

## I. Introduction: towards a new national government

- A. Although the States had functioned as nearly independent nation states for a century and a half, and the central government had functioned more or less continuously for a quarter of a century, a truly independent nation state did not exist before the new constitution was ratified.
- i. Before the new constitution, the states were sovereign members of a perpetual union—member states—rather than subordinate states.
  - ii. Before the new constitution, states could conduct their own foreign policy, had their own foreign policies, tariffs, military, and taxes.
- B. The new constitution created an entirely new governmental template for the nation, and explicitly made the states subordinate to the central government in several areas of policy. (See Article 1, section 10, below.)
- i. On the other hand, it bears noting that local governments: the states, counties, towns and cities, remained the principal suppliers of most public services: roads, law enforcement, welfare, education.
  - ii. The states kept their own independent legislatures, governors and court systems.
  - iii. Indeed, the total state budget of state and local governments remained larger than the federal government for another 150 years.
  - iv. However, Article 1 section 9, explicitly forbids states from
    - { signing treaties, coining money, granting titles of nobility
    - { imposing duties on foreign or domestic trade
    - { declaring war, creating formal alliances of the states, or maintaining its own army or navy
    - { (The state militias evidently were not considered armies!)

## II. The (Almost) Modern Constitution

{ (Section II overlaps somewhat with the constitutional excerpts included in Lecture 6, but deepens the analysis, and adds the explicit lists of powers and prohibitions listed in Article 1, sections 8-10.)

- A. “We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, 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.”
- i. Note the contractarian and liberal foundation of the new nation state.

- { It is “we the people” not a king nor god that established the government.
  - { It is designed (Locke, Hobbes, and Montesquieu) to establish justice, insure domestic tranquillity and provide for the common defense.
  - { It attempts to secure the blessings of liberty, but also to promote the general welfare.
- ii. Government is a “means” not an “end” in its own right.
- { It is established to advance common interests.
  - { And the new architecture adopted in the new constitution, was simply an effort to “perfect” the union of the states.

## B. A new architecture for national governance was created by the constitution.

- { The unicameral confederal government typical of treaty organizations was replaced with a bicameral legislature (in Article 1: Senate and House of Representatives), an independently elected president (in Article 2), and a federal court system.
- { Note that only the senate carried forward the old form of the Articles of Confederation, by representing states rather than voters.

### i. Each branch of government had **partial veto power**.

- { Each chamber of Congress can veto proposals made by the other via majority vote.
- { The President can, in turn, veto any bill sent him by the two chambers of Congress.
- { (The Congress can, in turn, override this veto via a 2/3 super majority in both chambers of the legislature, Section 7)
- { The supreme court, as we will see, later obtains the power to veto legislation that it deems to be unconstitutional.
- { (The Supreme Court can only indirectly be vetoed by “packing” the court. Its independence was assured by lifetime appointments and income guarantees (article 3, section 1).)

### ii. In the original documents, only the House of Representatives was directly elected by citizens. The senate was appointed by state legislatures and the president was indirectly elected by selecting state “electors.”

- { Although many state and colonial governments had long used elections to select a “lower chamber” with veto power over taxes and legislation, they had much less experience with fully elected governments.
- { State upper chambers were often selected by county and town governments or were appointed by the governors or lower chambers.
- { Until 1760, most governors were appointed by the Crown or proprietors rather than elected, except in Rhode Island and Connecticut.

- { Only a few of the new State constitutions included directly elected governors (NY, Massachusetts). Most governors were appointed by their state legislature (Virginia, New Jersey, New Hampshire, Pennsylvania, North Carolina, South Carolina).
  - iii. All representatives to the House were subject to elections every 2 years (article 1, section 2), and 1/3 of the senate was also selected every 2 years (article 1, section 2. Senators had terms of 6 years.) Presidents were elected every 4 years (article 2, section 1).
    - { (There is an “off year” election in two weeks in which the House and 1/3 of the senate stand for election.)
    - { (Note that regular elections were a relatively new affair. Although England had long had an elected House of Commons, very few elections were actually contests between two or more candidates and elections were irregularly held during most of its history, because Parliament was not self-calling. Only in the eighteenth century did more regular elections emerge, as a consequence of the Triennial Acts and new budget cycles.)
  - iv. Representatives were to be paid for their services and were free from arrest during their attendance at the session of their respective Houses, and going and returning from same (Section 6).
    - { (Payment for “representatives” was not common in Europe until around 1900, which of course tended to restrict the members to the wealthy or those with wealthy sponsors.)
- C. The **powers of the Congress are explicitly enumerated** in section 8 of article 1.
- i. **The Congress shall have the power**
- { 1. To **lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States**; but all duties, imposts and excises shall be uniform throughout the United States:
  - { 2. To **borrow money** on the credit of the United States:
  - { 3. To **regulate commerce with foreign nations**, and among the several states, and with the Indian tribes:
  - { 4. To establish an **uniform rule of naturalization**, and uniform laws on the subject of **bankruptcies** throughout the United States:
  - { 5. To **coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures**:
  - { 6. To provide for the **punishment of counterfeiting** the securities and current coin of the United States:
  - { 7. To **establish post-offices and post-roads**:
  - { 8. To **promote the progress of science** and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries:

- { 9. To **constitute tribunals inferior to the supreme court**:
  - { 10. To **define and punish piracies and felonies committed on the high seas, and offenses against the law of nations**:
  - { 11. To **declare war**, grant letters of marque and reprisal, and make rules concerning captures on land and water:
  - { 12. To **raise and support armies, but no appropriation of money to that use shall be for a longer term than two years**:
  - { 13. To **provide and maintain a navy**:
  - { 14. To make **rules for the government and regulation of the land and naval forces**:
  - { 15. To provide for **calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions**:
  - { 16. To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress:
  - { 17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the **seat of the government** of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings: And,
  - { 18. To **make all laws which shall be necessary** and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.
- ii. It was **felt by many that this list of 18 powers completely defined the scope of the central government and therefore no “bill of rights” was needed**.
- { But, you can see that number 1's "general welfare" and 18's "all other powers vested by this constitution" suggest that the powers could be pretty broad.
    - } Central government powers could certainly go beyond this list insofar as other parts of the constitution mention other powers.
    - } Moreover, as the meaning of “general welfare” changed through time, new types of laws could evidently be adopted.
- iii. Section 9 of Article 1 further **restricts the Congress from enacting some kinds of laws**—in this it provides a preview of the Bill of Rights that would be added in the next two years.

- { 1. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importations, not exceeding 10 dollars for each person.
  - { 2. The privilege of the **writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.**
  - { 3. No bill of attainder or ex post facto law shall be passed.
  - { 4. **No capitation, or other direct tax** shall be laid unless in proportion to the census or enumeration herein before directed to be taken. (Modified by Amendment XVI in 1913)
  - { 5. No tax or duty shall be laid on articles exported from any state.
  - { 6. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from one state, be obliged to enter, clear, or pay duties in another.
  - { 7. No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.
  - { 8. No title of nobility shall be granted by the United States: And no person holding any office or profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.
- iv. Section 10 of Article 1 explicitly **limits the power of the states—which** implies that the new constitution "trumps" existing state constitutions and that states were **no longer sovereign**.
- { 1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.
  - { 2. No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.
  - { 3. No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in a war, unless actually invaded, or in such imminent danger as will not admit of delay.
- v. In addition, Article V, explains how the constitution can be amended and essentially blocks certain types of amendments:
- { The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress:
  - { Provided, that **no amendment which may be made** prior to the year 1808, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.
- D. Election law remained under the control of the States.
- i. Most states included explicit requirements for suffrage in their new constitutions. Most required significant holding of land (or wealth) to qualify for suffrage: a country voter had to own 25-50 acres and a town voter a 1/acre of land. [ A hectare includes about 2.5 English acres.]
  - ii. Women, Indians, and blacks were often explicitly excluded from suffrage as were atheists and, in some cases, those who practiced the wrong form of Christianity.
  - iii. In a few cases, the property requirements were simply extended to all, and in a few cases simply paying taxes (NY) or being the son of a taxpayer was sufficient (GA).
  - iv. Overall, however, electoral participation was larger than it had ever been outside of the colonies, with estimates varying from 40-90% of men participating.
    - { A men's suffrage movement during the next half century would cause most such restrictions to be eliminated.
- E. Slavery was not dealt with in the Constitution. Instead the issue of slavery was postponed (see the Article V on amendments).
- { (Section 2) "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, **three-fifths of all other persons.**"
  - { The word "slave" does not appear in the constitution. But this clause in Section 9 was evidently was meant to allow the possibility of regulating the slave trade: " The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importations, not exceeding 10 dollars for each person."

- F. States were prohibited from exercising certain powers in section 10. Section 10 assured internal free trade and made treaties and money the exclusive domain of the federal government.
- i. Every state in the union is guaranteed a "republican form of government" (for a definition of this, see Madison in the federalist papers in Lecture 6) and the federal government will protect each against invasion (article 4).
  - ii. And, Congress had the power to admit new states (article 4).
- G. The Constitution itself did not include a bill of rights, but rather a description of how new legislation would be adopted by the federal government

### III. Analysis of the "New" Architecture for Governance

- A. As mentioned in earlier lectures, the basic architecture of the new government was not entirely new, but clearly grounded in state constitutions and colonial charters.
- { Virginia had adopted a quite similar architecture in 1619.
  - { By 1787, all the states but Pennsylvania were bicameral, most included an elected lower chamber and an appointed (or indirectly elected) upper chamber.
  - { In the new state constitutions written after 1776, all included governors, who were either indirectly or directly elected.
- B. Thus, a good deal of the operation of the new national government would be based on routines (formal and informal internal rules) developed for the state legislatures.
- C. It is also clear that the expectation was that the chambers would negotiate and compromise with each other on the issues.
- i. With so many checks and balances, one could imagine an entirely non-functional government of endless vetoes by the House, Senate, President, and perhaps even the Supreme Court.
  - ii. On the other hand, electoral pressures on the first three would create pressures for policies with majority and supermajority support.
    - { Thus, it is common electoral pressures, as well as "statesmanship" that would push the government forward.
    - { Common interests would be advanced but not (necessarily) local or regional interests, which could be undertaken by state and local governments.
- D. The different constituencies of the house and senate, in effect, required super majorities for new legislation to be passed by Congress.

- { That is to say, only policies with relatively broad support are likely to make it through the legislative process to the President's desk.
  - { (On the other hand, this logic has not worked perfectly: it has turned out that "omnibus budget bills" often include narrow regional projects and tax breaks, that are clearly not in the average voter's interest.)
- E. The negotiators in Philadelphia realized that their final compromise was not necessarily the best of all possible constitutions for all times, and therefore provided for an amendment process.
- i. On the other hand, the difficulty of the amendment process (which is not very different from the ratification process) made the constitution likely to be very stable--at least insofar as its basic architecture is concerned.
    - { It takes a series of super majorities to change the constitution
    - { Note that the amendment process, like the legislative process, is not "democratic" or "majoritarian," per se, but rather representative. At no part in this process is there a direct consultation with the citizenry (as there currently is in Denmark and Switzerland)
  - ii. Stability in the underlying "rules of the game," implies that politicians will tend to take the rules as given for essentially all purposes.
- F. Note that the arguments for constitutional democracy is partly idealistic and partly pragmatic.
- i. The "founding fathers" were nearly all men of the enlightenment who regarded reason and equality before the law as givens.
  - ii. Most also were liberals who believed in the language of the declaration of independence that there were inalienable rights to life, liberty, and the pursuit of happiness.
  - iii. On the other hand, it is not exactly clear how one designs institutions to promote these ends--at least not in detail.
  - iv. In this respect, it is clear that negotiation and compromise were important to the process of designing the constitution and ratifying it--even given the substantial experience that the colonists and colonial legislators had had with their own representative systems of governance.

### IV. The Bill of Rights

- A. Several of the states had ratified the constitution, conditioned on passage of a formal bill of rights.
- i. The idea of a bill of rights was not new.



- { The colonists were, of course, familiar with the "English Bill of Rights" negotiated in early 1689 at what might be called the end of the Stuart period of rule (although both William and Mary could be said to be Stuarts, it is clear that William was much more of a Dutchman or Prince of Orange, than a Stuart.)
- { A bill of rights had been negotiated with English when James, the Duke of York and soon to be James II, added New Holland to his territory in the middle of the 17th century (through a grant from his brother King Charles II).
- { Most of the state and many of the colonial charters included explicit provisions for rights to trial and for freedom of religious conscience.
- ii. Moreover, it seems clear that "rights" were important political ideas during this period in both America and in Europe (especially in France where a the French revolution was underway, but also in England and the Netherlands, where discussion of rights had a long history)).
  - { The declaration of independence of 1776 mentions "That all men are created equal; that they are endowed by their Creator with certain **unalienable rights**; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men ..."
  - { (Note that this was after the famous French declaration of the rights of man in 1789, which of course was after the US Declaration of Independence, and the Dutch Act of Abjuration)
  - { Thomas Paine's famous "The Rights of Man" was published about this time, in 1791.
- B. A bill of rights was negotiated rather rapidly by the new Congress and sent to the States for ratification. (As noted last time, the list looks very similar to that proposed by the Pennsylvania minority.)
  - { Ten amendments were approved as a block in 1789 and eleven states had ratified them by the end of 1791.
- C. The ten "bill of rights" amendments are as follows:
  - i. **Congress shall make no law** respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the **freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
  - ii. A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.
  - iii. No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

- iv. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
- v. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without **just compensation**.
- vi. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.
- vii. In Suits at common law, where the value in controversy shall exceed twenty dollars, the **right of trial by jury shall be preserved**, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.
- viii. **Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.**
- ix. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
- x. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

## V. Analysis of the Bill of Rights

- A. Most of the rights listed in the "bill of rights "are short and to the point, and most are what many call "negative rights," protections from various forms of laws that a government (whether following majority will or not) might otherwise of chosen to adopt.
  - i. Perhaps the most important of these has turned out to be the first amendment which guarantees a free press, freedom of speech, and freedom of religious conscious.
    - { Close runner ups would be the forth and fifth amendments which state that a person can not be forced to be a witness against himself nor deprived of life, liberty or property without due process of law.

{ (It is from the fifth amendment that the term "pleading the fifth" comes from. A person "pleads the fifth, when he or she refuses to answer questions posed in a trial or in a senate hearing.)

- B. A surprising number of the Supreme court vetoes of legislation in the 20th century have come and continue to come from these first ten amendments, which implies that they were, in fact, important changes in the constitution (as argued by the proponents of them during the federalist debates).
- C. The last two amendments are a bit ambiguous. The 9th and 10th amendments do not specify individual or state rights, but essentially claim that there might be natural rights or other legal rights that already exist (in civil or state law) which are not eliminated by the constitution as amended.

{ It seems clear that these last two amendments were some kind of compromise to satisfy those concerned with the centralization of power under the new constitution

{ and/or to satisfy those who believe in natural rights (as in Hobbes, Locke, and Montesquieu and as in Thomas Paine's famous "The Rights of Man" published about this time in 1791).

## VI. Marbury vs. Madison: the Supreme Court becomes a Constitutional Court

- A. During the first two administrations, President George Washington and President John Adams appointed only Federalist Party members to administration and judiciary positions. When Thomas Jefferson won the 1800 election, President Adams, a Federalist, proceeded to rapidly fill the judiciary bench with members of his own party, who would serve for life during "good behavior." In response, Jeffersonian Republicans repealed the Judiciary Act of 1800, which had created several new judgeships and circuit courts with Federalist judges, and threatened impeachment if the Supreme Court overturned the repeal statute.
- B. Although President Adams attempted to fill the vacancies prior to the end of his term, he had not delivered a number of commissions. Thus, when Jefferson became President, he refused to honor the last-minute appointments of President John Adams. As a result, William Marbury, one of those appointees, sued James Madison, the new Secretary of State, and asked the Supreme Court to order the delivery of his commission as a justice of the peace.
- C. While a section of the Judiciary Act of 1789 granted the Court the power to issue writs of mandamus, the (Marshall) Court ruled that this exceeded the authority allotted the Court under Article III of the Constitution and was therefore null and void.

So, while the case limited the court's power in one sense, it greatly enhanced it in another by ultimately establishing the court's power to declare acts of Congress unconstitutional.

- D. (See [http://supreme.lp.findlaw.com/supreme\\_court/landmark/marbury.html](http://supreme.lp.findlaw.com/supreme_court/landmark/marbury.html))

## VII. Analysis

- A. Chapter II of Rehnquist's book provides a very nice overview of the historical and political context of the case.
- i. Essentially, it concerns the appointment of Marbury to the federal judiciary by Adams (the second president).
  - ii. As he was leaving office, Adams made a number of appointments to the "bench" including Marbury's. Marbury's appointment was approved by the senate and signed by Adams, but Jefferson's (the third president and an author of the declaration of independence) secretary of state (Madison, a chief proponent of the new constitution of 1787 in the federalist papers) refused to hand the appointment papers over to Marbury.
  - iii. Marbury sued and noted that the courts had been given the power to compel other parts of the administration to carry out their wishes.
  - iv. The Marshall court decided that Marbury's argument was sound, that the administration should turn over his commission to the court, but instead of compelling Madison to turn over the papers to Marbury, **argued that the powers given the court through legislation were unconstitutional!**
  - v. And therefore, although Marbury's argument was sound, the court lacked the power to compel Madison to turn over the papers.
- B. Note that Marshall's conclusion neatly avoided a constitutional crisis, because it was not clear whether the republican congress and president would have obeyed the court and turned the judgeship over to a federalist (member of Adam's party).
- { Also, on the one hand it reduced the court's own power (it could not directly compel compliance, it also increased it (the court could now strike down provisions of legislature deemed unconstitutional!
- { Note that this was clearly easier for the other branches to accept in this case, because the provision struck down, was one granting the court itself power!
- C. The Marbury vs. Madison decision is considered by many to be the most important supreme court decision, because it indirectly establishes the right of the court to review and to veto legislation.

- D. This power was not explicitly given it in the constitution, nor did other courts have this power at the time.
- { It, thus, represents a major change in the procedures of creating new laws.
  - { Indeed, many of the most important revisions to the constitution in the 20th century come from the Supreme court.
  - { (As we will see, court decision affect decentralization, election law, discrimination, religious practices by state institutions, and even presidential elections.)
- E. Note that a constitutional court could be said to be a necessary part of constitutional design, even within democracies.
- i. Insofar as minority interests are to be protected from the majority, it is clear that an elected legislature cannot do this.
    - { An elected legislature is bound to support the majority (through reelection pressures), even when the majority wishes to harm the minority.
  - ii. An independent court can, in principal, do this because it is not subject to electoral pressures.
    - { On the other hand, it is not obvious how one induces a court to advance constitutional interests rather than their own personal goals.
    - { In the US, this is largely done through the selection process which normally focuses a good deal of attention on the “constitutional philosophy” of potential supreme court justices.