

Chapter 3: The Constitution

Section 1: The Six Basic Principles

Lecture Notes

Key Words:

popular sovereignty; limited government; separation of powers; checks and balances; judicial review; federalism; constitutionalism; rule of law; unconstitutional

A. Overview

The Constitution was founded on six basic principles. In this section, you will examine these six principles, and how they are embodied in the Constitution, and understand their bearing on the workings of the United States government. **The six basic principles are: popular sovereignty; limited government; separation of powers; checks and balances; judicial review; and federalism**

B. Popular Sovereignty

1. Recall that in the United States, all political power belongs to the people, who are sovereign.
Popular Sovereignty: Basic principle of the American system of government; that the people are the only source of any and all governmental power; that government must be conducted with the consent of the governed.
2. Government can govern only with the consent of the governed.
3. Sovereign people created the Constitution and the government, both federal and state.
4. The Preamble:
"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

C. Limited Government

1. Limited Government is the principle that holds that government may do only those things that the people have given it the power to do.
Limited Government: Basic principle of the American system of government; that government is limited in what it may do, and each individual has certain rights that government cannot take away.
2. The government and its officers are always subject to the

law.

Constitutionalism: Basic principle of American system of government that government is conducted according to constitutional principles, i.e., that those who govern are bound by the fundamental law.

Rule of Law: Concept that government and its officers are always subject to -- never above -- the law.

2. Constitution is a statement of limited government. Reading it, displays explicit prohibitions of power to government. *See Article I, 9 and 10 (pp. 730-31); the 1st through the 10th Amendments (pp. 736-38); and the 13th, 14th, 15th (pp. 738-39), 19th (p. 740), 24th (pp. 741-42), and 26th Amendments (pp. 742).*

D. Separation of Powers

Separation of Powers: Basic principle of the American System of government, that the executive, legislative, and judicial powers are divided among three independent and coequal branches of government.

1. Recall previous discussions regarding differences between parliamentary system (power in one central agency) and presidential system (three branches).
2. The Constitution distributes the powers of the National Government among Congress (legislative branch), the President (executive branch), and the courts (judicial branch).
3. The Framers of the Constitution created a separation of powers in order to limit the powers of the government and to prevent tyranny -- too much power in the hands of one person or a few people.
4. James Madison wrote, "The accumulation of all powers...in the same hands...may be pronounced as the very definition of tyranny," he was arguing on behalf of the principle of separation of powers.

E. Checks and Balances

1. Each branch of government is subject to a number of constitutional restraints by the other branches. This is the concept of "checks and balances."

Checks and Balances: System of overlapping the powers of the legislative, executive, and judicial branches, to permit each branch to check the actions of the others.

2. Although there have been instances of spectacular clashes between branches, usually the branches of government restrain themselves as they attempt to achieve their goals.
3. For example, it is this constitutional principle that when the Senate confirms or rejects the President's appointee to be the director of the Central Intelligence Agency (CIA), to be secretary of defense, or a federal judge.

F. Judicial Review

1. Through the landmark case of *Marbury v. Madison* (1803), the judicial branch possesses the power to determine the constitutionality of an action of the government.

Marbury v. Madison: (Article III, judicial powers) Chief Justice Marshall established "judicial review" as a power of the Supreme Court. After defeat in the 1800 elections, President Adams appointed many Federalists to the federal courts, but the commissions were not delivered. New Secretary of State James Madison refused to deliver them. Marbury sued in the Supreme Court. The Court declared a portion of the Judiciary Act of 1789 unconstitutional, thereby declaring the Court's power to find acts of Congress unconstitutional.

Judicial Review: Power of the courts to determine the constitutionality of the actions of the legislative and executive branches of government.

2. In most cases the judiciary has supported the constitutionality of government act; but in more than 130 cases, the courts have found congressional acts to be unconstitutional, and they have voided thousands of acts of State and local governments.

Unconstitutional: Contrary to constitutional provisions and so illegal, null and void, and of no force and effect.

G. Federalism

Federalism: The division of political power among a central government and several regional governments. **Horizontal and vertical federalism**

1. United States federalism originated in American rebellion against the edicts of a distant central government in England.

2. Federalism is a compromise between a strict central government and a loose confederation, such as that provided for in the Articles of Confederation.

3. This constitutional principles was devised as a compromise between a powerful central government and a loose confederation of States.

APPENDIX

OUTLINE OF THE CONSTITUTION OF THE UNITED STATES

Article I	Legislative Department
Article II	Executive Department
Article III	Judicial Department
Article IV	Relations Among the States
Article V	Provisions for Amendment
Article VI	Public Debts; Supremacy of National Law; Oath
Article VII	Ratification of Constitution
1st Amendment	Freedom of Religion; Speech; Press, Assembly, and Petition
2nd Amendment	Right to Keep, Bear Arms
3rd Amendment	Lodging Troops in Private Homes

4th Amendment	Search, Seizures, Proper Warrants
5th Amendment	Criminal Proceedings; Due Process; Eminent Domain
6th Amendment	Criminal Proceedings
7th Amendment	Jury Trials in Civil Cases
8th Amendment	Bail, Cruel, Unusual Punishment
9th Amendment	Unenumerated Rights
10th Amendment	Powers Reserved to the States
11th Amendment	Suits Against States
12th Amendment	Election of President and Vice President
13th Amendment	Slavery and Involuntary Servitude
14th Amendment	Rights of Citizens
15th Amendment	Right to Vote -- Race, Color, Servitude
16th Amendment	Income Tax
17th Amendment	Popular Election of Senators
18th Amendment	Prohibition of Intoxicating Liquors
19th Amendment	Equal Suffrage -- Sex
20th Amendment	Commencement of Terms; Sessions of Congress, Death or Disqualification of President-Elect
21st Amendment	Repeal of 18th Amendment
22nd Amendment	Presidential Tenure
23rd Amendment	Inclusion of District of Columbia in Presidential Election System
24th Amendment:	Right to Vote in Federal Elections -- Tax Payment
25th Amendment	Presidential Succession; Vice Presidential Vacancy; Presidential Inability
26th Amendment	Right to Vote -- 18 years of age
27th Amendment	Congressional Pay

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Section 2: Formally Amending the Constitution

Lecture Notes

Key Words:

amendment; formal amendment; Bill of Rights

A. Overview

When the Constitution was written, provisions were made to allow for amendments that would reflect the changing needs of the people. In Section 2, you will learn about the four methods of formal amendment, and will begin to examine the Bill of Rights.

B. Formal Amendment Process

Framers knew of need to build for all time. Constitution provides for its own amendment. (See Art. V, p. 735)

Amendment: A change in, or addition to, a constitution or law. **Formal amendment** refers to changes or additions that become part of the written Constitution.

1. Methods of amending the Constitution:

- a. First Method -- Amendment is proposed by Congress by a two-thirds vote in both houses, then ratified by three-fourths of the State legislatures (38 of 50)(27 adopted).
- b. Second Method -- Amendment is proposed by Congress by a two-thirds vote in both houses, then ratified by special conventions in three-fourths of the States (38 of 50)(Only repeal of prohibition, i.e., 21st Amendment adopted in this fashion).
- c. Third Method -- Amendment is proposed at a national convention when requested by two-thirds of the State legislatures (34 of 50), then ratified by three-fourths of the State legislatures (38 of 50).
- d. Fourth Method -- Amendment is proposed at a national convention called by Congress when requested by two-thirds of the State legislatures (34 of 50), then ratified by special conventions held in three-fourths of the States (38 of 50).

2. Procedures and Restrictions:

- a. Art. V declares that "no State, without its consent, shall be deprived of its equal suffrage in the Senate."
- b. Proposals at national level, ratification is a State-by-State process. The participation of both the Federal Government and state government in the amendment process is evidence of federalism. An amendment may be formally proposed ONLY by Congress or the President.
- c. When Congressional resolution passed, proposal not forwarded to President for signature, as in other enrolled legislation.
- d. Criticism due to no popular vote or conventions, rather legislative action.
 - 1) *Hawks v. Smith* (1920), U.S. Supreme Court holds that a State cannot require an amendment proposed by Congress to be approved by a vote of the people of the State before it can be ratified by the State legislature.
 - 2) *Kimble v. Swackhammer* (1978), State can call for an advisory vote by the people before it acts.
- e. Congress can place reasonable time limits on ratification process.
- f. Note as an illustration of how difficult it is to amend the constitution, the fact that a simple majority is not enough to satisfy constitutional requirements in either the proposal stage or the ratification stage of the amendment process.
- g. The most commonly used method of amending the Constitution is for Congress to propose and the State legislatures to ratify.

B. The 27 Amendments

1. The first 10 amendments are called the Bill of Rights.

Bill of Rights, i.e., the first 10 amendments to the U.S. Constitution, set out the great constitutional guarantees of freedom of expression and belief, of freedom and security of the person, and of fair and equal treatment before the law. [Note that a women's right to vote is not a right guaranteed by the Bill of Rights]
2. The Bill of Rights were proposed by Congress in 1789 and arose from the controversy surrounding the ratification of the Constitution itself.
3. The Civil War Amendments combined to end slavery (13th, 1866), define American citizenship, proclaim the rights of due process and equal protection of the law (14th, 1868), and outlaw restrictions on the right to vote based on race, color, or previous condition of servitude (15th, 1870).
4. Other amendments further define the workings of government, empower the government in certain ways, or deal with important social issues.

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Section 3: Informal Amendment

Lecture Notes

Key words:

informal amendment; executive agreement

A. Overview

Informal amendments, unlike formal amendments which change the **written** word of the Constitution, are changes not affecting the written document.

B. Basic Legislation

1. Congress can pass laws that spell out some of the Constitution's brief provisions.
2. Congress can pass laws defining and interpreting the meaning of constitutional provisions. Congressional legislation is an example of the informal process of amending the constitution.
3. Two ways in which Congress may informally amend the Constitution is by enacting laws that expand the brief provisions of the Constitution, and enacting laws that further define expressed powers.

C. Executive Action

1. Presidents have used their powers to delineate unclear constitutional provisions, for example, making a difference between Congress's power to declare war and the President's power to wage war.
2. Presidents have extended their authority over foreign policy by making informal executive agreements with representatives of foreign governments, avoiding the constitutional requirement for the Senate to approve formal treaties. **Executive agreements** are pacts made by a President with heads of a foreign government.

D. Court Decision

1. The nation's courts interpret and apply the Constitution as they see fit, as in *Marbury v. Madison*, a court case involving the process of informal amendment.

2. The Supreme Court has been called "a constitutional convention in continuous session."

E. Party Practices

1. Political Parties have been a major source of informal amendment.
2. Political parties have shaped government and its processes by holding political conventions, organizing Congress along party lines, and injecting party politics in the process of presidential appointments.
3. The fact that government in the United States is in many ways government through political party is the result of a long history of informal amendments.

E. Custom

1. Each branch of government has developed traditions that fall outside the provisions of the Constitution. Prior to Franklin Roosevelt, there was a tradition of the Executive branch that a president would not serve a third term, however that "custom" was added to the written Constitution through formal amendment. No third term for president.
2. An example is the executive advisory board known as the President's cabinet.