

## Unit 2: The US Constitution Notes & Activities

### *The Federalist Papers*

*The Federalist Papers* were a collection of 85 essays written by James Madison, Alexander Hamilton and John Jay

They presented the view of the Federalists who advocated ratification of the new US Constitution.

Among the most notable essays are:

- *Federalist 10* which argued:
  - factions (or special interests) would always exist
  - the best way to deal with them is to control their effects
  - you can control these effects better in a large rather than a small republic
- *Federalist 39* which argued:
  - the Constitution is both a federal and a national document
  - a federal document--a system with many autonomous local governments under a central government
  - a national document--a system with a central government that can exercise specified powers over the autonomous governments
- *Federalist 51* which argued:
  - for separation of powers
  - checks and balances
  - by separating power in government, you control the temptation of having too much power
  - by allowing one faction of government to check the power of the others, you make sure everyone is doing their job under the constitution
- *Federalist 70* which argued:
  - for a vigorous chief executive
  - the characteristics of an effective executive
- *Federalist 78* which argued:
  - for judicial review--the power declare acts of government unconstitutional

### Constitutional Debates

The compromises agreed to at the Constitutional Convention included:

- the issues of slavery
- trade
- representation
- voting

The delegates were philosophically split on how to organize government:

- On the one hand:
  - people should not be given the power to govern
  - a popular government would be too weak in preventing some factions from exploiting others
  - popular majority could also turn into a tyranny
- On the other hand:
  - people would not tolerate an absolute government or an oligarchy
  - there had to be sufficient checks on the government to balance out interests and to prevent natural rights from being abridged

The *Virginia Plan*:

- established a strong central government divided into three branches: legislative, executive and judicial.

The *Connecticut Compromise* (or Great Compromise) established:

- the legislature would be *bicameral* with a House of Representatives and a Senate
- the House would be based on proportional representation determined by a census every ten years
- the Senate would be based on equal representation

The *Three-Fifths Compromise*:

- dealt with the issue of slavery
- for the purposes of representation in the House, slaves would count as three-fifths of a person
- slaves could continue to be imported until 1808 at which time Congress could forbid it

### **The Bill of Rights**

The Framers of the Constitution knew that without a *Bill of Rights* the US Constitution would not be ratified

The Bill of Rights fulfilled an agreement to the Anti-Federalists at the state ratifying conventions that these fundamental rights would be offered for approval

James Madison introduced a set of proposals for the amendments:

- twelve of which were approved by Congress and ten of which were approved by the voters

The Bill of Rights set out fundamental personal guarantees of:

- freedom of expression and belief
- freedom to be secure in yourself and your property
- fair and equal treatment before the law

### **Application of the Bill of Rights through the 14th Amendment**

The Bill of Rights was originally intended to place restrictions of the federal government

The **14<sup>th</sup> Amendment** addresses the issue of whether states can deny the basic rights of the people

The due process clause of the 14<sup>th</sup> Amendment prohibits states from denying any right basic to the concept of ordered liberty

Through a series of Supreme Court decisions, most of our constitutional protections also apply to the states

### **Common Law**

*Common Law*:

- refers to the English legal system that is the basis for most English-speaking countries
- is a series of judge-made laws that have been established through custom and practice
- is commonly called *unwritten law*
- its application usually depends of the unique circumstances of the case

English Common Law was codified by Sir William Blackstone in the 18<sup>th</sup> Century

## **Amendments to the Constitution**

The first ten amendments of the US Constitution comprise the *Bill of Rights*, ratified in 1791

The intent of the Bill of Rights was to explicitly protect individual liberties that many feared may be compromised under the new Constitution

These amendments, particularly the 1<sup>st</sup> Amendment, have been the subject of scrutiny under court decisions since they were adopted

### *1<sup>st</sup> Amendment:*

- sets out five basic liberties: speech, press, religion, assembly and petition
- none of these rights is guaranteed in absolute terms

### *2<sup>nd</sup> Amendment:*

- allows states to maintain an armed militia
- the possession of firearms is regulated by both state and federal guidelines

### *3<sup>rd</sup> Amendment:*

- prohibits the lodging of troops in private homes during wartime

### *4<sup>th</sup> Amendment:*

- provides for proper search and seizure rules
- sets up proper warrants and deals with the exclusionary rule

### *5<sup>th</sup> Amendment:*

- sets up the proper course for criminal proceedings and due process of law
- establishes eminent domain at a fair price
- protects against self-incrimination and double jeopardy

### *6<sup>th</sup> Amendment:*

- the right to a fair and speedy trial in criminal matters
- the right to face and cross-examine accusers
- the right to be represented by an attorney

### *7<sup>th</sup> Amendment:*

- the right to trial by jury in civil matters
- the right to waive trial by jury in favor of a bench trial

### *8<sup>th</sup> Amendment:*

- protects against excessive bail
- prohibits cruel and unusual punishment

### *9<sup>th</sup> Amendment:*

- states that there are other inherent rights not listed in the Bill of Rights

### *10<sup>th</sup> Amendment:*

- rights not granted to the federal government and not prohibited to the states are given to the states

The 11<sup>th</sup> and 12<sup>th</sup> Amendments:

- passed soon after the original ten
- 11th Amendment--cleared up issues of state sovereignty
- 12th Amendment--issues with the Electoral College

The 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Amendments:

- passed after a nearly sixty-year gap
- were a result of the Civil War
- 13th Amendment--ended slavery
- 14th Amendment--provided for equal protection under the law
- 15th Amendment--extended the right to vote regardless of race

After another forty-year gap, the amendments of the Progressive Era were added:

- 16th Amendment--the income tax
- 17th Amendment--direct election of Senators
- 18th Amendment--set up Prohibition
- 19th Amendment--the right of women to vote

During the Great Depression and WWII:

- 20<sup>th</sup> Amendment--ending lame duck sessions
- 21<sup>st</sup> Amendment--repeal of Prohibition
- Since 1950, most amendments have dealt with elections:
- 22nd Amendment--presidential term limits
- 25th Amendment--presidential succession and disability
- 26th Amendment--the right of 18-year-olds to vote
- 27<sup>th</sup> Amendment (1992)--delayed any salary adjustments in Congress until after the next regular congressional election

### **Amending the Constitution**

There are four ways to formally amend the Constitution

First method:

- an amendment may be proposed by a two-thirds vote in both the House and Senate
- must then be ratified by three-fourths of the state legislatures
- 26 of the Constitution's 27 amendments were adopted this way

Second method:

- an amendment may be proposed by a two-thirds vote in both the House and Senate
- must then be ratified by three-fourths of states in conventions called for that purpose
- only one amendment has been adopted this way

Third method:

- two-thirds of the state legislatures can call for Congress to set up a national convention
- the amendment must then be ratified by three-fourths of the state legislatures
- Congress has never called such a convention

Fourth method:

- two-thirds of the state legislatures can call for Congress to set up a national convention
- the amendment must then be ratified by three-fourths of the states in conventions called for that purpose in each state
- no amendments have ever been adopted in this manner, this was the procedure used to adopt the US Constitution itself

## THE FEDERALIST PAPERS

*The Federalist Papers* were written by Alexander Hamilton, John Jay and James Madison to try to convince the citizens of New York to ratify the Constitution. They were arguments attempting to explain the reasons behind the new constitution and to refute many of the arguments brought forth by the anti-Federalists who were opposed to it. These papers were printed separately in various newspapers and were later published collectively as *The Federalist Papers*. We're going to look at the three that are considered to be the most important of the eight-five essays which comprise these papers, *Federalist* #10, 51 and 78.

### **Federalist #10 written by James Madison**

Madison argues in *Federalist* 10 that while factions, or special interest groups, can be dangerous, they are essential to liberty and a democratic government. He defines a faction as...

"...a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."

Madison believes that factions are essential to a free government. He uses the following analogy:

"Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."

Why do factions come about? Madison writes...

"...the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society."

Madison believes that because they are essential, factions will always be present in society. The trick is control the effects these special interests have so that they don't replace the will of ALL the people:

"The inference to which we are brought is that the causes of factions cannot be removed and that relief is only to be sought in the means of controlling its effects."

The best way to control the effects of factions are in a large, not a small society. The greater the number of people, the less likely a small faction can gain control.

"The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens...."

### **Federalist 51 by James Madison**

James Madison in *Federalist* 51 argues that separation of powers, which we learned about in Unit 1, is essential in the new government because it will divide powers and allow the three branches of government to continually check the powers of the others.

"In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others."

Madison begins examining the nature of man in determining that he is ambitious or continually seeks to further his own causes. This ambition is key in balancing the powers of government. The ambition of one branch of government can be used to control the ambition of another. And man's interests should revolve around their constitutional duties, not their personal interests:

"But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others....Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional right of the place."

In what is perhaps the most well known quote from *The Federalist Papers*, Madison argues for the need for separation of powers. Going back to his arguments that factions or special interests will always be present in politics, it is as important for government to lay down a fair governing system for its citizens as it is for the government to make sure it doesn't run away with the power given it by the Constitution. Madison writes...

"It may be a reflection on human nature that such devices [separation of powers] should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

We learned about federalism in this unit. Federalism provides yet another check on the power of the federal government by giving certain powers to the states. This also helps to separate powers. Madison asserts...

"In the compound republic of America, the power surrendered by the people is first divided between two distinct governments [state and federal], and then the portion allotted to each subdivided among distinct and separate departments. The different governments will control each other, at the same time that each will be controlled by itself."

### **Federalist Paper 51--James Madison**

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#### **For Discussion**

1. Which of the following statements would Madison agree with based on his views in the above excerpt?
  - a. Government is necessary.
  - b. The people should elect government leaders who act like angels.
  - c. Elected government officials should be controlled by a system of "checks and balances." (Refer to your government textbook if you are not familiar with this term.
2. What would you say was Madison's general opinion of people in government: angels? devils? something else?

#### **Individual Assignment**

Find and describe five examples of "checks and balances" in the Constitution (refer to your government textbook).

### **Federalist 78 by Alexander Hamilton**

Alexander Hamilton, in *Federalist 78*, argues that federal judges should hold their positions for life. He believes that it is yet another check against oppressions by the other branches:

"According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices during good behavior....In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body."

By placing judges in their positions for life, the comings and goings of various Presidents and members of Congress will not have an effect on the consistency of the courts in interpreting the Constitution. Hamilton writes...

"If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty."

It is important for the courts to be able to examine acts of Congress or other law-making bodies in the United States and determine whether those laws are constitutional or not. This, as we know, is called judicial review. Hamilton defines judicial review as follows:

"The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."

Under judicial review, the judges cannot make their own law but must rely on what is written or implied in the US Constitution. This document forms the basis for determining an act of the legislature as constitutional or not.

"They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former."

### **Federalist Paper 78--Alexander Hamilton**

"If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of . . . designing men."

### **For Discussion**

1. What does Hamilton mean by "the permanent tenure of judicial offices"? Does Hamilton support or oppose this idea?
2. What does Hamilton mean when he says that an "independent spirit in the judges" is essential for them to do their duty?

### **Individual Assignment**

Write a letter of about 100 words to the editor of a newspaper agreeing or disagreeing with the view that the U.S. Supreme Court justices should be elected for limited terms of office.

As we know from the reading, the US Constitution was ratified, not by the nine-thirteenths required but by all thirteen states. It is the oldest working constitution in the world because of its capability to be amended. It spells out a framework for government and our three federal branches, which we will examine in the next few units. It also spells out your rights as a US citizen, which we will discuss toward the end of the semester.

## **CONGRESSIONAL POWERS AND INVESTIGATING THE U.S. CONSTITUTION**

**DIRECTIONS:** For each of the following situations, determine if Congress is permitted or prohibited from carrying out the action. You will need to cite where in the U.S. Constitution support for your answer can be found. Cite the article, section and paragraph numbers (see sample).

1. The Senate holds an impeachment trial for a U.S. President and the Vice President presides over the trial.  
ANSWER: No, Article 1 Section 3 Clause 6:  
The Senate shall have the sole Power to try all Impeachments:  
When the President of the United States is tried the Chief Justice shall preside....
2. Congress sets up a new federal court to deal specifically with naturalization issues.
3. 88A 40-year-old man who was born in the U.S. of American parents but who grew up in Great Britain for all but three of his years is elected President.
4. Congress allows the state of California to sign a separate treaty with Japan to obtain a better balance of trade deal.
5. An American ambassador to Chile is tried by the U.S. Supreme Court.
6. A 25-year-old woman who became a U.S. citizen 7 years ago decides to run as a US Representative to Wyoming, the state in which she resides.
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7. An individual commits a felony in Kentucky and flees to Tennessee where he is captured. Tennessee refuses to send the prisoner back for trial in Kentucky and decides to hold the trial in their state instead at the insistence of Congress.
8. The President declares war on a foreign country.
9. The Senate arrives at a 50-50 vote on an important health bill. The U.S. Vice President casts the deciding vote to break the tie.
10. Congress allows Nevada to boost the purchase of state-produced merchandise by charging an extra tax on goods manufactured in and shipped from Arizona.8888



## **UNDERSTANDING THE AMENDMENTS TO THE U.S. CONSTITUTION**

**DIRECTIONS:** For each of the following situations, determine if the action can be carried out. You will need to determine what amendments to the Constitution permit or prohibit this action (see sample).

1. A law is passed giving men the ability to vote at age 18 but women at age 21.  
ANSWER: No, 26th Amendment
2. A U.S. President decides he wants to run for a third four-year term as President.
3. An unscrupulous businessman is holding three legal immigrants in involuntary servitude in exchange for payment to bring them to the United States.
4. A suspected criminal is found not guilty on the charges against him. Prosecutors decide to try him again for the same crime but the courts reject the motion.
5. The President of the United States resigns. The Speaker of the House of Representatives becomes acting president until the Vice President is officially declared President or a new President is elected by the people.
6. A 50-year-old steel worker has a glass of champagne at midnight on New Year's Eve 1935. He is arrested for violating Prohibition.
7. Certain citizens are turned away at one polling place because of their race and cannot cast their ballots in 99hotly contested presidential election.
8. A warrant is issued without probable cause and evidence of a crime is collected. A court throws out the evidence during the trial as being unconstitutional.
9. Two senators are elected from each state by the state legislature. They both serve six-year terms.
10. A group of citizens takes out a permit and hold a peaceful demonstration against the build-up of nuclear weapons.
11. A defendant is excluded from the courtroom while witnesses who saw her commit the crime testify. This is done to preserve the anonymity of the witnesses.
12. The House of Representatives votes themselves a pay raise. They must wait until they are re-elected, however, to receive it.