



AMERICAN CONSTITUTIONAL HISTORY

A Brief Introduction

JACK FRUCHTMAN

WILEY Blackwell

American Constitutional History

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For Clara, Juliette, Sophia, Elsa, and Nicholas

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Prologue

The United States Constitution is the oldest, continuous, national republican document in existence today. It was not the first. Republics, or mixed regimes as they are also known, existed long before the Americans crafted theirs in 1787. Most did not last very long. In the ancient world, the Roman republic collapsed when it degenerated into empire. During the Renaissance, the Florentine republic in Italy survived a mere 14 years, from 1498 to 1512. It dissolved when the powerful Medici family, which had once ruled Florence, re-established a dictatorship. According to the classical republican tradition, republics were fragile political organizations, because the critical balance between the various branches of government could easily crumble when one or two dominated the others. The Americans modeled their constitution on the British government with its one-person executive and two-part legislature. The British failed to create a true republic, because a hereditary monarch led the executive branch and hereditary aristocrats controlled the upper house, the unelected House of Lords. Large landowners controlled the House of Commons and only a few men possessed the right to vote. Americans believed that after separating from the British Empire, they could create a true republican structure where citizens participated in decision-making and enjoyed peaceful transitions of power.

The Constitution created a democratic republic, not a democracy. In a democracy, citizens vote directly on government policies, while in a republic, they elect representatives to develop policies on their behalf. Vestiges of democracy remain in America. They include the New England town meeting when residents directly vote on issues, such as

whether the town should purchase a new police cruiser. The ballot initiative, also called the referendum, exists in over 40 states, allowing voters to make specific policies, such as whether a state should repeal its capital punishment law. Most laws in the United States today, however, are passed by representatives elected by the citizens. This system comprises the republic.

Americans wanted their new government to represent every person, including those ineligible to vote, such as women, making it a democratic republic. The Constitution addresses “persons,” not “citizens” or “voters” when it guarantees a structure, rights, and liberties. It reserves direct elections only for the House of Representatives, because many delegates to the constitutional convention, including James Madison, believed that ordinary citizens failed to have the requisite education, intelligence, or common sense to decide who should be a senator or president. They initially devised a system of indirect election for those offices. The people elected state legislators who then chose US senators, a procedure that changed only in 1913 when the states ratified the Seventeenth Amendment. In presidential elections, the people vote for a special group of people, known as Electors. They alone vote directly for the president. Today, Electors still choose the president.

Since the Constitution’s ratification 225 years ago, Americans have formally added only 27 amendments. Congress still makes the laws, the president enforces them, and the courts interpret their constitutional validity. Formal changes to the document have typically occurred during or just after political or social crises. A few examples will suffice. The first 10 amendments, known collectively as the Bill of Rights, emerged in 1791 as a direct reaction to the Constitution’s ratification process. Many state ratifying conventions made the addition of a bill of rights contingent on their ratification. They declared that if the first Congress declined to amend the original document to protect basic civil liberties, their ratification vote was void.

The Twelfth Amendment in 1804 resulted from the highly contested 1800 presidential election. The Constitution provided for candidates for president and vice president to run separately for office. The candidate with the highest number of electoral votes became president, the second highest vice president. This arrangement worked in the first three elections, despite the outcome in 1796 when men from different

parties became president: John Adams, a Federalist, and vice president, Thomas Jefferson, a Republican. However, when Jefferson ran for president in 1800 with Aaron Burr as his vice presidential running mate, the electoral vote ended in a tie between the two men. The Twelfth Amendment allowed presidential and vice presidential candidates to run together on the same ticket.

The most striking examples materialized during and after the Civil War: the Thirteenth Amendment in 1865 ended slavery; the Fourteenth in 1868 ensured the equal protection of the laws; and the Fifteenth in 1870 guaranteed the right to vote for the newly freed black slaves. The Nineteenth Amendment in 1920 extended the vote to women in national elections, a consequence of many years of contentious advocacy for the right. With the adoption of the Twenty-Second Amendment in 1951, the states created a two-term limit for presidents after Franklin D. Roosevelt won four presidential elections from 1932 to 1944. Years later, the war in Vietnam paved the way for lowering the national voting age to 18.

The Constitution is notoriously difficult to amend. Over the years, members of Congress have proposed tens of thousands of amendments, but few have passed the stringent requirements set out in Article V: two-thirds of both houses of Congress must approve an amendment or the same two-thirds could call a constitutional convention to propose one, and then three-quarters of the states must ratify it. Among the failed amendments are those guaranteeing equal rights to women, balanced federal budgets, term limits for members of Congress, prayer in the public schools, as well as those outlawing abortion and flag desecration. While 27 amendments have altered several constitutional provisions, the document has in reality changed only 13 times since 1804. The founders modified and tinkered with their work as the new government was becoming settled, first in New York City, then Philadelphia, and finally Washington, DC. The founding generation added the first 12 amendments within 15 years after the document was ratified: the Bill of Rights in 1791; the Eleventh Amendment in 1795, overruling a decision by the Supreme Court to forbid citizens of one state to sue another state; and the Twelfth Amendment in 1804.

While American constitutional history comprises the story of these formal alterations, it is even more an account of informal changes. This is where constitutional interpretation comes in. The wording of the

document is vague and imprecise. It demands that people interpret the meaning of its words, like due process of law, equal protection, and cruel and unusual punishments. The First Amendment declares that “Congress shall make no law ... abridging the freedom of speech.” Was it left only to Congress to protect free speech? Did this mean the states could abolish it? What does “no law” mean: literally no law whatsoever, so that free speech is an absolute value that must be protected at all cost? What does “abridge” mean? No universal agreement has ever been reached when it comes to any provision – by the justices of the Supreme Court, the members of Congress, or the president.

This is why it is important to learn how the branches of government have interpreted the Constitution’s words and spirit. Numerous informal changes have been due to a president’s decisions, especially in military affairs and national security, to Congress in the realm of lawmaking, or to the Supreme Court in deciding cases. Differing interpretative approaches have sometimes been a matter of partisan politics and political ideology, but more importantly it has been the result of competing values among liberals and conservatives in response to various events. When can the president act alone without congressional or judicial oversight? What is the appropriate relationship between the federal and state governments? What is the proper balance between liberty and security in a democratic order? What is the best way to pursue equality? How does religious faith figure in American society and government? These and other questions like them have faced all three branches over the past 225 years.

The president, Congress, and the Supreme Court have all changed the Constitution’s meaning as they make public policy. Presidents issue executive orders, sign executive agreements, and claim unilateral authority, especially in matters of national security and military affairs. They have used “signing statements” to set forth their reasons for not enforcing a law even after they have signed it. While Congress may not delegate its authority to another branch of the government, it possesses the authority to change or repeal existing laws. Finally, Supreme Court justices have long held that precedent, known formally as the doctrine of *stare decisis* (“let the decision stand”), is an important principle to ensure legal continuity and stability. They have also held that it is not an inexorable command whenever they overrule earlier decisions. Congress and the states too may overrule Supreme Court decisions by

adding a constitutional amendment to the Constitution as they did when the states adopted the Eleventh Amendment in 1795.

Structure of the Book

The American republic today reflects the constitutional changes that have taken place formally and informally over the past two centuries. It has evolved through a series of clearly identifiable stages. In the new republic, the framers implemented their principles into practice, often tinkering with changes that developed into the first 12 amendments. Overshadowing everything was the institution of slavery, which became increasingly contentious in the republic as the nation hurtled toward division and ultimately civil war. The aftermath of that horrendous struggle, in a period known as Reconstruction, led to new ideas and social movements as the United States entered the industrial age and the world of the free market. Manufacturing and the rise of the railroads contributed to the idea that government must avoid regulation as much as possible. At the same time, a countervailing ideology called for governmental intervention to help wage earners, farmers, and women. These reformers promoted wage and hour laws, unionization, and equal rights for women.

The welfare state took hold in the United States after the Depression of 1929 with President Franklin Roosevelt's New Deal. New national entitlement programs and the drive for legal and social equality were hallmarks of Roosevelt's presidency. They included social security, minimum wage and maximum hour laws, and even the regulation by the US government of local businesses. In the 1950s and 1960s, leaders of the civil rights movement like Dr. Martin Luther King stimulated a reconstituted vision of the Constitution as a guarantor of rights and liberties for minorities, including African-Americans and women. This struggle, often known as the Second Reconstruction, opened a new debate over affirmative action programs as a means to help minorities enter mainstream society. Others argued affirmative action was reverse discrimination.

The book is divided into five parts, one for each phase of the American republic. These phases are not hardbound and rigid. The new republic was also a slave-owning republic and free market advocates have

flourished well into the twenty-first century. Social reformers supported government-sponsored welfare and labor laws during the free market republic, and supporters of civil rights advocated changes in the nineteenth century as they did during the civil rights movement and today. Each of the five parts begins with a summary and a description of the formal constitutional amendments ratified by the states. In addition, readers will find in each part boxed excerpts concerning developments in the Constitution's evolution. The chapters highlight this evolution through three major developments: government regulation of the economy, individual and civil rights, and executive power with or without congressional authorization. A short summary concludes each part. The goal is to help readers understand how the Constitution evolved through formal amendments and informal decisions by the president, the Congress, and the Supreme Court.

Part I

The New Republic, 1781–1828

The Constitution's first three articles set forth the structure of the new government with three separate and coequal branches: a Congress, divided into two houses, to make laws; a president to enforce them; and a Supreme Court to interpret them. The structure reflected the classical republican tradition, which envisioned a mixed regime where power was divided to avoid tyranny and to promote a public spirit among the people. The framers' vision of a republic hearkened back to ancient Greek ideas about political organization. In one of his most celebrated works, *The Politics*, Aristotle, the fourth century BCE philosopher, was concerned with the most practicable rather than the ideal state. He observed that society was naturally divided into three social classes: royalty, nobility, and the common people. In terms of governmental decision-making, this division falls into the categories of the one, the few, and the many. Only one ruler, a king or prince, comes from the royal class, a few from the aristocracy, and many from the people. In government, each class corresponds to a political body organized along these lines:

	<i>Rule by the One</i>	<i>Rule by the Few</i>	<i>Rule by the Many</i>
Society:	Royalty	Nobility	Common People
Government:	Monarchy	Aristocracy	Democracy

To ensure that government represents all three classes, the political structure must guarantee that each has a role in making decisions

2 *The New Republic, 1781–1828*

and setting policy. The mixed regime, or republic, balances the three elements to ensure that citizens participate in decision-making, if only indirectly through representatives.

Early republics defined citizens as only male property owners and excluded all others. Landowning citizens possessed a stake in society; they were public spirited and had the desire and qualifications to participate in decision-making. No one held office for a long period of time, because when citizens rotate in and out of office they avoid corrupting influences. The great Renaissance theorist Niccolo Machiavelli argued in his *Discourses on Livy* that this public spiritedness promoted virtue (*virtú*), the highest ideal a republican citizen could achieve. Rooted in the Latin *res publica*, the term *republic* literally means the “public thing.” In the eighteenth century, the framers used the word republic, or *res publica*, to refer to the “common good,” the “public good,” or the “good of all.” Three examples from history illustrate the republic and the balance of the mixed regime work in practice: ancient Rome; Renaissance Florence; early modern England. In each, the mixed regime combined all three forms of government. They supplied the republic with what Aristotle and Machiavelli thought was the most practicable way to achieve the common good. The structure followed this scheme:

	<i>The One</i>	<i>The Few</i>	<i>The Many</i>
Rome:	The Consuls	The Senate	The Council
Florence:	<i>Consigliere de justicia</i>	The Senate	The Great Council
England:	The King	House of Lords	House of Commons

While Americans believed that this pattern provided a model, many of them also thought that Britain did not have a true republic because of its hereditary king and nobility. Six months before the formal break with Britain in 1776, pamphleteer Thomas Paine wrote that its two remaining ancient tyrannies, the king and the Lords, dominated the “new republican materials” in the Commons. “The two first, by being hereditary,” he contended, “are independent of the people; wherefore in a *constitutional sense* they contribute nothing towards the freedom of the state.”

The Americans’ first constitution, the Articles of Confederation, did not follow the historic pattern of the classical republic (Box 1). Only one branch existed, a Congress, which had no authority to raise revenue.

Box 1 The Articles of Confederation, Agreed to by Congress November 15, 1777; ratified and in force, March 1, 1781, excerpts

Preamble

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

Whereas the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the Year of our Lord One Thousand Seven Hundred and Seventy seven, and in the Second Year of the Independence of America, agree to certain 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, in the words following, viz:

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.

4 *The New Republic, 1781–1828*

The government also lacked an independent judiciary. After some Americans saw the shortcomings of this scheme, they reconsidered the structure of their republic. After a rancorous debate, they ratified the Constitution, paralleling the ancient Roman Republic and its political heirs:

	<i>The One</i>	<i>The Few</i>	<i>The Many</i>
United States:	The President	The Senate	The House of Representatives

The Congress, with its bicameral legislature, and the president had links to the people through the electoral process, though mostly indirectly. The framers also created an unelected, unaccountable judiciary independent of the other two branches. The judges served terms “during good behavior,” which means they remained in office until they retired, resigned, died, or were removed by Congress through impeachment. Congress could never lower the judges’ compensation to influence their decisions. Americans thus engaged in a political experiment in ratifying a constitution that they hoped would achieve the good of all.

The framers divided power horizontally between the executive, legislative, and judicial branches of the national government in a scheme called the separation of powers. While classical republicanism promoted the separation of powers, the eighteenth-century French theorist, Baron de Montesquieu (1689–1755), strongly advocated it in *The Spirit of the Laws*. The framers were as familiar with Montesquieu’s work as they were with Aristotelian and Machiavellian republican ideas. In Federalist 47, one of the essays designed to inspire the ratification of the new Constitution, James Madison noted that “the oracle who is always consulted and cited on this subject, is the celebrated Montesquieu.”

The new American republic also divided power vertically between the states and the national government in a structure known as federalism. The states retained the authority to make laws regulating behavior within their own geographic territory. The delegates who signed the Constitution on September 17, 1787, were certain that no one branch of government and no state or federal entity could dominate the others. Divided power ensured that just and fair laws would pass, the president would sign them, and the courts would ensure their constitutionality.

John Locke, Deism, and Religious Liberty

The classical republican tradition and Montesquieu's doctrine of the separation of powers formed part of the principles of the American republic. The influential ideas of John Locke (1632–1704) also contributed to the framers' understanding of government. Locke, an English political philosopher and statesman, provided the rationale for the overthrow of the Stuart monarchy in England in 1688 and the rise of parliamentary supremacy. While very few copies of his *Second Treatise of Government* (1689) turned up in America in the eighteenth century, his views were important to the development of Anglo-American political thought.

Locke posited a genial, pre-government state of nature when human beings mostly lived in peace. The few who failed to understand the needs and desires of their fellow human beings lived beyond the law of nature as outlaws. Men's responsibility was to destroy those who violated the peaceful state of nature, but this was an inconvenient duty. To overcome these inconveniences, the people entered into a social contract and gave up some of their natural rights in exchange for the security that government offered them. A legitimate government protected the people's possessions and their rights of life, liberty, health, and happiness. Natural rights were thus transformed into civil rights and civil liberties. Locke especially wanted to protect property rights. He developed an early form of the labor theory of value, which maintained that a person had the right to enjoy the fruits of his own labor. Government based on these principles was good.

Locke also set forth a theory concerning revolution. When government became oppressive and deprived its citizens of their civil rights and liberties, it broke the social contract. The people, in turn, have a right to change it, even by force, to create a new contract. The opening lines of the Declaration of Independence reflected this Lockean view of revolution: "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." Jefferson, the principal author of the

document, pointed to three of the four rights that Locke had addressed: life, liberty, and the pursuit of happiness. Some commentators have assumed that the latter was a euphemism for “property” or wealth, or at least its pursuit.

The reference to the laws of nature and nature’s God in the Declaration reveals Jefferson’s religious views. He did not believe in a personal God to whom he could pray for salvation, health, or riches. Like many of the American founders, he was a deist, who believed in Enlightenment reason and science. Deism holds that God exists only as a creator who had instilled free will in human beings. After he created the universe, God relied on men to improve or destroy it. Benjamin Franklin, George Washington, James Madison, and Alexander Hamilton were deists. John Adams was more orthodox in his Christianity.

The idea that God instilled in human beings a longing for freedom was rooted in early American history. It was embodied in the idea that freedom is as much a spiritual condition as it is a political and social one. The Puritan impact on New England colonies was profound. Obedience to state authority, especially to the established church, ensured a moral and righteous citizenry. John Winthrop, the seventeenth-century Puritan minister and governor of Massachusetts Bay Colony, understood this when he was on board ship in 1630 headed to America, the “New Israel.” He famously sermonized that “we shall be as a City upon a Hill,” or else the Almighty would bring down His wrath. Fifteen years later, he told his flock that natural liberty differed from moral liberty. The former was the liberty “to do evil,” whereas the latter was liberty “to do only what is good.” To perform good deeds meant that the citizens had to adhere to the officially established church, its dogma, and teachings. Christian liberty demanded that citizens submit to the laws of the secular authority and, consequently, the will of God.

Not all religious leaders followed these precepts. Notably, Winthrop expelled Roger Williams from Massachusetts Bay in 1636 for heresy. Williams, a Baptist, believed in religious liberty. He moved south to found Rhode Island, a new colony, specifically underscoring the importance of the separation of church and state. William Penn, a Quaker who founded Pennsylvania as “a Holy Experiment” in 1681, mirrored Williams’ beliefs in religious freedom. Penn’s colony was to be a refuge for those seeking political and religious liberty. Quakers became so

politically powerful in Pennsylvania that they controlled the colonial legislature until the mid-eighteenth century.

Although principles of religious liberty spread throughout the new American republic, most states, even after the ratification of the First Amendment's establishment clause, maintained officially established churches, some well into the nineteenth century. In the 1780s, Thomas Jefferson and James Madison fought against the establishment of the Anglican Church in Virginia. Jefferson initially drafted his bill, the Virginia Statute for Religious Freedom, as early as 1777 as a member of the Virginia legislature. It failed to pass until Madison reintroduced it by attacking tax revenues used to support the state-established Church. His powerful arguments in "Memorial and Remonstrance Against Religious Assessments," published anonymously, underscored the importance of religion as a private affair between man and God within the church and the family. It was not a matter for the public square of politics and government. In 1786, the Virginia assembly passed Jefferson's bill when he was serving in France as America's ambassador.

Ideological Origins of the New Republic

The new republic began in 1781 after the ratification of the Articles of Confederation and continued when the Americans replaced the Articles with the United States Constitution 7 years later. In 1789, the people elected their first federal government. Over the next 15 years, the founding generation made substantive formal changes: in 1791, the states adopted the first 10 amendments, known collectively as the Bill of Rights, followed by two others in 1795 and 1804. The United States doubled its geographic size in 1803 when the Jefferson administration purchased the Louisiana territory from France.

The new republic endured slavery, even as some states began its gradual elimination in the 1780s. Most Americans focused on modifying their new government and its powers while declining to resolve the future of slavery. To avoid contention and disunion, the delegates to the constitutional convention did not address it. The words “slavery” or “slave” appear nowhere in the document. Some abolitionists like Benjamin Franklin – a former slave owner himself – John Adams, Alexander Hamilton, and Benjamin Rush attempted to raise the issue, but their efforts failed. Later leaders like William Lloyd Garrison, who founded the abolitionist paper, *The Liberator*, in 1831 and was co-founder of the Anti-Slavery Society, were active throughout the period. It was not until the end of the Civil War that slavery finally ended.

The period also saw the enhancement of the Supreme Court’s authority when Chief Justice John Marshall issued his unanimous opinion in

Marbury v. Madison in 1803. Marshall wrote into the Constitution that the judges' duty was to interpret the document and to overturn all laws that conflicted with that interpretation. New institutions were created, such as the Bank of the United States, and the Court unanimously approved Congress's authority to create it. James Monroe became the first president to issue a signing statement, indicating his ideas of legislation and how he intended to enforce it.

The Articles of Confederation and the Constitutional Convention

Five years after the Continental Congress issued the Declaration of Independence, the states adopted the Articles of Confederation, though Congress had acted from 1776 as if this had already occurred. Because the new government lacked sufficient authority to create a uniform legal system, the states were supreme. The Articles placed all power, limited though it was, in a single-house Congress. There was no separate executive, but only a "president" who chaired a temporary congressional committee when Congress recessed. Nor did the Articles provide for a judiciary. Congress itself was the nation's highest tribunal.

The problems with the Articles lay embedded in one of the main themes outlined in the Declaration. Jefferson ended the document with the resounding words that "these United Colonies are, and of Right ought to be Free and Independent States ... 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." The use of the term "states" was significant. A state, as the founders understood it, signified a nation of people organized under one government in a defined territory. Many leaders of the new 13 states believed their states were independent, not only of Britain, but of each other, with the exception of maintaining unity to combat Britain in the Revolutionary War. Accordingly, with the exception of Connecticut and Rhode Island, which simply adopted their existing colonial charters as their new constitutions, each state prepared new documents for internal governance. Because those two states were originally