THE CONSTITUTION

The U.S. Constitution is the starting point for the study of American government and politics. It is a document that presents a republican form of government under which authority is divided among the legislative, executive, and judicial branches to ensure separation of powers; it also provides a system of checks and balances so that one branch does not dominate the others. The Constitution lays the framework for the relationship between the federal government and the states (known as federalism) and lays out the fundamental civil liberties and civil rights Americans have strived for more than 200 years to expand and preserve.

The Historical Background to the Constitution

As the American colonies moved toward a formal break with Great Britain, one of the first steps they took was to create a new political system. The First Continental Congress (1774) limited itself to issuing statements of rights and principles, while the Second Continental Congress (May 1775) assumed the functions of government. The Second Continental Congress, moreover, created a postal system, established the Continental Army with George Washington at its head, and made decisions regarding foreign policy. Most importantly, the Second Continental Congress formally declared independence from Great Britain, July 4, 1776.

Following an opening section that briefly states its purpose, the **Declaration of Independence**, written by Thomas Jefferson, is divided into three parts:

- **Theoretical Justification for Independence:** Here Jefferson drew heavily from the English political philosopher John Locke's *Second Treatise on Civil Government* (1689), particularly the concept of natural rights — "life, liberty, and the pursuit of happiness" — and the social compact theory of government. The social compact theory of government holds that people create governments to protect their rights; when a government breaks that contract, the people have the right to create a new government.
- **Grievances against the King:** The bulk of the Declaration of Independence is a long list of specific charges against King George III. Jefferson's original draft of the grievances section held the king responsible for slavery and the slave trade in the colonies as well as for encouraging American slaves to revolt against their masters. This provision was dropped from the Declaration that Congress approved.
- **Formal Declaration:** A statement that the colonies are "free and independent states" with no ties or allegiance to Great Britain.

The Second Continental Congress also urged the former colonies to draft new state constitutions. Two models emerged. In Pennsylvania (1776), there was a **unicameral** (one-house) legislature, whose members served for limited terms, and an executive council that had no real power. Massachusetts (1780) boasted a **bicameral** (two-house) legislature along with a governor, who could veto laws, and judges who served for life. A Bill of Rights that protected basic civil liberties such as freedom of the press was common in all the states' constitutions.

The **Articles of Confederation** was the first written constitution of the United States. It was approved by Congress in 1777 but did not go into effect until March 1781 when finally ratified by all of the states. The government created under the Articles was fundamentally weak for the following reasons:

- Congress was the only national institution; there was no Executive or Judiciary branch.
- Congress' power was limited; it did not have direct authority to tax, to regulate interstate and foreign trade, or to raise an army.
- Each state had one vote in Congress, and a super majority (9 out of 13) was needed to act on major issues such as the appropriation of funds.
- All powers not specifically granted to Congress belonged to the states.
- A unanimous vote of the states was required to amend the Articles.

Events like Shays' Rebellion (1786–1787), a short-lived revolt of debtor farmers in western Massachusetts, convinced many Americans that a stronger central government was needed.

Drafting the Constitution

The Constitution was written at the Federal Convention, better known as the Constitutional Convention, between May and September 1787. Many of the 55 delegates who met in Philadelphia that summer were seasoned politicians with experience in the Confederation Congress or the state legislatures. They were men who understood the art of compromise, and compromise was the key to such thorny matters as representation, slavery, and the presidency.

The Structure of the Legislative Branch

The early debates at the Convention focused on the proposal introduced by James Madison known as the **Virginia Plan.** It called for a bicameral national legislature with the lower house elected by the people in each state, and the upper house chosen by the lower house from candidates selected by the state legislatures. In both houses, representation was based on population; in other words, the large states would dominate. The legislature was empowered to veto state laws and to choose the national executive. Under the proposal, the national judiciary consisted of one or more "supreme tribunals" and "inferior tribunals" appointed by the legislature. Some members of the judiciary along with the national executive branches constituted the Council of Revision, which had the right to review and reject laws enacted by the national legislature and the states.

A less drastic departure from the Articles of Confederation was presented in the **New Jersey Plan.** It expanded the authority of Congress to include the power to tax and regulate interstate and foreign trade. While each state continued to have one vote in Congress, the Plan envisioned a multi-person Executive chosen by Congress, whose members could be removed from office

through a petition to Congress from a majority of the state governors. The federal Judiciary was appointed by the Executive, and had both original and appellate jurisdiction. The New Jersey Plan also recognized that laws enacted by Congress and treaties entered into by the United States were the "supreme law" of the land.

Differences between the Virginia and New Jersey Plans were reconciled at the convention through the **Great Compromise** (also known as the **Connecticut Compromise**), which put legislative power in the hands of Congress — made up of the House of Representatives (lower house) and the Senate (upper house). Members of the House were elected directly by the people of each state with the number of representatives determined by population. There was equal representation in the Senate, meaning each state had two senators, chosen by the state legislatures.

Dealing with the Slavery Issue

Although the Constitution never mentions the words slave or slavery, the delegates grappled with the problem. The first issue was whether slaves would be counted in the apportionment of seats in the House of Representatives. Under the **Three-Fifths Compromise**, five slaves would equal three free people in determining population for representation and taxation. While there was considerable sentiment to put an end to slave trade, the Convention ultimately allowed it to continue for at least 20 years. Congress could not prohibit the "migration or importation of such persons any of the states now existing think proper to admit" until 1808 (the year Congress prohibited the importation of new slaves from overseas, thus ending the international slave trade to the United States.) Furthermore, states were obligated to return runaway slaves to their rightful owners.

Deciding How Presidents Should Be Elected

There were several questions about the presidency. The delegates quickly settled on a one-person executive but hotly debated how the president should be elected and the term of office. Having Congress select the president was rejected because it violated the principle of the separation of powers; the popular election of the president was also problematic. The framers of the Constitution were not democrats; they equated the "people" with a mob that was too easily swayed.

The solution was a complex and indirect process known as the **electoral college**. States would appoint electors equal to their total number of representatives in Congress; these electors would cast their ballots for two persons. The person receiving the most votes — providing that is a majority of the votes cast — becomes the president, and the one who receives the second highest total becomes the vice-president. In the event that no one receives a majority, the election is decided in the House of Representatives with each state having one vote.

In the first draft of the Constitution, the president served a single seven-year term and could not run for reelection. The language the Convention finally adopted gave the president a four-year term and was silent on the subject of a second term.

Ratification of the Constitution

The Constitution provided for its own ratification procedures. Under Article VII, the Constitution went into effect when approved by conventions in nine out of the thirteen states. (New Hampshire became the ninth state to ratify the Constitution on June 21, 1788.) This ratification process was much easier to achieve than the unanimous consent required in order to change the Articles of Confederation, and it is significant that approval was left to state conventions rather than the state legislatures. State legislatures may well have voted against the Constitution that strengthened the federal government at the expense of the states.

Supporters of the Constitution were known as **Federalists**. Their most persuasive spokesmen were Alexander Hamilton, John Jay, and James Madison, who wrote a series of articles for the New York newspapers explaining and defending the strong central government created under the Constitution. The articles were collectively known as *The Federalist Papers* or simply *The Federalist*, and were widely disseminated throughout the country during the ratification debate. The opponents of ratification, which included Virginia's Patrick Henry and Thomas Jefferson, went by the somewhat awkward and unfortunate name the **Antifederalists**. Their case against the Constitution rested on three points:

- A strong central government contained the seeds of tyranny, and threatened the rights of the people.
- Too much authority was taken away from the states.
- The absence of a Bill of Rights left individual liberties unprotected.

With respect to the last point, certain civil liberties were guaranteed under the Constitution:

- Neither the Congress nor the states could suspend (except in time of war or rebellion) the **writ of habeas corpus** (authorities must show cause why a person under detention should not be released) nor enact an **ex post facto law** (a law that makes an action a crime after the fact) or a **bill of attainder** (a law that makes a person guilty of a crime without trial).
- The right of trial by jury was provided for in criminal cases.
- No religious test was required to hold public office.

The Federalists were quick to point out that state constitutions amply protected the individual. Finally, the Constitution only granted limited powers to the federal government; there was no need to guard the people against actions against them that the government could not take. Still, the Federalists were willing to add a Bill of Rights as the price for ratification.

Basic Principles of the Constitution

The Constitution established a republican form of government, explained the organization of that government, and outlined the essential features of the federal system.

Republican Form of Government

The Constitution established the United States as a republic in which power is ultimately in the hands of the people and exercised through their elected representatives. The federal government guaranteed each state a republican form of government as well (Article IV, Section 4). The republic was not, however, a democracy. Participation in the political process was severely limited by state-imposed property qualifications for voting; even those who could vote were far removed from selecting members of the Senate and the president; moreover, slavery was accepted, albeit somewhat reluctantly.

Separation of Powers/Checks and Balances

The government is divided into three co-equal branches: the legislative branch that makes the laws (Congress), the executive branch that carries out the laws (President), and the judicial branch that interprets that laws (Supreme Court). A system of **checks and balances** prevents any one branch from dominating the others. The easiest way to understand how checks and balances work is to review the powers each branch has, as well as how those powers are limited by the other branches.

The president has a broad appointment power: He/she nominates justices to the Supreme Court and judges to the lower federal courts, as well as appoints numerous officials in the executive branch. Under the Constitution, most presidential appointments must be confirmed by the Senate. The Senate can and has rejected a president's nominee to the Supreme Court and even to the cabinet. Congress (the House and the Senate) can impeach and remove a federal judge from office. It can also impeach and remove the president from office.

The president can ask Congress to pass legislation; often outlining the administration's legislative program in the State of the Union Address. As the law-making body, Congress can refuse to enact legislation the president wants or can pass a law that the president opposes. In the latter case, the president can exercise the **presidential veto**; in other words, the president can refuse to sign into law legislation approved by Congress. Congress can override a presidential veto with a two-thirds vote of both houses. If the vote passes, the legislation the president vetoed goes into effect.

The Supreme Court, of course, can declare a law passed by Congress or an action taken by the president unconstitutional. Congress can increase the number of justices on the Supreme Court and change the number and jurisdiction of the lower federal courts. The president usually nominates judges to the federal bench that support the administration's philosophy on the role of the courts.

The power of the Supreme Court to declare laws and executive actions unconstitutional is implied rather than specifically stated in the Constitution. Alexander Hamilton in *Federalist No. 78* argued that the Court did in fact have this authority, but the principle of **judicial review** was not firmly established by the Court itself until the landmark decision *Marbury v. Madison* (1803). In this case, Chief Justice John Marshall ruled the parts of the Judiciary Act of 1789 were unconstitutional.

Federal System

The federal system means that power is divided between the federal government and the states. Since the purpose of the framers was to strengthen the central government, it is not at all surprising perhaps that the Constitution is clearer on what the states cannot do (Article I, Section 10) than on what they can; the Constitution is also more specific on setting the parameters of inter-state relations (Article IV, Sections 1 and 2) than on relations between the states and the federal government.

Summary of the Constitution

Article I

Article I grants legislative power to the Congress — the House of Representatives and the Senate. This article also covers the qualifications for holding office in each house, the organization of each house, and the impeachment and veto process. The officials of Congress mentioned in the Constitution are the Speaker of the House, the President of the Senate, and the President Pro Tempore of the Senate. The vice president serves as the President of the Senate, acts as the Senate's presiding officer when available, and casts a vote only when the Senate is tied. The longest section (Section 8) spells out the specific powers that Congress has, which are known as the **enumerated** or **delegated powers**. Section 8 includes the **necessary and proper clause** (also known as the **elastic clause**) that expands the authority of Congress. This clause allows Congress to pass laws that it believes are "necessary and proper" to carry out its enumerated powers. The powers Congress assumes under the necessary and proper clause are known as **implied powers**. Article I also states what actions both Congress and the states cannot undertake.

Article II

Article II pertains to the presidency. It covers the method of election (electoral college), the qualifications for holding the office, the powers of the president — such as the president's role as Commander-in-Chief of the armed forces — and presidential authority to grant pardons, negotiate treaties and make appointments (with concurrence of the Senate), and to propose legislation to Congress. Article II also makes clear that the president and vice-president are subject to impeachment and removal from office.

Article III

The provisions on the judiciary are rather vague. Article III establishes the Supreme Court but does not describe its organization, such as how many judges sit on the high court.

Article III explains the jurisdiction of the Supreme Court — **original jurisdiction** and **appellate jurisdiction** (see the chapter titled "The Judiciary"). This article provides for trial by jury in all cases except impeachment and defines the crime of treason.

Article IV

Article IV deals with the relations between the states. The **full faith and credit clause** provides that the laws, records, and court decisions of one state are valid in every other state. In addition, Article IV states that citizens should be treated the same in all states, and makes provision for extradition. This Article also explains the creation of new states and the governance of territories, and the federal government commits to providing each state with a republican form of government and to protecting the states from invasion or domestic violence.

Article V

This article sets down the process by which the Constitution is amended (discussed in detail later in this chapter under "The Amendment Process and the Bill of Rights").

Article VI

Under this article, the United States assumed all debts incurred by the government under the Articles of Confederation. The **supremacy clause** recognizes that the Constitution, laws passed by Congress, and treaties entered into by the United States are the supreme law of the land. This article also makes clear that no religious test for holding office is required.

Article VII

This Article explains ratification of the Constitution by conventions of nine of the thirteen states. As noted earlier, this provision made it easier to ratify the Constitution, since all the states did not have to approve, as was the case under the Articles of Confederation.

The Amendment Process and the Bill of Rights

Amending the Constitution is a two-step process. First an amendment is proposed and then it is ratified. There are two ways to propose an amendment:

- By a two-thirds vote of both houses of Congress
- Two-thirds of the state legislatures ask Congress to call a national convention for that purpose (this has never been used)

There are also two ways to ratify an amendment:

- Three-fourths of the state legislatures approve an amendment.
- Conventions in three-fourths of the states approve an amendment. (This was only used to ratify the Twenty-first Amendment in 1933 that repealed Prohibition.)

The first Congress proposed 12 constitutional amendments to the states in September 1789; ratification was completed for 10 by December 1791. The initial 10 amendments are known as the Bill of Rights. One of the first two amendments that was not originally approved (which dealt with compensation for members of Congress) was ultimately ratified in 1992 and became the Twenty-seventh Amendment.

The Bill of Rights

The Antifederalists were concerned that basic individual liberties were not protected in the Constitution as ratified. The Bill of Rights was a response to this concern. Although the first ten amendments are referred to as the Bill of Rights, only the first eight pertain to specific rights that were often included in the state constitutions. The following is a summary of the Bill of Rights.

Amendment I: Prohibits the establishment of a state religion and guarantees freedom to practice religion; protects freedom of speech and the press, as well as the right to assemble and petition the government.

Amendment II: Protects the right to keep and bear arms, and mentions this right in the context of a "well-regulated militia."

Amendment III: Prohibits the stationing of troops in people's homes without their consent or as set down in law during wartime.

Amendment IV: Protects against unreasonable search and seizure; probable cause is required to get a warrant to conduct a search, and the warrant must describe the place to be searched and what is to be seized.

Amendment V: Provides for indictment by a grand jury for capital or serious crimes; protects against **double jeopardy** (a person cannot be tried for the same crime twice) and **self-incrimination** (a person cannot be forced to testify against him/herself); guarantees due process and **eminent domain** (compensation must be paid for private property taken for public use).

Amendment VI: Guarantees the right to a speedy trial by an impartial jury in criminal cases, to be informed about charges, to confront witnesses and present witnesses in defense, and to have representation by an attorney.

Amendment VII: Provides for a trail by jury in most civil cases.

Amendment VIII: Prohibits excessive bail and fines as well as the infliction of cruel and unusual punishment.

Amendment IX: The people are not denied any rights not specifically mentioned in the Constitution. This amendment seems to refer to the rights covered in the first eight amendments, and recognizes that the people may be entitled to other rights. The

Supreme Court, for example, based a constitutionally protected right of privacy in part on the Ninth Amendment (see the "Civil Liberties" chapter).

Amendment X: Powers not granted to the federal government nor denied to the states in the Constitution, belong to the states or to the people. The powers refered to in this amendment are known as **reserved powers.** The authority that states have to determine their own marriage and divorce laws is an example of a reserved power.

AMENDMENTS TO THE CONSTITUTION, 1798–1992

The Constitution was only amended seventeen times following the adoption of the Bill of Rights. Among these are amendments that significantly expanded democracy — the abolition of slavery, granting African Americans the right to vote, the direct election of senators, extending suffrage to women, and lowering the voting age to 18. Although many more amendment proposals were introduced, Congress and the states used the Constitutional process sparingly.

Indeed, the states refused to ratify six amendments that Congress passed, including one dealing with child labor and the **Equal Rights Amendment (ERA),** which provided that "equality of rights" cannot be denied on the basis of sex (gender). The amendment was approved by Congress in 1972, and its original seven-year deadline for action by the states was extended to 1982. By that time, only 35 of the required 38 states had ratified the amendment.

Here are the 17 amendments that follow the Bill of Rights and their dates of ratification:

Amendments	*Ratification Dates*
Amendment XI	Sets limits on suits against states by citizens of another state or foreign country (1795)
Amendment XII	Ensures that electors cast separate ballots for president and vice-president in the electoral college (1804)
Amendment XIII	Prohibits slavery in the United States (1865)
Amendment XIV	Defines citizens as anyone born or naturalized in the United States; prohibits states from denying any person life, liberty, or property without due process, or denying any person equal protection under the laws (1868)
Amendment XV	Prohibits denying the right to vote on account of race, color, or previous condition of servitude (1870)
Amendment XVI	Authorizes federal income tax (1913)
Amendment XVII	Provides for direct election of senators (1913)
Amendment XVIII	Prohibits the manufacture, sale, and distribution of intoxicating liquor; ushers in the era known as **Prohibition** (1919)
Amendment XIX	Grants women the right to vote (1920)

(continued)

Amendments	*Ratification Dates*
Amendment XX	Changes dates when president, vice-president, and members of Congress take office and Congress convenes; covers presidential succession in an emergency (1933)
Amendment XXI	Repeals the Eighteenth Amendment (1933)
Amendment XXII	Effectively limits the president to two terms (1951)
Amendment XXIII	Extends the right to vote in presidential elections to the District of Columbia (1961)
Amendment XXIV	Prohibits payment of poll tax or other tax in order to vote in a federal election (1964)
Amendment XXV	States that the vice president becomes the president if the president is removed from office, resigns, or dies; also states that the new president nominates a new vice president to fill a vice-president vacancy (vice president is then confirmed by a majority of both houses of Congress); also presents the procedures for dealing with presidential disability (1967)
Amendment XXVI	Lowers voting age to 18 in state and federal elections (1971)
Amendment XXVII	Changes law stating the compensation of members of Congress does not go into effect until after an election to the House (1992)

Informal Amendment Process

While the language of the Constitution can be changed only by the formal process described earlier, other factors come into play that can change the meaning of the Constitution. Court decisions are obviously important. As we have seen, *Marbury v. Madison* established as a matter of law that the Supreme Court had the power to declare a law passed by Congress as unconstitutional. In *McCulloch v. Maryland* (1819) the Court ruled that the "necessary and proper clause" gave Congress the power to do things not specifically mentioned in the Constitution, in this case, create the Second Bank of the United States. Congress has tried to expand the powers of the president through legislation such as the **Line-Item Veto Act** (1996) and place limits on the president's actions like the **War Powers Act** (1973; see chapter titled "The Presidency"). Finally, political and social developments come into play. Even the most ardent Federalist would have found the unprecedented growth of the federal government since the Great Depression and World War II alarming; the maze of departments, bureaus, and agencies comprise a fourth branch of government — the bureaucracy — that the Constitution hardly contemplated (see the chapter titled "The Bureaucracy").

Nor could the framers begin to grasp the multitude of issues with which the Congress, the president, and the courts have to deal, ranging from abortion and stem cell research to nuclear proliferation and the international space station.