonists created a loose league of friendship under "The Articles of Confederation." The only way the colonists could have devised a system less like the British unitary system would be if they had chosen anarchy (the lack of any government at all). In a confederacy, the central government is very weak and the component parts—states—have the majority of the power and the sovereignty. This is almost the opposite of the unitary system used in Britain in which all of the power and sovereignty is vested in the central government. The Articles of Confederation (the text is in the appendix of the book) was predominantly a reaction to British rule in many other ways as well.

Key provisions under the Articles included:

- A national government and national legislature (Congress)
- Congress would have the power to coin money, make peace, appoint officers to the military, run the post office, and negotiate with Indian nations
- Each state in the Congress had equal representation, one vote
- A super-majority was required for the passage of any legislation (9/13) and amendments must be unanimous
- Members of Congress would be chosen and paid for by the state legislatures

The Articles were ratified in 1781 and had been operational throughout the Revolutionary War. However, after the British surrendered and the people were no longer united in war, problems began to manifest.

Problems Under the Articles of Confederation

As I already mentioned, the central government under the Articles was to be weak. The national Congress was empowered to make peace, coin money, appoint officers for an army, control the post office, and negotiate with Indians. That's it. The states retained independence and sovereignty. Therefore each state, regardless of size, had one vote in the Congress. To further limit government powers, nine of 13 states were necessary to pass any measure and unanimity was required to amend the Articles. The requirement for "super-majorities" for even simple legislation guaranteed the continuing preeminence of the states over the center. Delegates to the Congress were to be chosen by state legislatures further ensuring states' rights. Fearful of a new king, the Articles made no provision for an executive branch and assumed that a federal judiciary was not needed—states could handle all judicial functions.

By 1784, Congress had trouble getting a quorum of nine states to conduct business. Even when quorum was made, the states did nothing but bicker. The Congress faced a very serious problem—how to raise money to pay the Revolutionary War debt. They had no power to tax. States coined their own money and trade wars erupted. Congress had no power to regulate commerce among the states or ensure a unified monetary system. Although Congress could coin money, Continental Dollars were worth little because the government had nothing to back the currency. States conducted foreign relations without regard to neighboring states' needs or wants. Duties, tariffs, and taxes on trade proliferated with different ones in each state. Vermont threatened to annex itself to Canada, and border wars between states began.

So in summary, the greatest weaknesses of the Articles of Confederation were:

- a weak central government
- Congress had
 - no power to tax
 - no power to regulate commerce among the states or with foreign countries
 - no ability to ensure the value or unity of money
 - no power to post or regulate duties and tariffs
- no executive
 - no one to implement and enforce laws
 - no one to coordinate foreign policy
 - no one to ensure compliance with the Treaty of Paris (1783) that ended the Revolutionary War
- no judiciary
 - disputes among states about borders could not be addressed adequately in state courts
- neither could trade disputes
- neither could disputes about the frontier and lands to the west
- an extremely limited ability to amend or change the Articles, thus addressing weaknesses without abandoning the document

The economy began to deteriorate. Several years of bad harvests ensued. Farmers went into ever-deeper debt (remember most Americans were farmers at this time). George Washington and Alexander Hamilton, among others, worried about questions of defense, trade, and frontier expansion. Under the Articles, the central government was not strong enough to cope with these problems. By 1786, several states had called for a convention to discuss ways of strengthening the national government.

Before that convention could meet, unrest broke out in America. In Massachusetts, banks were foreclosing on farms and the Massachusetts legislature enacted a new law requiring all debts be paid in cash. Daniel Shays, a Revolutionary War veteran, was outraged and frustrated with the new law and the huge debt burden of farmers. He led a group of 1,500 armed and disgruntled farmers to the capital, Springfield. They forcibly prevented the state court from foreclosing on their farms.

Congress authorized the Secretary of War to call up a national militia to respond and appropriated \$530,000 for the purpose. Every state except Virginia refused. Finally, a private army put down Shays's Rebellion. This failure of Congress to protect the citizens and property of Americans was yet another example of the weakness of the Articles.

The Miracle at Philadelphia: Writing a Constitution

On February 21, 1787, Congress called for a Constitutional Convention in Philadelphia "for the sole and express purpose of revising the Articles of Confederation." All states sent delegates except Rhode Island.

Twenty-nine men gathered at the convention. They were farmers, businessmen, intellectuals, and politicians. They were all respected members of their state communities and almost all were well-known at the time. They elected George Washington to preside over the convention. When the Virginia delegation suggested they throw out the Articles and devise a new system of government, the delegates realized that this act could be considered treason, so they adopted a pledge of secrecy.

The Characteristics and Motives of the Framers

Eventually, there were 74 delegates selected for the convention. Fifty-five ultimately made it to Philadelphia. They are often referred to as the "Framers" or the "Founding Fathers." Most of them were quite young although Ben Franklin was 81! And they represented a vast amount of experience.

There were (and are) numerous debates about the motives of the Framers. They have been accused of being a group of self-serving elites out to protect their own vested interests. The Framers themselves asserted that they were trying to "preserve the nation." This debate has raged on among historians and political scientists.

The Virginia and New Jersey Plans

There were many conflicts among the states in the years of the early republic. Among them were the conflicts in interests between the large and small states; between the predominantly agricultural South and industrial North; and between slave and free states. Virginia—a large, populous, agricultural, slave-owning state—presented the first plan for a new government, thus setting the agenda for the convention.

The Virginia Plan proposed that sovereignty be vested in the people and not the states (this would benefit states with large populations since they would then have "more sovereignty"). They advocated a powerful central government with three branches—legislative, executive, and judicial. The legislative branch was to be bicameral with one house directly elected and the other appointed by state legislatures, but both in proportion to population.

The small states were more satisfied with the Articles and its guarantees of equal status for small states. They proposed the New Jersey Plan that primarily would strengthen the Articles by giving Congress the ability to raise revenues from duties and a post office and retaining a unicameral legislature chosen by state legislatures.

Constitutional Compromises

The most serious disagreements were the conflict between the large and small states over the

PLANS PRESENTED AT PHILADELPHIA IN BRIEF

Virginia Plan	New Jersey Plan	Connecticut Compromise
Legislature	bicameral	bicameral
Representation	by population	lower: pop upper: equal
Executive	size undetermined elected by legis	single exec chosen via electoral college
Judiciary	life tenure able to veto state legislation	jurisdiction over inter state conflict
Ratification	by the people	by special nominating conventions in the states
Presented by	Edmund Randolph James Madison	Roger Sherman

representation of states in Congress and the argument between North and South on the issue of slavery. The question of slavery dealt with whether and how slaves were to be counted in population figures and how slaves would be dealt with for taxation purposes.

Connecticut offered a compromise, taking elements of both the Virginia (large state) and New Jersey (small state) plans. The legislature would be bicameral with the lower house (House of Representatives) based on population and the upper house (Senate) premised on equal representation for the states. The House, as the more representative body, would originate all money bills. Both houses had to pass all legislation so both small and large states were satisfied.

Southern states did not want Northern states to interfere in the lucrative cotton trade. The proposal of a tax on the importation of slaves was severely contested by the South. This brought up the issue of slavery. In order to gain the acquiescence of the North to continuing the slave trade for another 20 years and for a 20-year ban on taxing cotton exports, Southerners agreed to allow the national government to regulate commerce and for the Senate to pass treaties with a 2/3rds majority vote. They also agreed to navigation laws being subject to a simple majority vote.

This left the problem of how to determine the populations of the states. The slave states wanted slaves counted for purposes of representation (of course, they would not receive the right to vote), and the free states were opposed to this formulation. They compromised by deciding that slaves would count as 3/5ths of a person—this became known as the Three-Fifths Compromise.

Unfinished Business Affecting the Executive Branch

The Framers next had to decide on an executive branch. The most controversial decisions were term of office and method of selection. They feared tyranny if the executive was too strong, similar to the tyranny of King George. They also feared direct election of an executive. After Shays's Rebellion, they were wary of the power of the masses. Again, the conflict between the influence of large and small states was a problem.

The Committee on Unfinished Portions was tasked with finding a compromise. They chose a four-year term of office with the possibility of reelection, and created the Electoral College that would give states a role in selection of the president and limit the influence of the masses. In addition, the Committee devised a method of impeaching and removing the president—again both House and Senate get separate roles to ensure the interests of both large and small states are met.

The U.S. Constitution

The Preamble came last. The words "We the People" decided in whom sovereignty was vested. It came from the people, not the states. The Constitution was signed by most of those remaining at the convention and was sent to the states for ratification.

The Basic Principles of the Constitution Federalism

Unitary government was unacceptable due to the British experience and confederation had failed under the Articles, so the Founding Fathers created a half-way house they called federalism. Under federalism, power is divided among the states and the national government.

Separation of Powers

The Framers feared government and wanted to limit it; they didn't want to put too much power into one set of hands. So they divided power vertically through federalism and horizontally through separation of powers among the three branches of government. Each branch would be independent and equal with different staffs and functions.

Checks and Balances The power of each branch of government is checked or limited and balanced by powers held by other branches. This way no one branch can tyrannize the other branches or the people.

The Supremacy Clause Article IV says that federal law is supreme. So if the states and federal government argue, the feds win. This was designed to avoid many of the excesses under the Articles of Confederation.

The Articles of the Constitution Article I: The Legislative Branch —establishes the legislative branch. Congress consists of two houses: The House of Representatives and The Senate. It determines the qualifications for holding office, methods of selection, terms of office, operating procedures and officers for each house. Article I, section 8, enumerates the powers of Congress. These enumerated powers include the right to tax, regulate commerce, coin money, and so on. However, Congress also has implied powers—those not listed in Article I, section 8. The “Elastic Clause” at the end of that section says that Congress shall "make all laws which shall be necessary and proper for carrying into Execution the foregoing powers." This has been interpreted as a broad grant of power over the years.

Article II: The Executive Branch

—establishes the executive branch headed by the president.

Section 1 sets the president's term of office and explains the electoral college. It also states the qualifications for office and the mechanism to replace or remove the president.

The powers and duties of the presidency are set out in section three including his role as commander-in-chief of the armed forces and the authority to make treaties with the consent of the Senate. In other passages, the president is told to report to the Congress “from time to time.” That has become the annual State of the Union Address today.

Article III: The Judicial Branch

—establishes the judicial branch. Congress was authorized to set up "such inferior courts as they deem necessary," but the article does not outline a federal judiciary beyond the Supreme Court. Article III establishes the Supreme Court, but does not specify the number of judges or their qualifications. It also lays out the Supreme Court's original jurisdiction. Federal judges serve terms of “good behavior” or basically life. This allows the judiciary independence from political motives. Article III forbids Congress from lowering judicial salaries while a judge holds office.

The most important power of the Supreme Court is not mentioned in the Constitution, the power of judicial review. Judicial review is the power of a court to determine whether a law or regulation is constitutional. They took this power in a clever decision written by Chief Justice John Marshall in the case of *Marbury v. Madison* (1803).

Articles IV through VII

Article IV begins with the "full faith and credit clause" that mandates that states honor the laws and proceedings of another state. For example, if I get my windows tinted in Nevada and it's legal there then I move to Michigan where such a thing is illegal, I cannot be prosecuted. It also means states must recognize each other's marriage and divorce laws. This has become very controversial due to Hawaii's attempts to legalize same-sex marriages.

These articles also include rules on the admission of new states to the union, how amendments can be added to the Constitution, prohibits religious tests for holding office, and set out procedures for the ratification of the document.

The Drive for Ratification

The Framers, worried about resistance in the state legislatures, mandated that the new Constitution be ratified by special ratifying conventions in each state. From the fall of 1787 to the summer of 1788, the proposed Constitution was hotly debated throughout the country. The ratification debate was polarized around the ideas of two groups: the Federalists and Anti-Federalists.

In general, the Federalists were in favor of the new Constitution and the Anti-Federalists were opposed. The primary concern of the Anti-Federalists was the power of the new proposed central government. They were concerned with civil liberties and freedoms. They preferred most power to rest at the state level where it was more easily limited and controlled in their minds.

Much of the debate took place in newspapers and pamphlets written under pseudonyms, as was the custom of the times. What we now call the Federalist Papers and the Anti-Federalist Papers are collections of those writings. The Federalist Papers—those arguing for ratification—were written by James Madison, Alexander Hamilton, and John Jay. The Anti-Federalist Papers—those opposing ratification or insisting on additional amendments to protect civil liberties—were penned by Patrick Henry, George Clinton, John Winthrop, and George Mason.

The Anti-Federalists feared the power of the new national government would ride roughshod over the liberties of the people. They feared higher taxes, a standing army, a tyrannical executive, and a Supreme Court that would interfere with states' rights. They also complained that there was no bill of rights (a tradition in state constitutions).

Nine states had ratified by June 1788; however, the two largest states had not: Virginia and New York (together they were 40 percent of the population). Once Virginia ratified, New York was forced to ratify despite their misgivings or they might have been left out of the new union. They voted to ratify with a margin of only three votes. However, they insisted that the first order of business for the new Congress be a bill of rights. North Carolina did not ratify until September 1789, and Rhode Island remained outside of the union until 1790.

Amending the Constitution Amending the Constitution: The Bill of Rights

Once the document was ratified, elections were held and the new Congress seated. Twelve amendments were immediately sent to the states for ratification. The first ten— now known as the Bill of Rights—were ratified by 3/4ths of the states in 1791. Two others did not. One amendment was to enlarge the House of Representatives; it failed. The other prevented members of the House from raising their own salaries during their terms. It was ratified by the states over 200 years later and is now the 27th Amendment.

The Bill of Rights offers individuals specific protections of personal rights and liberties such as free speech, free press, religious liberty, and procedural safeguards for those accused of crimes.

Article V creates a two-stage process for amending the Constitution: proposal and ratification. An amendment can be proposed by 2/3rds of both houses of Congress or by 2/3rds of state legislatures requesting Congress to call a national convention to propose amendments. An amendment can be ratified by a favorable vote in 3/4ths of all state legislatures or by such a vote in specially called ratifying conventions called in 3/4ths of the states.

This is, by design, a very difficult process. More than 10,000 amendments have been introduced in Congress over the years and only 33 of them got beyond the first hurdle to be sent to the states for debate and ratification. Twenty-seven were ratified and six were defeated including the Equal Rights Amendment.

Formal Methods

Article V sets out the amendment procedure. It is a two-step process: proposal and ratification. This is deliberately difficult. The Framers did not want wholesale change but a lasting document.

An amendment can be proposed through a vote of 2/3rds of both houses of Congress or by a vote of 2/3rds of the state legislatures calling upon Congress to call a national convention to propose amendments. The second method has never been used but its threat looms large. Once a convention is called, the entire Constitution could be up for dramatic change.

Ratification also has two methods. The more common method is ratification by 3/4ths of state legislatures. Alternatively, an amendment can be ratified by conventions in 3/4ths of the states. The latter method has been used only once; for the 21st Amendment that repealed Prohibition.

Informal Methods

The formal amendment process is slow and cumbersome to deliberately ensure that any additions to the Constitution are serious and thoughtful, not frivolous. The Constitution, though, also changes informally through judicial interpretation and through cultural and social change.

The first informal “amendment” to the Constitution may have been John Marshall's interpretation of the Constitution that granted the Supreme Court the power of judicial review. The Supreme Court has dramatically changed the way it interprets many clauses of the Constitution over the years. In particular, it has vastly broadened the interpretation of the Commerce Clause to include civil rights issues. The Supremacy Clause has been interpreted differently over the years as well. The Court has drastically changed its position on slavery and women, has adapted to new technologies and forms of communication in its interpretation of the First Amendment, and reinterpreted the meaning of due process in the Fourteenth Amendment (and others).

Social and cultural changes have stimulated some of the Court interpretations and have also influenced how Congress and the executive branch read the Constitution. Not so many years ago, “We the People” excluded blacks, women, the poor, and others. The Founding Fathers did not think in terms of gender discrimination or the Americans with Disabilities Act. In addition, large and activist government was accepted in the 1930s and 1940s. Now we are trending away from that and leaning towards smaller government and states' rights. These are just some of the ways the Constitution has changed over the years. It is a flexible and graceful document that has stood the test of time.