The US Constitution

The Constitution Today

The design of the US Constitution was the result of political compromise first, political theory second. So while one can, in hindsight, imagine a better constitution, the Constitution probably represents the best formula that would actually hold the states together. Historians have debated the motives of the framers in drafting the Constitution and their role in shaping its final design. Critics such as Charles Beard, in his book *Economic Interpretation of the Constitution of the United States*, have argued that a stronger national government directly benefited the economic interests of the narrow political and economic elites represented at the convention in Philadelphia. While economic considerations certainly played a role, many historians highlight more altruistic motives that were at play as well. The men who signed the document in Philadelphia in the summer of 1787 were also nationalists who wanted to create a stronger sense of American identity among the states. They also hoped to create a continent-wide state that would be sufficiently unified to resist the territorial and diplomatic ambitions of then more powerful European empires.

The US Constitution in its original form does not seem to be particularly democratic when viewed from the 21st century. It preserved the institution of slavery, provided direct popular elections for only the lower chamber of Congress, and did not guarantee universal male suffrage. At the time, however, it represented the most cutting edge example of a government accountable to its citizens. Subsequent reforms, however, have greatly democratized the original document. Consider as well that with the significant, bloody, but brief exception of the Civil War, the US Constitution has served as an astonishingly flexible foundation for American unity. In the same amount of time that France has had over 14 constitutions, we have had only one. Its success is due largely to its ability to solve two major weaknesses under the Articles of Confederation: its provision of a national government strong enough to defend the emerging nation from both external and internal threats, and creating the conditions for a unified and prosperous national economy.

Constitutional Comparisons

One can make some interesting comparative observations about the US Constitution. First,
whereas most democracies today are parliamentary systems, with chief executives chosen by
the national legislature, the US Constitution installs a presidential system with the legislative and
executive branches independent of each other. Presidentialism is the formal name for political
systems adopting the principle of American-inspired separation of powers. Second, the United
States' federal system places it in the minority since most democratic constitutions establish a
unitary system of government. Third, the US Supreme Court and its sweeping power of judicial
review traditionally differentiated the US from practically every other democracy. In most
democracies judicial review, the power of a court to declare unconstitutional an act or legislation
of elected officials, was considered inconsistent with democracy and rejected.

Since the end of World War II, however, a very large number of democracies have adopted or
adapted the American-style practice of judicial review as a safeguard for minority rights. Fourth,
most political scientists agree that in general the civil liberties, particularly those relating to free
speech and criminal rights, are more extensive than other democracies, though perhaps not in
other particulars. Fifth, the constitutions of many modern democracies contain emergency
clauses providing for the legal suspension of the constitution in times of national crisis. The US
Constitution contains no such clause and, historically, this has required the government to make
difficult decisions in times where national security and even the constitution itself are
threatened.

**What's NOT in the Constitution**

The US Constitution provides the blueprint for American government but to someone
approaching American politics for the first time, it would provide a deeply deficient guide to how
things really work. For one thing, the Constitution does not even mention judicial review. Nor
does it mention executive orders and executive agreements, two important powers used by the
government in day-to-day governance. Also absent is any mention of political parties, which the
Framers seem not to have fully anticipated, or interest groups. There is also no description of
the election system for legislators. The adoption by the states of the winner-take-all single-
member district election systems contributed enormously to the permanence of the country’s
party system. Finally, while a hallmark principle of our criminal system rests on the presumption
that defendants are innocent until proven guilty, you will search in vain for the statement of such
a principle in the Constitution's text.
Virtual Roundtable 1

Although the United States has existed under the same Constitution for well over two centuries, the document has evolved due to constitutional amendments, judicial interpretation, governmental practice, and war. Does our Constitution still reflect the core values of the Framers?

Video: Randall Kennedy, Michael R. Klein Professor of Law, Harvard Law School

Video script:

Some of the values of the Framers are still part of our constitutional regime. I mean, the Framers voiced a belief, at least an abstract belief in certain notions that we still hold dear; liberty, equality, in particular. On the other hand, there are certain values that were embraced by the Framers of our Constitution that have fortunately -- we have fortunately repudiated. After all, in 1789, you know, chattel, you know, human slavery was part of our constitutional regime. It's been repudiated. So we have a mixed bag.

End of video.

Video: Sanford Levinson, Garwood Centennial Chair, Professor of Law, University of Texas School of Law

Video script:

If you look at our basic institutions, then, many of them are remarkably similar to 1787. From my perspective, this is not necessarily a good thing. The value of a fixed term presidency so that we can't vote out of office a president in whom we lose confidence with regard to issues of war and peace or life and death is a very important value that I think deserves us, in part because the modern president, for better and for worse, has powers that could never have been imagined in the 18th century. I think, you can also say to be fair to the Framers, that they did have a vision of self-governance, what they called the Republican form of government and I think that continues to be a very important value today. One of the things that explains the ever greater inclusion of people in the voting pool is I think a belief that if you’re a citizen and are honest and law abiding, you ought to be allowed to vote. So you know, we’ve got rid of gender exclusions. We get rid of racial exclusions. We lowered the voting age to 18 and I think those
are important. You can view them both as changes in values but also responsive to an enduring value of self-government.

End of video.

**Video: Barry W. Lynn, Executive Director, Americans United for Separation of Church & State Washington, DC**

**Video script:**

In many ways the Constitution still reflects the Framers’ values, because the Framers intended the Constitution to be a guide, not a specific road map to resolve each and every question. You know when the writers of the Constitution wanted to be specific, they were. You can’t be a member of the House of Representatives until you're 25 years old. It doesn’t say only mature people can be members. It's very specific. But when it came to writing the grand promises of the first amendment, for example, it was very expansive. Congress shall not do this, no laws at all, they knew they were writing a Constitution for the centuries or at least they hoped they were writing that and they wanted some of these majestic generalities to be able to move and change as the country changed.

End of video.

**Video: Carol M. Swain, Professor of Law and Political Science, Vanderbilt University Law School**

**Video script:**

The American Constitution hasn't changed in 200 years. It’s what it is and it’s a document that has really stood the test of time. Unfortunately, the people that are interpreting the Constitution have changed in all sorts of ways and we now have justices that are willing to cite foreign laws and foreign courts to decide cases in the United States and I think this is totally contrary to what the Framers intended. I don't believe that the Constitution was meant to be a document where judges could read into it whatever whim or whatever happens to be the fad at a given point in time.

End of video.
The threshold problem that we have in America is that most people have no idea what the Constitution says, much less what it means anymore and I include in that universe of people that don’t understand what’s going on with the Constitution most people in Washington. There is virtually no thought given in Congress, for example, to whether or not proposed legislation or legislation that is adopted has a proper constitutional basis or not. It’s almost always all about the money. It’s not about the constitutional basis and that’s one of the reasons why government has grown so big in terms of its power and its control over individuals and states, involving itself in virtually every aspect of our society because we lack that fundamental constitutional understanding.

End of video.

It sounds like an exaggeration or a hyperbole, but the Constitution has very little to do with constitutional law. Let me put it this way most importantly. Was it the intent of the Framers that the Supreme Court would become the most important institution of American government in terms of domestic social policy and certainly nothing could have possibly been further from their intent. If it’s arguable in a democracy, the choice should be left to the legislature. So no, the Framers certainly didn’t expect or intend that the Constitution would become the alleged basis for a system of government by the Supreme Court which is what we have achieved in terms of the important basic issues of domestic social policy. As I say, prayer in the schools, abortion rights, criminal procedure, control of pornography, libel law, whatever the court chooses to take out of the political process and leave a final decision to itself, it does.

End of video.
Virtual Roundtable 2

Despite shortcomings in practice, many see the United States as having been established upon the core values of freedom, equality, and justice. How have these values changed over the last 200 years?

Video: David Boaz, Executive Vice President, CATO Institute, Washington, DC

Video script:

I don’t think the basic American dream has changed. I think it’s still a dream of individual freedom, of being able to swing your arms and enjoy your own space and of being able to get ahead. America was the country that where the streets were paved with gold and that’s still true and it’s still why people come here. People want to make a living; they want to make a better life for their children. They want their children to live better than they did. I think that’s still the American dream. One thing that has changed is that more people are allowed to participate in the American dream. It’s not just for straight, white, male property owners anymore. Over the course of two centuries, we have extended the promises of the Declaration of Independence to black people, to women, to Jews, now to Muslims and Hindus, to gay people and all of that I think has broadened the American dream but not fundamentally changed it.

End of video.

Video: Carol M. Swain, Professor of Law and Political Science, Vanderbilt University Law School

Video script:

If you look back at the founding of the republic at the time it was drafted, the only ones in the room were white men. Women couldn’t vote. Blacks were slaves and so there were a lot of people that were not included in the ‘We, the people,’ of that time. I mean these were people that wanted to be righteous and of course, they fell short you know because that’s the nature of human beings that we fall short. In recent years, there have been things that have happened that have embarrassed us and caused us to wonder who are we? You know because we’ve fallen so short, but if you go back and you look over history, you see a people that have been exceptional and there’s a reason why people from all over the world want to come to America.
They risk their lives to get here. Now they are not always – they’re often critical of us, but at the same time, they want to come. They want to stay here. There’s something good about America and I think that we should all hope that it never gets erased.

End of video.

Video: Sanford Levinson, Garwood Centennial Chair, Professor of Law, University of Texas School of Law

Video script:

The core values of Framers in 1787 included protection of slavery, not necessarily because all the Framers thought slavery was a good thing. That’s obviously untrue, but that enough of the Framers didn’t think slavery was sufficiently bad that you could make a deal with slave owners and obviously slave owners thought that slavery was just fine. That presumably has changed completely for the better. I think it’s fair to say that when the Framers used the masculine pronoun to refer to the president and things like that, they never imagined in their wildest dreams that a woman might be president, secretary of state, senator, etc. That has changed entirely, partly because of changes in the Constitution, partly because of American culture.

End of video.

Video: Barry W. Lynn, Executive Director, Americans United for Separation of Church & State Washington, DC

Video script:

I think the American creed in a sense respects two ideas, a sharp individualism, a sense that people as individuals do matter, but second, that we have some kind of collective responsibility, for our neighbors, for making sure that there are roads and a military to protect us, that we’re not just living on an island by ourselves. So the American creed really is a combination of the rugged individualism of the West and the things you saw in John Wayne movies but also a reflection that we have some responsibility to the rest of our neighbors, whether they’re literally living next door or living across the country.

End of video.
Activity: Check Your Understanding

Covers today’s U.S. Constitution. When viewed from the 21st century, the original form of the U.S. Constitution does not seem particularly democratic because it preserved the institution of slavery. Mentions how judicial review differentiates the United States from practically every other democracy. Explains that the Constitution does not address the presumption that defendants are innocent until proven guilty even though this is a critical element of the U.S. criminal justice system. Also mentions that U.S. Constitution does not contain an emergency clause providing for the legal suspension of the constitution in times of crisis.

Additional Resources

Websites

National Constitution Center
http://constitutioncenter.org/

Located on Philadelphia’s Independence Mall, this independent, nonpartisan organization is “dedicated to increasing the public understanding of the US Constitution and the ideas and values it represents.” The website highlights exhibits at the Center’s museum, an interactive exploration of the US Constitution, and discussion of current constitutional issues.

Books

Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It), by Sanford Levinson, PhD.

Levinson takes the unorthodox position that the US Constitution is fundamentally undemocratic, pointing to flaws that he believes promote unjust or ineffective government. He proposes a second constitutional convention to bring forward a new and improved national charter.