An Introduction to the US Constitution
or Constitutional Chit Chat

A. Historical Background

The Articles of Confederation were adopted in 1777 during a time of war, and they united the thirteen separate colonies of America in their fight for independence from Great Britain. The American Revolution provided a sense of urgency to efforts to bring the colonies together in a common cause which otherwise may not have happened. As Ben Franklin succinctly put it, "We must, indeed, all hang together or, most assuredly, we shall all hang separately."

The Articles of Confederation formed a league of friendship with the sovereign and independent colonies, with considerable power being retained by the new states at the expense of a weak central government. It served to unite the states in a time of war but proved to be woefully inadequate to support the new continental army during the war, and during the peace that followed the war in 1783. The central government was unable to regulate commerce, set economic policy or form a united front in response to external forces. As a result, the states were on the brink of economic disaster and anarchy after gaining independence.

With this as the backdrop, the Constitutional Convention was held in Philadelphia in 1787 attended by delegates from twelve of the thirteen states. Rhode Island was the only state that refused to send delegates; its leaders feared it was an attempt to subvert their State's independence. Other Americans also had their suspicions. Patrick Henry of Virginia refused to attend, declaring he "smelt a rat" due to his suspicion that James Madison, also of Virginia, favored the creation of a powerful central government and the subversion of the authority of the state legislatures. Henry, along with many other political leaders, believed that state governments offered the primary protection for personal liberties.

The convention provided a hotly contested debate between nationalists, who favored a strong central government, and those desiring more power to reside with the individual states. Eventually, a compromise was reached with a proposal for legislative, executive and judicial branches of government. The legislature, or law-making body of government, would have a lower chamber made up of proportional representation based on each state's population, and an upper chamber with an equal number of members from each state.

Complicating the polarizing discussions over legislative representation was the North-South divide over the method by which slaves were to be counted for purposes of taxation and representation. Southern states wanted to maximize their populations by

including the slave count for proportional representation purposes, but to minimize their populations by not including the slave count for federal taxes based on total population. At that time, 40% of the population of southern states was comprised of enslaved people. A compromise was reached such that proportional representation and tax amounts would be based on the number of free persons and three-fifths of "all other persons," a euphemism for slaves.

There were additional issues that held up ratification of the new constitution. Regulation of commerce was opposed by southern states who feared that a northern dominated Congress would restrict their agricultural exports and push for a ban on the importation of slaves. The issue of slaves was an explosive topic pitting abolitionists against large landowners whose farming operations required a large, cheap labor force. A Faustian bargain temporarily overcame these obstacles by allowing slave importation for twenty years in return for the southern states' acceptance of commerce laws.

One of the last major areas of dispute was the procedure for electing the President. Several proposals were considered including election of the chief executive by members of Congress, and election based on the popular vote of all eligible voters. A compromise was reached with a cobbled together plan for an "electoral college" whereby a designated number of electors from each state would officially vote for the president, presumably based on a popular vote. The number of electors from each state would be based on population with the same three-fifths formula for counting slaves.

This alleviated the fear of many Framers of direct election of the President by an uneducated, and unruly, general electorate. If no candidate received an absolute majority of the electoral college votes, it would then fall to Congress to elect the president. At the time it was felt that multiple candidates would divvy up the vote preventing any one candidate from receiving an absolute majority of electoral votes and Congress would end up determining the winner in most elections.

Ratification of the new constitution required the consent of nine of the thirteen states before it would be accepted as the law of the land. Two separate factions emerged to push their agendas at the state level. Federalists, who favored ratification with a strong central government, included James Madison from Virginia, and New Yorkers Alexander Hamilton and John Jay, who would, along with Madison, write the Federalist Papers in support of ratification. Most importantly, George Washington (also from Virginia) favored ratification which lent huge moral support to their cause. As a sweeping generalization, Federalists tended to have a more global perspective and to be more urban.

Anti-Federalists, who opposed the formation of a strong central government, feared a reduction in states' rights, although they knew the Articles of Confederation needed improvement. This group included its own list of political heavyweights including Virginia's Patrick Henry, Massachusetts's Samuel Adams, and New York's powerful governor George Clinton. Anti-Federalists were more likely to be small farmers than lawyers or merchants and were typically less well-traveled. Thomas Jefferson, despite

being well-educated and well-travelled, was against a strong central government and would later lead the pro-states' rights Republican Party in the late 1790's.

Even with all the negotiations and compromises, ratification of the new Constitution was not a sure thing. James Madison, fearful that Alexander Hamilton's push for an even stronger, more centralized government would carry the day (Hamilton talked of an imperial president for life and the central government assuming all debts which favored northern states), started to have misgivings about the new government's powers, which pushed him toward Jefferson's way of thinking. Anti-Federalists had been pushing for individual rights as a check on the new government's possible tyrannical powers and they demanded a more concise, unequivocal Constitution that clearly laid out the right of the people and limitations on the power of government. Madison's support for this Bill of Rights was significant in persuading Anti-Federalists to support the new Constitution with the promise of amendments which would guarantee individual and states' rights.

The US Constitution was officially enshrined as the law of the land upon its signing on September 17, 1787. The Bill of Rights was ratified by the states on December 15, 1791, and became the initial ten amendments to the Constitution. The fun was only just beginning.

B. Makeup of the Constitution

The Constitution contains a Preamble, 7 articles, and 27 amendments. The principles influencing the document include liberty, federalism, separation of power into three branches of government, checks and balances, and individual rights. Surprisingly, the original Constitution at just four pages long is the shortest written constitution of any major government in the world, yet it influences every aspect of our society.

The preamble is an introduction to the Constitution but is not the law. Its fifty-two words are as follows: *We the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, 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.*

Its seven Articles detail the core components of the organization and operation of the new government. Articles 1 – 3 provide the organizational structure of the three branches of government: executive, legislative and judicial. Article 4 defines rules for how states must deal with the laws and court decisions of all other states. Article 6 establishes the Constitution as the highest law in the nation. Article 7 sets out the procedure for ratifying the original constitution and is now of purely historical value.

The Framers left future generations a procedure for continuing to improve the Constitution (or at least change it) with the amendment process, which is detailed in Article 5. Over time, this amendment process has transformed the Constitution by adding the Bill of Rights (collectively the first ten of the amendments), abolishing slavery, extending the right to vote to women and African Americans, implementing prohibition, and repealing prohibition among other changes. There have been 27 amendments to the Constitution, beginning with the Bill of Rights. The Framers purposely made the amendment process a difficult one believing that frequent changes would undermine the sanctity of the document.

A method of adding to or changing the Constitution that was not envisioned by the Framers is the doctrine of judicial review and interpretation. The US Supreme Court, in the early 1800's, arrogated or usurped to itself this power of exclusively explaining the Constitution. This was not a power explicitly granted to the judicial branch in the Constitution. Thomas Jefferson remarked at the time that the Constitution was merely a thing of wax in the hands of the judiciary, which they may twist and shape into any form that they please. In the words of one Chief Justice, "We are under a Constitution, but the Constitution is what the judges say it is".

The Constitution can be unclear and ambiguous, and the judicial branch has stepped in to clarify its application to specific issues through judicial review and interpretation. This provides a working framework for application of the Constitution to a changing world,

but also opens the door to interpretation of the Constitution based on inherent biases of the courts.

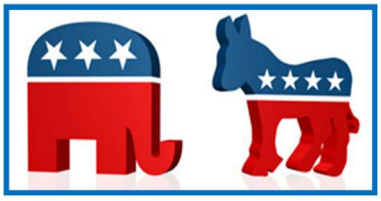
C. Influences on the Constitution

The Framers of the Constitution were mainly of British heritage, steeped in English law, and were thus influenced by British sources. But they also departed from British traditions in many ways. The Magna Carta, dating back to 1215, is one such source containing several concessions made by King John of England to his rebellious barons. Some of the concepts borrowed from this document, or at least interpreted as salient points by the Framers, were trial by jury, taxation without representation, and habeas corpus or the right to take legal action to end unlawful detention.

The “rule of law” is commonly regarded as a fundamental principle of the Constitution first used to counter claims by European monarchs who considered themselves above the law. John Adams introduced this concept into his own State of Massachusetts’s Constitution of 1780 as “a government of laws and not of men”. A counterpoint to this was the belief by some that what was proposed was a government not of laws but of lawyers, whereby power would reside with an educated elite.

The Declaration of Independence of 1776, composed by Thomas Jefferson, Ben Franklin and John Adams, provides concepts that set the tone of the Constitution. These include inherent and unalienable rights, a government by popular consent, and the establishment of a republic. The Founders believed that each nation of people had the right to self-determination which could not be taken away. They weren’t suggesting rule by direct democracy, but rather governance by an elite group of well-informed citizens or indirect democracy.

D. Principles Not in the Constitution



Democracy doesn't figure into the Constitution at all. US Senators originally were not elected but rather were appointed by state legislatures. The President was not to be elected by eligible voters but rather by an Electoral College. Finally, the right to vote was narrowly restricted by individual states to white men who owned property. It would take a half century for the US to be called a democracy in any true sense of the word, and even now elections are greatly influenced by wealth. One person, one vote was not an ideal concept for the Framers.

The Constitution doesn't contain even one reference to political parties, but they have become its lifeblood, and the competition between the parties has made the US much more democratic than it would have been otherwise. A two-party political system allows voting of the executive to reside with the voting public and not with Congress by ensuring an absolute majority of electoral college votes for the winner. Political parties also force members of the legislative chambers to work together to pass laws avoiding a cacophony of independent voices arguing for separate visions of laws and policies. That said, a strong two-party system also makes it difficult for minority opinions to gain traction.

The Constitution doesn't specifically allow or prohibit the death penalty, but both the Fifth and Fourteenth amendments refer to it. The Fifth refers to capital crimes (that may include a death sentence) but only with federal cases, and most murder offenses are state cases. The Fourteenth refers to state law when it requires "no State shall deprive any person of life, liberty, or property without due process". But due process is regarded as judicial trials, and the Amendment doesn't address the legality of a death sentence for specific crimes.

The word "privacy" does not appear anywhere in the text of the Constitution, yet, federal and state legislatures have enacted laws based on privacy issues, and the judiciary has reviewed specific cases brought before it regarding privacy issues. For example, despite the absence of a statement regarding a right to privacy in the Constitution, privacy acts exist in United States Code legislated by Congress. Also, the U.S. Supreme Court, in many decisions, has ruled that several Constitutional Amendments imply certain privacy rights.

E. The Articles of the Constitution

Article 1: Setting up the Congress.
This Article defines who is eligible for election to Congress, how many members each chamber has, and how the business of Congress is to be done. Sections 8 and 9 of this Article are the most controversial with the former listing of the powers of Congress and the latter defining limits on congressional power. Section 8 includes the *Commerce Clause* which has been used to encompass all economic activities including, among others, FDR's New Deal policies and the advancement of civil rights. Justices favoring a strong federal government have tended to adopt a broad interpretation of the clause, while justices favoring states' rights adopt a more narrow view.

Article 2: Setting up the Executive.
This Article is surprisingly brief, but presidents have assumed and exercised different degrees of power based on their interpretation of this Article. Abraham Lincoln and Franklin Roosevelt expanded executive power during their administrations through the issuance of executive orders, foreign policy, and national security actions. Others, such as James Buchanan and William Howard Taft, did not assume as much executive power. A few of the main issues today regarding presidential power include approving hostile acts against other nations without an official declaration of war, restricting individual rights based on issues of security, and the executive's role in healthcare policies.

Article 3: Setting up the Judiciary.
This Article appears straightforward and mind-numbingly dull and does not grant this branch of government expansive power. In fact, the most important power assumed by the Judiciary isn't in the Constitution at all, the power of judicial review, which the Supreme Court has taken on for itself. As a result, the Supreme Court can also strike down any law passed by both chambers of Congress and signed by the President, if it finds a law is unconstitutional. In this regard, the Judiciary is more powerful than the other two branches of government.

Article 4: Relationships Between States
This article defines the relationship between the states and the federal government, protects the nation and the people from foreign or domestic violence, and determines how new states can join the Union. The first sentence of this Article appears to require every state to recognize the laws and court cases of every other state, but judicial review has established limitations to this requirement. Between 1996 and 2004, 39 states passed laws which defined marriage as the union of a man and a woman and prohibited the honoring of same-sex marriages of other states. But in 2015, the US Supreme Court determined that same-sex marriages were a Constitutional right and obliged all states to recognize these unions.

Article 5: Amending the Constitution

This article outlines the procedures that can be used to change the Constitution. Only 17 amendments have been added since the addition of the Bill of Rights in 1791, which demonstrates how difficult it can be to amend the document.

Article 6: Supremacy Clause
This article declares that the Constitution and the laws and treaties of the federal government are the highest in the land. While state courts rule on state laws, the federal courts can step in and order changes if the state laws go against federal law. Recently, cases have been brought to the courts involving voter rights, immigration, healthcare, and same-sex marriages that challenge the government's enforcement of these policies.

Article 7: Ratifying the Constitution
This Article was used for ratification of the original document and doesn't apply to the ratification of amendments, therefore it's now obsolete.

F. The Amendments to the Constitution

1. The Founding era of 1791 – 1804

   The Bill of Rights (the initial ten amendments)
   First Amendment – Freedom of speech, religion, and assembly
   Second Amendment – Right to bear arms
   Third Amendment – Ban on quartering of soldiers
   Fourth Amendment – Unreasonable search and seizure
   Fifth Amendment – Due process, self-incrimination, and taking private property
   Sixth Amendment – Rights of defendants in criminal proceedings
   Seventh Amendment – Trial by jury in civil suits
   Eighth Amendment – Cruel and unusual punishments
   Ninth Amendment – Rights retained by the people
   Tenth Amendment – Powers reserved to the states or people

   Eleventh Amendment – Lawsuits of citizens of one state against another state
   Twelfth Amendment – Electing the President and Vice President

2. The Reconstruction Era of 1865 – 1870

   Thirteenth Amendment – Abolishing slavery
   Fourteenth Amendment – Rights of citizenship and state obligations
   Fifteenth Amendment – Ban on racial discrimination in voting

3. The Progressive Era of 1913 – 1920

   Sixteenth Amendment – Establishing income tax
   Seventeenth Amendment – Direct election of US Senators
   Eighteenth Amendment – Prohibition

Nineteenth Amendment – Women's right to vote

4. The Modern Era of 1933 - 1992

Twentieth Amendment – Establishing new terms for President and Congress
Twenty-first Amendment – Repealing Prohibition
Twenty-second Amendment – Presidential term limits
Twenty-third Amendment – Voting rights for Washington, DC
Twenty-fourth Amendment – Banning poll tax used to limit voting rights
Twenty-fifth Amendment – Procedure upon vacancy of executive
Twenty-sixth Amendment – Voting age reduced to 18
Twenty-seventh Amendment – No pay raise for Congress until after general election

G. Checks and Balances

The separation of powers is one of the fundamental principles of the U.S. Constitution, and like other principles such as democracy, the rule of law, and judicial review is not specifically mentioned in the text of the Constitution. Madison and the other Framers considered separation of powers to be essential to avoid tyranny, and they established an elaborate system of checks and balances to minimize the accumulation of excessive power in any one of the three branches of government. The concept of checks and balances is a natural extension of separation of powers, but surprisingly they're in opposition to each other.

The Framers deliberately introduced overlaps between the functions of the three branches to check the power of any one of these branches. A check on the Legislative Branch includes the President's veto power (The Supreme Court would assume a separate check – that of judicial review in 1803). Checks on the Executive Branch include impeachment, approval of treaties, approval of executive appointments, and declarations of war (these all by Congress), and review by the Judiciary of executive decisions and orders. There are remarkably few checks on the judiciary, but they include impeachment of a Justice by Congress (only one Supreme Court Justice has been impeached, and he was acquitted), and the ability of the President to grant pardons of judicial convictions.

The Judicial Branch has fewer checks on its power than either of the other two branches of government and exercises more control over the other two branches than those branches over the judiciary. Judicial review, the main power held by the Supreme Court, can used against the President, Congress, and the individual states. Interestingly, it doesn't appear in the text of the Constitution. It effectively gives a group of unelected justices the power to strike down any laws passed by a democratically elected Congress. Thomas Jefferson recognized the danger of runaway power in the hands of the Supreme Court but even he was powerless to check it when he was President, and none of his successors has been able to stop the inexorable growth of judicial power either.

H. Constitution Interpretation

As noted earlier, the power of the Supreme Court to rule on the constitutionality of laws and orders was not granted to that branch of government by the Framers, but some sort of review is necessary to prevent Congress from passing laws that may conflict with the Constitution. This could be done by internal review by Congress, essentially Legislative supremacy, but that could be analogous to the idiom of the "fox guarding the hen house". Another alternative would be the Executive Branch to have supremacy but that hints at a type of authoritarian rule. Proponents of the doctrine of judicial review and interpretation believe it's the only acceptable alternative to make sense of the ambiguous text of the Constitution and apply it to the modern age. Given that the Constitution is only four pages long, it doesn't provide guidance for every issue that can be contentious or debated.

There are differing strategies on how best to interpret the Constitution to ascertain the meaning or intent of the written document. Classification of the various schools of constitutional interpretation is messy, but broadly speaking they include Originalist and Progressive methods. An originalist interpretation assumes that the Constitution had a clear and definite meaning at the time it was written that must be respected. Progressive interpretation assumes that the Constitution is a living, breathing document whose values must reflect a changing world. These two methods can lead to different interpretations. Other methodologies and factors that get used within each of these broad categories include determining judicial precedent, pragmatism, moral reasoning, historical practices, and the inherent biases of the justices.

How an originalist or a progressive interpretation is applied to cases involving the Fourth Amendment is often used to highlight the difference between the two methods of interpretation. An example is the clause "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated". In the 1928 case of *Olmstead v US,* the Supreme Court ruled that a defendant's Fourth Amendment's privacy rights were not violated after law enforcement obtained evidence by installing a wiretap on the defendant's phone, reasoning that the defendant's rights could not be expanded to include anything other than "persons, houses, papers and effects". Most of the Justices on the Court at that time were considered Originalists. The fact that telephone wires and wiretaps didn't exist at the time of the writing of the Constitution was not a concern to them.

By the 1960's, most Justices on the Supreme Court were more progressive in their interpretations of the Constitution. In a case brought before the Court in 1967, *Katz v US*, federal agents had attached a wiretap to a public phone booth to collect evidence in an illegal gambling investigation. The Court's majority opinion in ruling against the government was that there was a reasonable expectation of privacy implied by the Fourth Amendment. The Justices, aware that phone booths didn't exist when the Constitution was written, determined the intent of the Framers didn't preclude the

expectation of privacy when an individual was not at home, and this should be expanded to include a public phone booth with the door closed.

Originalist interpretations must contend with the difficulties of applying founding-era rules outside their historical context. Progressive interpretations that attribute evolving meaning to constitutional text enmesh the judiciary in what are essentially policy judgments. Either of these two broad methods of interpretation can lead to an overextension of the power granted to the judiciary by the Constitution.

I. Landmark Rulings by the Supreme Court

Marbury v Madison 1803
The far-reaching impact of this case brought before the Supreme Court was not the facts of the case itself, but rather Chief Justice John Marshall's claiming the power of judicial review for the Court. This power of the Court is now taken for granted but it was never the intention of the Framers.

Brown v Board of Education 1954
In this milestone decision, the Supreme Court ruled unanimously that separating children in public schools based on race was unconstitutional as it violated the 14th Amendment. It signaled the end of legalized racial segregation in US schools, overruling the "separate but equal" principle set forth in the 1896 *Plessy* v. *Ferguson* case, and serving as a catalyst for expanding the civil rights movement.

NY Times v Sullivan 1964
The ruling in this case secured First Amendment protections for the press and others who speak on public affairs. When a statement is made about a public figure, the Court held, it is not enough to show that the statement is false for the press to be guilty of libel. Instead, the target of the statement must prove that it was made with knowledge of, or reckless disregard for, its falsity.

Griswold v. Connecticut 1965
The Court ruled that the Constitution did in fact protect the right to marital privacy against state restrictions on contraception. While the Court explained that the Constitution does not explicitly protect a general right to privacy, the various guarantees within the Bill of Rights create penumbras, or zones, that establish a right to privacy. Together, the First, Third, Fourth, and Ninth Amendments create the right to privacy in marital relations. This ruling played a major role in expansion of privacy rights on issues such as abortion and LGBTQ rights.

Miranda v Arizona 1966
The Court held that the Fifth Amendment requires that law enforcement officials advise suspects of their right to remain silent and to obtain an attorney during interrogations while in police custody. Any evidence obtained by interrogation of a suspect without this warning would be considered inadmissible.

Roe v Wade 1973
The majority decision in this case held that the right of privacy, implied in the Fourteenth Amendment, protects a woman's choice to have an abortion. They ruled that this right is limited, however, as the pregnancy advances. Interestingly, before she was a Justice, Ruth Bader Ginsburg believed this ruling would ultimately prove to be harmful to women's reproductive rights by leaving it vulnerable to originalist interpretation in future Court cases. She thought the Court's decision should have been based on gender equality and not on "implied privacy".

DC v Heller 2008

The Supreme Court ruled by a 5-4 vote that the District of Columbia's code against carrying unregistered firearms and restricting handgun licensing violated the Second Amendment which includes the statement "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." The majority opinion reasoned that the term "militia" should not be confined to those serving in the military, because at the time the term referred to all able-bodied men who were capable of being called to such service. They interpreted the Amendment to mean to "guarantee an individual's right to possess and carry weapons in case of confrontation." The dissenting opinion reasoned that the Amendment should be interpreted as protecting the right to keep and bear arms for certain military purposes and does not curtail the legislature's power to regulate nonmilitary use and ownership of weapons. They argued that there were colonial laws in force at the time the Constitution was written that regulated the storage and use of firearms in the home, which is an example of using historical perspective in interpreting the Constitution.