

UNIT II

FOUNDING DOCUMENTS

CP Chapters 1, 2, 3, 4
9/5/09

Amending the Constitution*

- Two ways to propose an amendment: (1) Two-thirds of both houses of congress vote to propose an amendment *or* (2) Two-thirds of the state legislatures ask Congress to call a national convention to propose amendments
- Two ways to *ratify* an amendment: (1) Three-fourths of the state legislatures approve it *or* (2) Ratifying conventions in three-fourths of the states approve it
- Only the first method of proposing an amendment has been used
- The second method of ratification has been used only once, to ratify the Twenty-first Amendment (repealing Prohibition)
- Congress may limit the time within which a proposed amendment must be ratified. The usual limitation has been seven years
- Thousands of proposals have been made, but only thirty-three have obtained the necessary two-thirds vote in Congress
- Twenty-seven amendments have been ratified
- The first ten amendments, ratified on December 15, 1791, are known as the Bill of Rights

Amendment

- Changes in, or additions to, the U.S. Constitution.
- Amendments are proposed by a two-thirds vote of both houses of Congress or by a convention called by Congress at the request of two-thirds of the state legislatures and ratified by approval of three-fourths of the states.

Anti-federalist party*

- Opponents of a strong central government who campaigned against ratification of the Constitution in favor of a confederation of largely independent states.
- Anti-federalists successfully marshaled public support for a federal bill of rights.
- After ratification, they formed a political party to support states' rights.
- See also Federalists.

Articles of Confederation*

- Submitted July 1776; ratified 1781
- Framework for an American national government; states had the most power
- Empowered the federal government to make war and peace, coin money, and create new states
- No federal empowerment to levy taxes, raise troops, or regulate commerce
- Government could not pay off war debt without taxes
- States were allowed to impose tariffs that produced bidding wars and interstate disputes.
- Congressional revision of the articles created a weak national government
- Created a government which had a difficult time coping with the problems that the growing nation was facing
- Was, in a sense experiment that tested some of the principles of government set forth earlier in the Declaration of Independence, an unplanned
- Each state had one vote in the unicameral Congress
- 9/13 were required to pass any measure
- There was no executive branch to enforce the laws nor was there a Judiciary Branch to review the measures passed by the Legislature
- For Amendments to the Articles, a unanimous vote was required.
- Confidence in AofC diminished greatly as a result of Shay's Rebellion
- See attached notes from reading/lecture

Bicameral legislature

- A lawmaking body made up of two chambers or parts
- Example #1: U.S. Congress consists of the House of Representatives and the Senate
- Example #2: The California State Legislature consists of a Senate and an Assembly
- The only unicameral legislature is in Nebraska
- Framers created this check and balance to prevent legislative tyranny

Bill of attainder*

- A law that declares a person, without a trial, to be guilty of a crime.
- The state legislatures and Congress are forbidden to pass such acts by Article I of the Constitution.

Bill of Rights*

- A list of individual rights and liberties, such as freedom of speech, religion, and the press.
- Term often used to describe Amendments 1-10, sometimes also 14.

Checks and Balances*

- See class notes.

Clear and Present Danger*

- A legal interpretation that reconciled two views of the First Amendment right of free speech, the first that Congress could not pass any law to restrict speech and the second that it could punish harms caused by speech.
- Proposed by Supreme Court justice Oliver Wendell Holmes in 1919, it held that Congress could punish only speech that created a “clear and present danger” of bringing about the actions that Congress is authorized to prevent.

Commerce clause

- The section of the Constitution that grants Congress the power to regulate trade among the states and with foreign countries

Confederation

- A political system in which states or regional governments retain ultimate authority except for those powers that they expressly delegate to a central government.
- The United States was a confederation from 1776 to 1787 under the Articles of Confederation.

Constitution

- Drafted at the Constitutional Convention in Philadelphia in 1787
- Included a preamble and seven articles
- Created a stronger federal government
- Bill of Rights are the first ten amendments; they protect individual rights and freedoms
- Written in order to promote general welfare
- Written in order to secure the blessings of liberty
- “Was made not merely for the generation that existed, but for posterity – unlimited, undefined, endless, perpetual prosperity”
- Often called a living, breathing document, created by people with a vision
- Written in order to establish justice
- The first 3/7 of this document are written to establish the structure and the powers of the three branches of government
- Written after the Articles of Confederation and before the Federalist Papers
- Written in large part by James Madison, Alexander Hamilton, and John Jay
- James Madison – “father”
- Written to form a more perfect union
- Protects you against cruel and unusual punishment
- Begins with a preamble
- Describes the “methods of amendment in Article V

- Written in order to create domestic tranquility and provide for the common defense
- (Signed September 17, 1787; ratified by required nine states June 21, 1788)
- See attached notes from reading/lecture

Constitution & Slavery

- Nowhere can the word “slave” (or “slavery”) found in the Constitution
- To some, the failure of the Constitution to address the question of slavery was a great betrayal on the promise of the Declaration of Independence that “all men are created equal”; by remaining silent on the subject of slavery, and thereby allowing the odious practice to continue, was to convert (by implication) the wording of the Declaration to “all white men are created equal.”
- Many of the signers of the Declaration and the Constitution were hypocritical in that they knew of slavery, many owned slaves, and still remained silent about the issue.
- Any effort to use the Constitution to end slavery would have meant the end of the Constitution (the southern states would never have signed a document that seriously interfered with slavery)
- Framers of the Constitution compromised with slavery:
- In determining the representation each state was to have in the House, “three-fifths of all other persons” (slaves), are to be added to the “whole number of free persons”
- Constitution guaranteed that if a slave were to escape his or her master and flee to a non-slave state, the slave would be returned to the state to “the party to whom...service or labour may be due”
- Convention agreed not to allow the new government by law or even constitutional amendment to prohibit the importation of slaves until the year 1808
- Allowing slavery to continue led to the worst social and political catastrophe in the nation’s history: the Civil War
- Framers chose to sidestep slavery to create a union that, they hoped, would eventually be strong enough to deal with the problem when it could no longer be postponed.

Constitutional Convention*

- A meeting of delegates in 1787 to revise the Articles of Confederation, which produced a totally new constitution still in use today.
- Not attended by Thomas Jefferson

Declaration of Independence

- Document restating political ideas justifying the separation from Britain
- Thomas Jefferson and his committee had the duty of drafting for the Continental Congress
- John Locke’s influences served as a foundation for the document
- The final product lacked provisions condemning the British slave trade and a denunciation of the British people that earlier drafts had contained.
- “When, in the course of human events, it becomes necessary for one people to dissolve the political bonds 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.
- We hold these truths to be self-evident: 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, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government”
- (Declaration adopted July 4, 1776)
- See attached notes from reading/lecture

Democracy

- A term used to describe a political system in which the people are said to rule, directly or indirectly.
- Can be either direct (aka pure) or participatory (aka representative) democracy

Direct/participatory government

- A political system in which all or most citizens participate directly by either holding office or making policy.
- The town meeting, in which citizens vote on major issues, is an example of participatory democracy.

Establishment Clause of the First Amendment

- A clause in the First Amendment to the Constitution stating that “Congress shall make no law respecting an establishment of religion...”
- Thomas Jefferson originated the idea of a “wall of separation” between church and state.
- The Court has developed a three-part test to decide under what circumstances government involvement in religious activities is constitutional. Involvement is constitutional if:
 - It has a secular purpose.
 - Its primary effect neither advances nor inhibits religion.
 - It does not foster an excessive government entanglement with religion.
- See attached notes from reading/lecture

Ex post facto law*

- Ex post facto is a Latin term meaning “after the fact.” A law that makes criminal an act that was legal when it was committed, that increases the penalty for a crime after it has been committed, or that changes the rules of evidence to make conviction easier; a retroactive criminal law.
- The state legislatures and Congress are forbidden to pass such laws by Article I of the Constitution.

Federalism

- Defined as a political system in which ultimate authority is shared between a central government (also known as national and or federal government and state and/or regional governments
- One level of government can serve as a check on the other
- Helps to secure democracy
- Compare to Confederation and Unitary systems
- Confederation-a political system in which states or regional governments retain ultimate authority except for those powers that they expressly delegate to a central government
- Unitary system- a system in which sovereignty is wholly in the hands of the national government so that subnational political unites are dependent on its will
- Therefore;

Federalism	Confederation	Unitary System
F>S	S>F	F>S

Federalist Papers

- A series of eighty-five essays written by Alexander Hamilton, James Madison, and John Jay (all using the name “Publius”) that were published in New York newspapers in 1787-1788 to convince New Yorkers to adopt the newly proposed Constitution.
- They are classics of American constitutional on political thought.
- Federalist Paper No.10 discusses the inevitability of factions in a democracy and proposes possible solutions ranging from removing the causes of factions to controlling their effects (Madison)
- Federalist Paper No. 51 assumes that people are factious by nature and states that government is “the greatest of all reflections on human nature.” (Madison)
- See attached notes from reading/lecture

Great Compromise

- Roger Sherman’s plan to resolve the large-state / small-state controversy during the Constitutional Convention of 1787.
- He proposed a bicameral legislature in which representation in the lower chamber (the House of Representatives) would be based on population, and each state, regardless of size, would have an equal number of representatives in the upper chamber (the Senate)

Indirect/representative democracy

- A political system in which leaders and representatives acquire political power by means of a competitive struggle for the people’s vote.

- This is the form of government used by nations that are called democratic.

Judicial Review

- The power of the courts to declare acts of the legislature and of the executive to be unconstitutional and hence null and void.

Libel*

- A written statement that falsely injures the reputation of another person.

New Jersey Plan

- A plan proposed by William Paterson of New Jersey during the Constitutional Convention
- It called for equal representation by all states (thereby favoring the smaller states)

Petition*

- A request that individuals submit to government officials.
- The petition may involve government policy or it may be a request to become a citizen.
- The right to petition is protected under the first amendment to the Constitution

Power

- The ability of one person to require another person to act in accordance with the first person's intentions.

Preamble

- An introductory statement to an official document that usually explains the document's goals and purposes
- Normally the term is used in reference to the preamble of the US Constitution
- "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."

Prior Restraint

- The traditional view of the press's free speech rights as expressed by William Blackstone, the great English jurist.
- According to this view the press is guaranteed freedom from censorship-that is, rules telling it in advance what it can publish.
- After publication, however, the government can punish the press for material that is judged libelous or obscene.

Republic

- A form of democracy in which power is vested in representatives selected by means of popular competitive elections.
- The name given to a nation in which the supreme power rests in those who are entitled to vote and is exercised by elected representatives who are responsible to voters and who govern according to law.
- See also Representative democracy

Rights Found in Constitution

- Writ of habeas corpus may not be suspended (except during invasion or rebellion)
- No bill of attainder may be passed by Congress or the states
- No ex post facto law may be passed by Congress or the states
- Right of trial by jury in criminal cases is guaranteed
- The citizens of each state are entitled to the privileges and immunities of the citizens of every other state
- No religious test or qualification for holding federal office is imposed
- No law impairing the obligation of contracts may be passed by the states

Separation of Powers

- A principle of American government whereby constitutional authority is shared by three separate branches of government—the legislative, the executive, and the judicial.
- See also Checks and Balances
- See attached notes from reading/lecture

Shay's rebellion

- A rebellion in 1787 led by Daniel Shays and other ex-Revolutionary War soldiers and officers to prevent foreclosures of farms as a result of high interest rates and taxes.
- The revolt highlighted the weaknesses of the Confederation and bolstered support for a stronger national government.

Supremacy clause

- Article VI, Section 2 of the Constitution, which establishes the Constitution and federal laws as superior to all state and local legislation
- “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

The 1st Amendment

- Six (6) rights
- Speech (expression); religion (free exercise and establishment clause); press; petition; and assembly
- “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.”
- See attached notes from reading/lecture

The 2nd Amendment

- Right to keep and bear arms
- “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.”
- See attached notes from reading/lecture

The 13th Amendmet

- See class notes

The 14th Amendment Equal Protection Clause

- See class notes

The 14th Amendment Due Process Clause

- “...nor shall any State deprive any person of life, liberty, or property, without due process of law”
- See attached notes from reading/lecture

Three-Fifths Compromise

- A compromise reached during the Constitutional Convention in which it was agreed that three-fifths of all slaves were to be counted both for tax purposes and for representation in the House of Representatives

Unalienable

- Based on nature and providence rather than on the preferences of people. In other words, a term that means, “God-given.”
- As in “unalienable rights” – a term that’s made reference to in the Declaration of Independence.
- “We hold these truths to be self-evident: 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”

Virginia Plan

- A fifteen-resolution plan proposed by Governor Edmund Randolph of Virginia during the Constitutional Convention
- It recommended an entirely new national government favoring the large states
- It included a bicameral legislature, a national executive branch, and a national court system

Wall of Separation Principle

- A Supreme Court interpretation of the establishment clause in the First Amendment that prevents government involvement with religion, even on a non-preferential basis.

Women and the Constitution

- Women were specifically mentioned nowhere in the Constitution
- Article I granted the vote to those people who were allowed to vote for members of the lower house of the legislature in which they resided, but women could not participate in these elections
- Every pronoun used is masculine – *he* or *him*
- However, whenever the Constitution or Bill of Rights grants a right, it either grants that right to “persons,” “people,” or “citizens,” not to “men,” or it makes no mention of gender

Writ of Habeas Corpus

- A Latin term meaning, “you shall have the body.”
- A court order directing a police officer, sheriff, or warden who has a person in custody to bring the prisoner before a judge and show sufficient cause for his or her detention.
- The writ of habeas corpus was designed to prevent illegal arrests and imprisonment.
- “Order to have Body”

PRECEDENT SETTING US SUPREME COURT CASES

9/5/09

Marbury vs. Madison (1803)

- William Marbury had been commissioned justice of the peace in D.C. by President John Adams.
- His commission was part of Adams' "midnight appointments" during his last days in office.
- Marbury's commission was not delivered, so he sued President Jefferson's Secretary of State, James Madison.
- Chief Justice John Marshall held that while Marbury was entitled to the commission the status, which allowed Marbury's remedy, was unconstitutional as it granted the Supreme Court powers beyond what the Constitution permitted.
- This decision paved the way for judicial review, which gave courts the power to declare statutes unconstitutional.

West Virginia Board of Education v. Barnette (1943)

- (1st Amendment, freedom of religion) During World War II the West Virginia Board of Education required all students to take part in a daily flag saluting ceremony or else face expulsion.
- Jehovah's Witnesses objected to the compulsory salute, which they felt would force them to break their religion's doctrine against the worship of any "graven image."
- The Court struck down the rule, agreeing that a compulsory flag salute violated the 1st Amendment's exercise of religion clause and stating "no official, high or petty, can prescribe what shall be orthodox, in politics, nationalism, religion, or other matters of opinion...."

Abington School District v. Schempp (1963)

- Facts: A Pennsylvania statute required that "at least ten verses from the Holy Bible shall be read at the opening of each public ... school day." A student could be excused from the Bible reading with a written note from a parent or guardian. The Schempp family, who had children in the Abington school system, disapproved of the Bible reading because it violated their religious beliefs. The family refused to write a letter to have their children excused, and took legal action to stop the school district from conducting the daily Bible readings, the district court ruled in favor of the Schempp family. The school district appealed to the Supreme Court of the United States.
- Issue: Whether a state, in creating a statute that promotes prayer in its public school system, is violating the establishment clause of the First Amendment, which states that the government may not establish any religion.
- Opinion: The Court declared the law calling for "prayer in school" unconstitutional because it represented an establishment of religion by government. Stating that this was a direct violation of the establishment clause of the First Amendment, the Court prohibited Bible readings in public schools.

Tinker v. Des Moines School District (1969)

- Decision: The Court upheld the students' First Amendment rights.
- Because students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," schools must show a possibility of "substantial disruption" before free speech can be limited at school.
- Students may express personal opinions as long as they do not materially disrupt class work, create substantial disorder, or interfere with the rights of other.
- In this case, the wearing of black armbands was a "silent, passive expression of opinion" without these side effects and thus constitutionally could not be prohibited by the school.

Lemon vs. Kurtzman (1971)

- (1st Amendment, Establishment Clause) In overturning State laws regarding aid to church-supported schools in this and a similar Rhode Island case, the Court created Lemon testing limiting.
- The Court noted that any State law about aid to religion must meet three criteria: (1) purpose of the aid to religion must be clearly secular, (2) its primary effect must neither advance nor inhibit religion, and (3) it must avoid "excessive entanglement of government and religion"

New York Times v. United States (1971)

- (1st Amendment, freedom of the press) In 1971 The New York Times obtained copies of classified Defense Department documents, later known as the “Pentagon Papers,” which revealed instances in which the Johnson Administration had deceived Congress and the American people regarding U.S. policies during the Vietnam War.
- A U.S. district court used an injunction against the publication of the documents, claiming that it might endanger national security.

Roe vs. Wade (1973)

- Supreme Court decision that ruled first trimester abortions were to be allowed.
- All state laws prohibiting such abortions were made unconstitutional.
- Decision was based on a woman’s right to privacy. (14th Amendment Due Process Clause)
- Led to criticism from Roman Catholics and right-to-life groups
- Argument In Favor of Petitioner (Roe):
- The due-process clause of the Fourteenth Amendment implies a “right to privacy” that protects a woman’s freedom to choose during the first three months of pregnancy whether to have an abortion.
- Argument IN Favor of Respondent (Wade)
- Life begins at the moment of conception, and so the human fetus is a “person” entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment.

New Jersey vs. TLO (1985)

- 14th and 14th Amendment) After T.L.O., a New Jersey high school student denied an accusation that she had been smoking in the school lavatory; a vice principal searched her purse and found cigarettes, and marijuana.
- T.L.O. was sentenced to probation by juvenile court, but appealed on the grounds that the evidence had been obtained by an “unreasonable search”
- The court rejected T.L.O.’s arguments stating that the school had a “legitimate need to maintain an environment in which learning can take place,”
- The Court then passed the “reasonable suspicion” rule for school searches

Wallace v. Jaffree (1985)

- Facts: The parents of three children attending public school in Alabama challenged the constitutionality of an Alabama law which authorized a one minute period of silence in all public schools for meditation or voluntary prayer.
- Issue: Whether the Alabama law requiring a one minute silence period encouraged a religious activity in violation of the First Amendment establishment clause.

Hazelwood School District v. Kuhlmeier (1988)

- (1st Amendment, freedom of speech). In 1983, the principal of Hazelwood East High School in Missouri removed two articles from the upcoming issue of the student newspaper, deeming their content “inappropriate, personal, sensitive, and unsuitable for student readers.”
- Several students sued the school district, claiming that their 1st Amendment right to freedom of expression had been violated.
- The Court upheld the principal’s action, stating that “a school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.”
- School officials had full control over school- sponsored activities “so long as their actions are reasonably related to legitimate pedagogical concerns....”
- On appeal, the Supreme Court cited the 1st Amendment guarantee of a free press and refused to uphold the injunction against publication, observing that it is the obligation of the government to prove that actual harm to the nation’s security would be caused by the publication.
- The decision limited “prior restraint” of the press.”

Texas v. Johnson (1989)

- Facts: In 1984, Gregory Lee Johnson burned an American flag in front of the Dallas City Hall. He burned the flag as a means of protest against the policies of President Ronald Reagan's Administration. Under Texas law desecration of the American flag is a criminal offense. Mr. Johnson was convicted and sentenced to one year in jail and a \$2,000 fine.
- Issue: Does a law against desecration of the American flag violate an individual's right to freedom of speech as found in the First Amendment?
- Opinion: In a 5-4 decision the Supreme Court of the United States found that desecrating the flag as an act of protest is an act of expression, an act protected by the First Amendment. The Court found that burning the American flag was political speech which Justice Brennan wrote, "...is the bedrock principle underlying the First Amendment. Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

Reno v. A.C.L.U. (1997)

- Facts: The 1996 Federal Communications Decency Act sought to protect minors from "incident" and offensive Internet materials. The Act made it a crime to transmit obscene or indecent messages over the Internet.
- Issue: Whether the 1996 Communications Decency Act violates the First and Fifth Amendments of the Constitution by being vague in its definition of the types of Internet communications it could find unlawful.
- Opinion: The Supreme Court of the United States, in a 7-2 decision, held the Communications Decency Act violated the First Amendment. The Court reasoned the act did not clearly define "indecent." The Court felt the act could establish a content-based blanket restriction of free speech and the act did not demonstrate an authority on the unique nature of the Internet and its social value.

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