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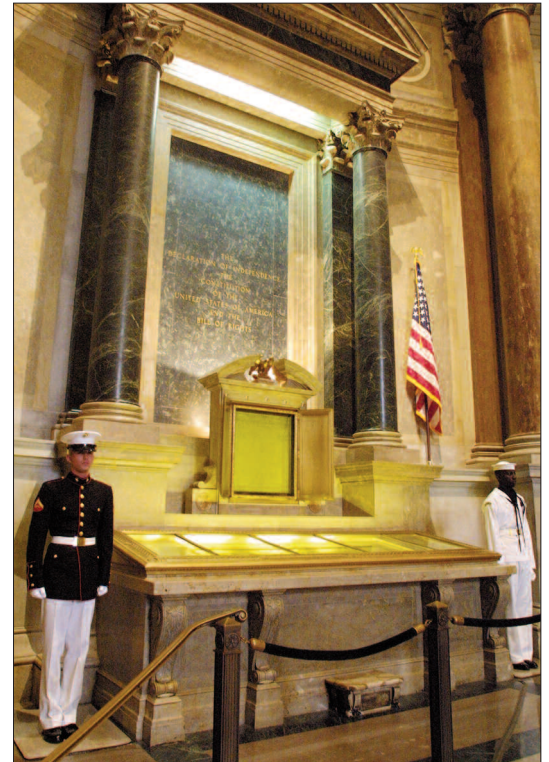
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## Re-examining the Constitution

*Are major changes needed?*

**T**he 225th anniversary of the U.S. Constitution finds Americans in a less celebratory mood than they were during the Bicentennial a quarter-century ago. The Constitution's intricate system of checks and balances and separation of powers is sometimes blamed for the political gridlock in Washington. Some of the basic structural features are also viewed as outmoded, such as the Electoral College, equal representation for each state in the Senate and life tenure for Supreme Court justices. And many conservatives and libertarians, including the Tea Party movement, complain that the federal government has taken on powers beyond what the Constitution was intended to allow. Simmering discontent on both the left and the right has led to efforts to force Congress to call a convention to propose constitutional amendments. Public opinion polls indicate, however, that most Americans view the Constitution favorably.



*The Declaration of Independence and Constitution are preserved at the National Archives in Washington. As the Constitution's 225th anniversary approaches, Americans appear more divided about the nation's founding document than they were 25 years ago.*

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# Re-examining the Constitution

BY KENNETH JOST

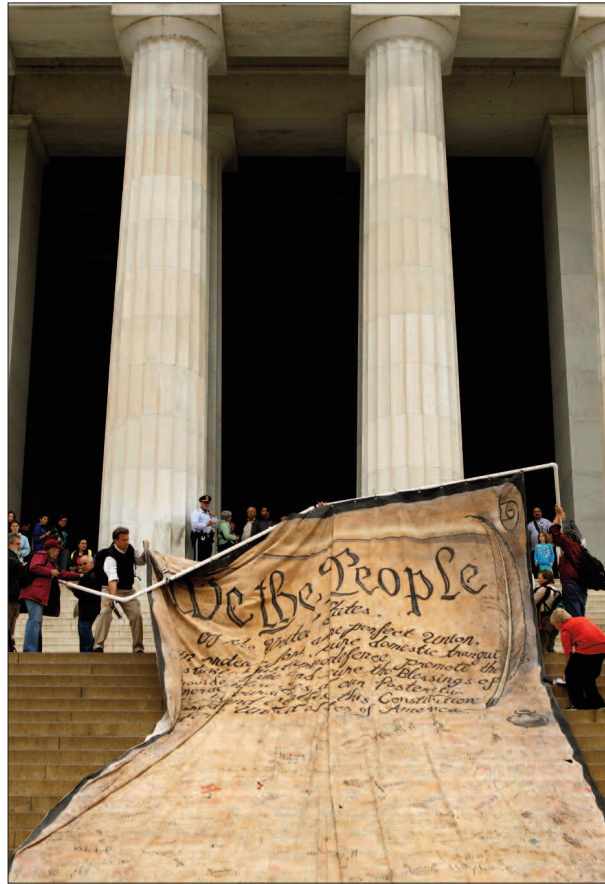
## THE ISSUES

Tours at the National Constitution Center in Philadelphia end in Signers' Hall, where visitors can stand shoulder to shoulder with life-size statues of 42 of the delegates who assembled in the summer of 1787 to rewrite the governing charter for the infant republic. There they are: George Washington, president of the four-month-long convention; Benjamin Franklin, the elder statesman; James Madison, the young politician later dubbed "the father of the Constitution"; Roger Sherman, author of the crucial compromise between large and small states; and 38 other delegates representing all of the 13 states except tiny Rhode Island, including the three who refused to sign. \*

Visitors to the center learn of the dangers besetting the new nation under the existing Articles of Confederation: threat of foreign invasion, economic rivalries between states and widespread unrest and disorder. The delegates to the so-called Federal Convention had gathered to revise the charter but ended by replacing it with something new and groundbreaking: a "Constitution for the United States of America."<sup>1</sup> (See p. 744.)

Once in Signers' Hall, visitors are invited to sign their names alongside a reproduction of the Constitution — "in support of constitutional govern-

\* In all, 70 delegates were selected to represent the 12 participating states at the convention; 55 of those actually attended sessions; only 39 signed the final document.



Getty Images/Chip Somodevilla

*Demonstrators at the Supreme Court unfurl a banner depicting the Constitution on Oct. 20, 2010, to protest the court's Citizens United decision allowing unlimited corporate spending in political campaigns. Some liberals want to amend the Constitution to undo the controversial decision.*

ment everywhere." Millions of visitors have done so since the independent, publicly and privately supported center opened on July 4, 2003. But when University of Texas law professor and constitutional scholar Sanford Levinson came to Philadelphia for the center's grand opening, he decided not to sign.

Levinson balked because he thinks the Constitution is out of date, given "our own twenty-first century norms." As he relates in his book *The Undemocratic Constitution*, he hopes for "a national conversation" about the Constitution in place of the automatic acceptance of it for current times.<sup>2</sup>

Then and even today, Levinson's book stirred debate in legal and academic circles, respectful but often negative. Polls show that, despite controversies, the Constitution still holds a special place in public opinion as well. (See poll, p. 745.) Yet, as the Constitution's milestone 225th anniversary on Sept. 17 approaches, Americans appear more ambivalent or divided about the Constitution than they were 25 years ago. During the Bicentennial, the only prominent dissent came from Supreme Court Justice Thurgood Marshall, who criticized the Constitution for perpetuating slavery.<sup>3</sup>

"We're very much divided as a nation about what we see as the appropriate role of the government," says David Bodenhamer, a professor of history at Indiana University's School of Liberal Arts in Indianapolis and author of a more celebratory book, *The Revolutionary Constitution*. "We're forced to think once again about what those fundamental assumptions of the relationship of the government to the individual are."<sup>4</sup>

"We have in this country people, on both sides, feeling that the Constitution has let them down," says Gloria Browne-Marshall, an associate professor of constitutional law at John Jay College in New York City. "When it's there for them, they think the Constitution is a wonderful document. And when it isn't, they think the Constitution needs to be amended."

Debates about the Constitution have topped the political agenda ever since the closely contested 2000 presidential race between Republican George W. Bush and Democrat Al Gore gave the nation a crash course in the

*Continued on p. 745*

## The Framers' Constitution: 'A More Perfect Union'

*The Constitution drafted in 1787 began with a "Preamble" followed by seven articles. The first three outlined the structure and powers of Congress, the president and the judiciary.*

*The next three pertained to the powers and responsibilities of the states, the amendment process and the powers of the national government. The final article set out the requirements for ratification. Here are some of the major provisions:*

### **Preamble**

"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

### **Article I**

Vests "all legislative Powers herein granted" in "a Congress," to consist of a Senate, with two members from each state, and a House of Representatives, with members apportioned by population; age, residency requirements set out; slaves to be counted as three-fifths of a person for apportionment.

Requires approval by each chamber of Congress and signature by president for enactment of law; if "returned" by president, bill may become law after two-thirds vote in each chamber.

Makes each chamber exclusive judge of qualifications and elections of members; no member to be "questioned in any other Place" for "any Speech or Debate."

Grants Congress so-called "enumerated" powers (sec. 8), including power to tax and spend, regulate interstate and foreign commerce, declare war, raise and support armies and "make all Laws . . . necessary and proper" for executing "foregoing Powers."

Bars restriction on importation of slaves until 1808.

Bars states from entering any treaty with another country or laying duties on imports or exports without consent of Congress.

### **Article II**

Vests "the executive Power" in "a President of the United States of America."

Prescribes election of president by "electors" to be "appoint[ed]" by each state as directed by legislature; each state to have number of electors equal to the state's "whole Number of Senators and Representatives;" meeting of electors, counting of ballots detailed; election by House of Representatives, with one vote per state, if no candidate has majority.

Makes president "commander in chief" of Army and Navy.

Grants president power to nominate, with "Advice and Consent" of Senate, ambassadors, judges and (most) "Officers of the United States."

Permit removal of president and vice president after impeachment (by House) and conviction (by Senate) of "Treason, Bribery, or other high Crimes and Misdemeanors."

### **Article III**

Vests "the judicial Power" in "one supreme Court" and inferior courts to be created by Congress; judges to hold offices "during good Behaviour;" compensation not to be diminished.

Extends judicial power to, among others, cases arising under Constitution, federal laws, treaties; cases where United States is party; controversies between two states or between citizens of different states; Supreme Court to have original jurisdiction in limited number of cases, appellate jurisdiction in all others.

### **Article IV**

Requires states to give "Full Faith and Credit" to official actions of other states, recognize "all Privileges and Immunities" of citizens of other states and extradite persons accused of crime in another state upon request of executive authority of that state.

Requires states to deliver escaped slaves upon claim by owner.

Permits admission of new states; no state to be divided or joined with another without consent of affected state or states and of Congress.

### **Article V**

Permits amendments to be proposed by two-thirds vote of both houses of Congress or by a convention called for by two-thirds of the state legislatures; amendments effective when ratified by three-fourths of the states by legislatures or conventions as Congress directs.

Bars until 1808 any amendment to restrict importation of slaves.

Prohibits depriving any state of equal representation in Senate without state's consent.

### **Article VI**

Accepts all debts of states as "valid against the United States."

Makes the Constitution and laws and treaties of the United States "the supreme Law of the Land."

Bars any religious test for any office of the United States.

### **Article VII**

Requires ratification by nine states to establish the Constitution "between the States so ratifying."

Continued from p. 743

Electoral College and the House of Representatives' back-up role in the event of a deadlock, as spelled out in the Constitution.<sup>5</sup> Bush came under nearly continual criticism throughout his eight years in the White House from liberals and libertarians for stretching presidential powers in what he called the "global war on terrorism." President Obama and congressional Democrats have been under all but constant criticism from conservatives and libertarians for stretching the federal government's powers in the new health care law.

Levinson broadly views what he sees as the Constitution's faults as among the causes of the growing discontent with politics generally and the declining public confidence in all three branches of the federal government. "There is just generally a much greater level of dissatisfaction with the state of American politics," Levinson says today. "What drives me crazy is the inability to engage in connecting the dots to recognize that the Constitution itself bears part of the blame."

Some constitutional scholars agree. "There is a fairly general perception that the constitutional structure that we regarded as normal 25 years ago isn't working," says Glenn Reynolds, a professor at the University of Tennessee College of Law in Knoxville and a conservative commentator on his Instapundit.com website and in other media.

Others say the concerns about dysfunctional government stem more from the political culture in Washington and partisan polarization nationwide than from the Constitution. "I agree that the Constitution is a deeply imperfect instrument, but I don't believe that the imperfections are tightly tied to our current predicament," says Akhil Reed Amar, a law professor at Yale University in New Haven, Conn., and prolific author on constitutional topics.<sup>6</sup> "I don't see what dots there are to be connected," he adds.

## 'Leave It Alone'

*More than half of Americans say the Constitution should be left alone, and two-thirds say it has a positive impact on life in the United States. Forty-three percent, however, think the Constitution does not place enough restrictions on what government can do.*

### *Which best describes your view toward changing the Constitution?*

<b>Leave it alone</b>	<b>57%</b>
<b>Make minor changes</b>	<b>39%</b>
<b>Make major changes</b>	<b>3%</b>

### *Does the Constitution place too many or not enough restrictions on what government can do?*

<b>Not enough</b>	<b>43%</b>
<b>Right amount</b>	<b>33%</b>
<b>Too many</b>	<b>15%</b>

### *How do you rate the U.S. Constitution in terms of how it impacts life today?*

<b>Excellent or good</b>	<b>67%</b>
<b>Poor</b>	<b>7%</b>

*Source: Rasmussen Reports, June 2012, [www.rasmussenreports.com/public\\_content/politics/general\\_politics/june\\_2012/57\\_say\\_constitution\\_should\\_be\\_left\\_alone](http://www.rasmussenreports.com/public_content/politics/general_politics/june_2012/57_say_constitution_should_be_left_alone)*

Levinson favors rewriting significant provisions in each of the Constitution's first three articles dealing with Congress, the president and the judiciary. Among other changes, Levinson would enlarge the Senate to give bigger states more senators, replace the Electoral College with direct popular election of the president and limit the lifetime tenure of Supreme Court justices.

Amar says he favors or could be open to some of those changes, but discounts their importance. "I think

those things tidy up the democratic project in ways that make the project more aesthetically appealing, but I don't think they change the system," he says.

Some constitutional scholars, on the other hand, flatly oppose any tinkering with the constitutional infrastructure. "What makes America exceptional is that we rejected a majoritarian form of democracy in favor of a limited-power republic," says Randy Barnett, a professor at Georgetown Law School in Washington and a libertarian critic of the federal government's expanding role since the 1930s. "I don't favor amending the Constitution to reverse those structural features."

Barnett, author of *Restoring the Lost Constitution*, has his own ideas for amending the Constitution, including limiting Congress' powers under the Commerce Clause more in keeping with what he regards as the provision's true meaning.<sup>7</sup> Barnett played a major role in crafting the legal and intellectual argument behind the court challenge to Obama's health care plan. Another of his proposals would allow a vote by legislatures in two-thirds of the states to repeal a law passed by Congress.<sup>8</sup>

The Framers — as the delegates to the convention have come to be called — included a procedure for amendments in Article V of the Constitution, but it is difficult, more difficult than provisions in other countries' governing charters. Some experts see the difficulty as fostering stability. "Perhaps it's good not to amend it too easily," says Caroline Fredrickson, president of the American Constitution Society, a progressive advocacy group.

Levinson complains that the procedure used for all 27 amendments so far — proposals submitted by Congress to state legislatures for ratification — imposes a daunting impediment in practice because members of Congress have little interest in or time for constitutional revision. He favors use of the second route set out in Article V: a convention called by Con-

## The Bill of Rights: Protections and Prohibitions

*Congress and the states approved 10 amendments to the Constitution, known as the Bill of Rights, in the first two years of the new national government. Originally, the provisions applied only to the federal government, but the Supreme Court has now held almost all of them applicable to state and local governments under the so-called incorporation doctrine.*

### **First Amendment**

*Prohibits any law “respecting an establishment of religion, or prohibiting the free exercise thereof;” protects freedom of speech and press; guarantees right to “peaceably assemble” and to “petition the Government for redress of grievances.”*

### **Second Amendment**

*Protects “right of the people to keep and bear arms.”*

### **Third Amendment**

*Prohibits quartering of soldiers in private homes during peacetime.*

### **Fourth Amendment**

*Prohibits “unreasonable searches and seizures” of “persons, houses, papers, and effects;” requires probable cause for warrants, which must specify place to be searched and person or things to be seized.*

### **Fifth Amendment**

*Requires grand jury indictment (not incorporated against states); prohibits double jeopardy; establishes privilege against self-incrimination; requires due process; prohibits taking of private property for public use except with “just compensation.”*

### **Sixth Amendment**

*Protects, in all criminal prosecutions, right to “speedy and public trial” by jury, with rights to be informed of charges, confront witnesses and be represented by counsel.*

### **Seventh Amendment**

*Protects right to jury trial in “suits at common law” (not applicable to states).*

### **Eighth Amendment**

*Prohibits “excessive bail,” “excessive fines,” “cruel and unusual punishments.”*

### **Ninth Amendment**

*Specifies that enumeration of rights “shall not be construed to deny or disparage others retained by the people.”*

### **Tenth Amendment**

*Provides that powers “not delegated to the United States . . . nor prohibited . . . to the States” are “reserved to the States respectively, or to the people.”*

gress when requested by two-thirds of the states, with ratification required from three-fourths of the states by their legislatures or specially called conventions. That idea draws mixed responses from scholars, advocates and politicians. (See “At Issue,” p. 757.)

However difficult the amendment process may be, interest in constitutional tinkering appears to be spiking in this anniversary year. *The New York Times* compiled a diverse list of possible changes from various invited experts this summer. The online magazine *Slate* drew a wider array of ideas when it threw the topic out for crowd sourcing. (See sidebar, p. 752.)

Historian Carol Berkin finds no fault with the current interest in possible changes despite the laudatory account of the convention in her book *A Brilliant Solution*.<sup>9</sup> The Framers “would not have been upset if we changed the Constitution,” says Berkin, a professor at Baruch College, City University of New York. “These were ordinary men, and what makes them extraordinary is that they compromised every day. They knew that they had to give up something in order to save the country.”

As Sept. 17 approaches, schools nationwide are required under a law passed in 2004 to provide educational programming that day on the history of the Constitution. The Philadelphia center is marking the anniversary with various events, including its annual Liberty Medal ceremony on Sept. 13; the 2012 awardee is Muhammad Ali, the former professional boxer, who is being honored as an “outspoken fighter for religious and civil rights.”<sup>10</sup> As these observances take place, here are some of the questions being discussed:

### ***Should the structure of Congress under the Constitution be changed?***

The Constitutional Convention came close to collapsing in June 1787 over the structure of the legislative body for the new government. The Virginia

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Plan, favored by Madison and other strong nationalists, called for two houses of Congress with the number of members in each chamber based on each state's population. Small states, led by New Jersey's delegation, wanted a unitary legislature with one vote per state, just as in the Articles of Confederation.

With each side having threatened to pull out of the convention over the issue, the Connecticut delegation — Roger Sherman and Oliver Ellsworth — offered the compromise that saved the project: proportional representation in the House of Representatives, equal representation by state in the Senate. With voting by states, the plan carried by a single vote, 5-4, with two delegations split and New York delegate Alexander Hamilton absent.<sup>11</sup>

More than two centuries later, the Connecticut Compromise remains the cornerstone of congressional architecture. But Levinson at the University of Texas is one of many academics who say the rule giving each state two senators without regard to population is utterly undemocratic. "Why should you be stuck to eternity with a compromise that was explainable only because of political considerations then and that hasn't worked out well?" he asks.

In his book, Levinson illustrates the results of small states' disproportionate voting power in the Senate. As one example, he quotes a study showing that in 2005, the Senate could have passed a bill with the votes of 51 Republican senators whose total votes amounted to less than 20 percent of the total national vote "The equal-vote rule in the Senate makes an absolute shambles of the idea that in the United States the majority of the people rule," Levinson writes.<sup>12</sup>

Indeed, full-throated defenses of the equal-vote rule appear to be hard to find among constitutional law experts. "I prefer a proportionally representative system," says Yale profes-

sor Amar. A change, he says, might make "a smallish difference." Historian Bodenhamer calls the Senate's composition "a real structural flaw that in some sense probably should be addressed."

"I can't figure out what damage it has, the current system," counters Donald Lutz, a professor of philosophy at the University of Houston who has studied national constitutions in the United States and other countries. "It's worked so well so far. What exactly is broken except for some people's sensibilities?"

Whatever the pros and cons, the rule appears impossible to change because of a specific provision agreed to at the convention that prohibits depriving any state of its "equal suffrage" in the Senate without the state's consent. "No small state is going to vote to do that," says Bodenhamer. Levinson agrees. "That's not going to happen in my lifetime," he says. "It probably won't happen in my grandchildren's lifetime."

Levinson has other complaints about the Senate — in particular, the current filibuster rule that, in operation today, effectively requires a 60-vote majority for a bill to pass. Amar agrees. "The Senate is ungovernable at 60," he says. But Amar quickly notes that no constitutional amendment is needed to change the Senate rules.

Other constitutional changes in Congress' structure currently being discussed seem almost as unlikely of adoption as any change in the equal-vote rule. One proposal pushed by elements of the Tea Party movement and other states' rights advocates is to repeal the 17th Amendment, which established direct election of senators in place of election by state legislatures as provided in the original Constitution. "Senators were emissaries of state government," says Adam Freedman, a conservative commentator and author of the recently published *The Naked Constitution*. "That was key to the original design."<sup>13</sup>

Levinson acknowledges the reasons supporters of state autonomy vis-à-vis the federal government favor the change. But he calls the idea of returning to election of senators by state legislatures "remarkably stupid, guaranteed to make the Senate even more egregiously parochial than it is now."

At least four current Republican candidates for the Senate have signaled interest in the idea. But even sympathetic constitutional law experts acknowledge that change is unlikely. "The 17th Amendment weakened the states' ability to resist the expansion of federal powers," writes John Yoo, a conservative law professor at the University of California-Berkeley and former Justice Department official in the George W. Bush administration. "The problem is that there is no point to trying to fix this problem — an effort to amend the Constitution will be fruitless."<sup>14</sup>

University of Tennessee professor Reynolds offers a more novel structural change: a new, third house of Congress empowered only to repeal existing federal laws. "Right now, there's no body that has an incentive to repeal laws," he says. Levinson disagrees. "We already have a third house of Congress," he says. "It's called the White House, with its power to veto and, therefore, to shape legislation. Or some might say that the Supreme Court plays that role, on occasion."

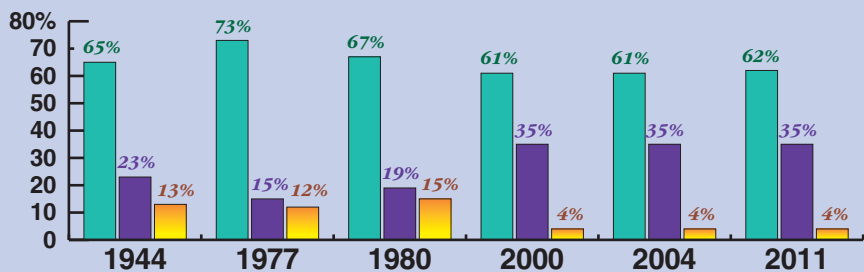
### ***Should the election of the president under the Constitution be changed?***

Delegates to the Constitutional Convention struggled to decide how to elect the president, who was to head the executive branch of the new government. Popular election was proposed but had scant support. Instead, delegates first voted in favor of election by the Senate. With persistent doubts about potential conflicts of interest, however, the convention referred the issue in August to the catchall Committee on Postponed Matters.

## Most Dislike Electoral College System

More than 60 percent of Americans say the Constitution should be amended to allow U.S. presidents to be elected by popular vote rather than through the Electoral College system, reflecting a view that has prevailed since at least 1944. Critics of the Electoral College say candidates can win the White House without gaining a popular majority. Supporters say the system ensures that the winning candidate has support from a broad, nationwide coalition.

**Do you prefer to amend the Constitution to elect presidents by popular vote or keep the current Electoral College system?**



\* Poll results in 1944, 1968, 1977 and 1980 include responses of “no opinion.” All others include responses of “both,” “neither,” and “no opinion.” Figures may not total 100 because of rounding.

■ Popular vote  
■ Electoral College  
■ Both/neither/no opinion

Sources: “Americans Have Historically Favored Changing Way Presidents Are Elected,” Gallup, November 2000, [www.gallup.com/poll/2323/Americans-Historically-Favored-Changing-Way-Presidents-Elected.aspx](http://www.gallup.com/poll/2323/Americans-Historically-Favored-Changing-Way-Presidents-Elected.aspx); Lydia Saad, “Americans Would Swap Electoral College for Popular Vote,” Gallup, October 2011, [www.gallup.com/poll/150245/americans-swap-electoral-college-popular-vote.aspx](http://www.gallup.com/poll/150245/americans-swap-electoral-college-popular-vote.aspx)

The committee’s recommendation, submitted on Sept. 4, set out the hybrid system that came to be called the Electoral College. Electors were allotted to each state based on the number of representatives and senators, to be chosen by the state legislature in whatever manner it chose. Each elector was to vote for two candidates. Each state legislature was to send the results to the Senate, which would open and count the ballots and declare a winner if a candidate received a majority; the runner-up was to be vice president. If no candidate received a majority, the election would go to the House, where each state would have one vote.<sup>15</sup>

The system malfunctioned in the nation’s third and fourth presidential elections. In 1796 Federalist John Adams was elected president and his political foe Thomas Jefferson, the runner-up, as vice president. In 1800 no candidate had a majority, and the election was thrown into the House, which required 36 ballots to choose Jefferson. The 12th Amendment, ratified in 1804, established the current system of separate balloting for president and vice president.

Even with that change, the Framers would be hard pressed to recognize the current system of nationwide, media-intensive campaigns organized by political parties, with anonymous electors chosen by popular vote. Yet

the superstructure remains, to the dismay of many experts and seemingly a majority of Americans, who would replace it with direct popular election. “I think the Electoral College is the most outmoded piece in the Constitution,” says historian Berkin.

“Popular election, this is what we expect from other countries,” says Browne-Marshall, the John Jay professor. “I think we are being hypocrites in allowing the Electoral College.”

Opponents of the Electoral College point in particular to the four presidential elections in which the winner did not come in first in the popular vote — most recently, Bush’s election over Gore. (The others: John Quincy Adams, 1824; Rutherford B. Hayes, 1876; Benjamin Harrison, 1888.) Levinson shares that concern, but in his book he sets out several other flaws at length.<sup>16</sup>

For one thing, Levinson says, the system results in candidates’ focusing disproportionately on “battleground” or “swing” states and virtually writing off states with solid majorities for one party or the other. “As someone who lives in both Massachusetts and Texas, I saw nothing at all of the 2004 campaign,” he writes.

Worse, Levinson says, is the possibility of an Electoral College deadlock being thrown into the House — on a one vote per state basis. “This provision,” he writes, “is a national constitutional crisis waiting to happen.”

Yale law professor Amar struck the same ominous note in a law review article in the mid-1990s, describing the Electoral College as “a constitutional accident waiting to happen.”<sup>17</sup> Today, however, he voices less concern about the system. “I like direct election,” he says, but then adds that he doubts that a change would make a significant difference in political campaigns. “You change the metric,” he says. “You don’t change the system.”

Supporters of the Electoral College see one major advantage to the sys-



tem: greater certainty than with a popular vote in a close election, with all but inevitable voting irregularities and errors in countless voting places. “Every time the presidential election is within 3 percent, you don’t know who wins,” says Lutz, the University of Houston professor. “The Electoral College gives us a winner — and what looks like a big winner because of the way it’s counted.”

Reynolds, the University of Tennessee professor, is tentative on the issue but sees a similar advantage in reducing the likelihood of vote recounts and contests. “There are reasons to think that the Electoral College compartmentalizes fraud,” he says. “Under the Electoral College, once a state’s won, extra votes don’t matter. In a national popular-vote system, any extra vote created by fraud anywhere could conceivably tip the result.”

Barnett, the Georgetown professor, opposes direct election for a different reason. He says a popular-vote system would shift power to populous, liberal states. “California would swamp a good deal of the rest of the country,” he says.

Among other changes affecting the presidency, Levinson favors shortening the two-and-a-half-month transition period between the election and inauguration. (The transition was even longer until the 20th Amendment in 1933 moved the inauguration from March 4 to Jan. 20.) In a more sweeping change, Levinson would provide for a president to be removed from office by a vote of confidence by two-thirds majorities in each chamber of Congress.

Barnett forcefully disagrees. “The Framers’ Constitution did not give us that form of government,” he says.

Of Levinson’s various proposals, only replacing the Electoral College with popular election has received wide-

jected for fear of weakening both Congress and the president.<sup>19</sup>

The judicial article is also the sparest of the first three. It vests “the judicial power” in a supreme court and “such inferior courts” as Congress decides to establish. The courts’ power was defined, significantly, to extend to “all” cases arising under federal law as well as to other categories of cases. And the Framers protected judges from control by the other branches by giving them tenure “during good behavior” and barring pay cuts while in office.

The Supreme Court had little to do in its first decade, but in 1803 Chief Justice John Marshall turned a partisan dispute over a judicial appointment in Washington, D.C., into the landmark ruling *Marbury v. Madison*, which established the court’s

power to declare acts of Congress unconstitutional. President Thomas Jefferson criticized the ruling as a judicial power grab. Despite continuing criticism in some conservative circles, the power of judicial review is now firmly established.

Like the Framers, Levinson devotes less attention to the judiciary than to Congress or the president. And he endorses only one significant structural change: an end to what he calls the “indefensible system of life tenure for judges,” especially for Supreme Court justices. Life tenure, he writes, “is an idea whose time has passed.”<sup>20</sup>

Civics textbooks typically treat the constitutional provision for life tenure for federal judges as essential to an independent judiciary. But the idea of changing life tenure for Supreme Court justices has drawn support over the



*Tea Party backers rally in Washington in opposition to the growth of the federal government on Sept. 12, 2010. Elements of the Tea Party movement and other states’ rights advocates are pushing to repeal the 17th Amendment, which established direct election of senators in place of election by state legislatures, as the Constitution originally stipulated.*

spread attention; it has consistently registered majority support in public opinion polls over several decades.<sup>18</sup> “Every poll has shown majority support for getting rid of the Electoral College,” Levinson says. “But it’s not going anywhere.”

***Should the tenure of Supreme Court justices under the Constitution be significantly changed?***

Delegates to the Constitutional Convention devoted less time to establishing the judicial branch of the new government than they did with regard to Congress and the president. There was also less controversy. The only major point of contention came over a proposal to give the judiciary a veto over legislation passed by Congress — a proposal advanced to strengthen the president’s power but eventually re-

AFP/Getty Images/Nicholas Kamm

past decade from a surprising number of law professors representing a range of ideological views. Concerns about the mental and physical capacity of aging justices are one motivation for the proposal, but — as Levinson explains — “not the main one.”

Instead, limiting justices’ tenure is aimed at promoting more frequent and more regular turnover on the court. With long tenure, Levinson argues, justices may stay wedded to legal views dating from an earlier era. In addition, regular turnover could reduce what he calls the “*sturm und drang*” (storm and stress) of contemporary Supreme Court confirmation fights and eliminate the justices’ political maneuvering to time their retirements so that a like-minded president names their successor.

One reason for increased interest in revising lifetime tenure is the trend toward justices serving longer than in the past. Justices who served from 1789 to 1970 served an average of 14.9 years, according to data compiled by Northwestern University professors Steven Calabresi and James Lindgren. Justices from 1970 through Justice Sandra Day O’Connor’s retirement in 2006 served considerably longer on average: 26.1 years.<sup>21</sup>

The most concrete proposals currently under discussion call for 18-year term limits for justices. Calabresi and Lindgren propose instituting the change by constitutional amendment. Paul Carrington, a professor at Duke Law School, and Roger Cramton, a professor at Cornell Law School, have an alternative that they believe could be enacted by statute. Under their plan, justices would have 18-year terms of active service on the court. Thereafter, a justice would be available to serve on lower federal courts or the Supreme Court itself to substitute for justices forced to disqualify themselves from an individual case.<sup>22</sup>

Lutz, the University of Houston professor, sees no rationale for the 18-year term limit, but looks favorably on

a mandatory retirement age. “That would make more sense for me,” Lutz says. “I think the Supreme Court should turn over every once in a while.”

Lifetime tenure still has supporters, however, even from a strong critic of contemporary Supreme Court jurisprudence such as Barnett. “I strongly support lifetime tenure,” the Georgetown professor says. “I am not a huge fan of the Supreme Court. [But] I don’t think the problem is lifetime tenure. The problem is who gets put on the court.”

Historian Bodenhamer also questions the need to revise life tenure to ensure the court’s responsiveness to changing political conditions. “Most historians of the court would argue that the court has changed over time and that it continues to be responsive to significant shifts of opinion in the American electorate,” he says.

“It’s quite clear that the court does follow the election returns,” Bodenhamer continues. “Unfortunately, the appointment process has become really embroiled in the political process. It’s not that the court is in some sense unresponsive. It is quite responsive. It looks dysfunctional at times because the politics of the moment has made it harder for the president to pick justices.” ■

## BACKGROUND

### An Imperfect ‘Miracle’?

The “Constitution for the United States of America” emerged from a convention called to rewrite, not replace, the existing Articles of Confederation. Built on crucial compromises on such issues as states’ rights and slavery, the new charter won ratification only after sharp debates between supporters who called themselves Federalists and their opponents, who got stuck with the moniker Anti-Federalists;

votes in several of the states were very close.

Ten amendments — the Bill of Rights — were needed immediately afterward to quiet the Anti-Federalists’ concerns about individual rights. (See box, p. 746.) Two more amendments were added in a little over a decade. But the Constitution was most seriously tested by the Framers’ attempt to skirt the slavery issue. The failure of constitutional politics to settle it brought on a bloody Civil War — and three additional amendments that, over time, fundamentally transformed individual rights and state versus federal powers.<sup>23</sup>

The Framers’ ability to craft the compromises needed to reach agreement on the proposed Constitution has been celebrated time and again — most famously, in the title *Miracle at Philadelphia* that historian Catherine Drinker Bowen gave to her detailed account. But George Washington, who presided over the convention, wrote afterward that the charter was “not free of imperfections.”<sup>24</sup> Today, historian Berkin stresses that the delegates were “terrified” that the country would disappear without a stronger national government to replace the confederation, with its rivalries among states and sections. “They compromised every day,” Berkin says. “They knew that they had to give up something in order to save the country.”

The Bill of Rights fulfilled the promise made by supporters of the Constitution during the ratification debates to add provisions protecting individual liberties from encroachment by the new national government. The 11th Amendment was added quickly in 1795, after an unpopular Supreme Court decision, to protect states from being sued in federal courts. The 12th Amendment followed a more dramatic demonstration of the Framers’ lack of foresight. The emergence of political parties during Washington’s presidency made it

*Continued on p. 752*

# Chronology

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## 1776-1791

***U.S. Constitution is drafted and ratified.***

### 1776-1787

Articles of Confederation drafted (1776), sent to states for ratification (1777), ratified by 13 states (1781).

### 1787-1788

Convention to revise Articles of Confederation meets in Philadelphia, drafts new Constitution with stronger central government; signed by 39 delegates (Sept. 17, 1787); sent to states for ratification; ratified by 11 states (December 1787-July 1788).

### 1791

Bill of Rights ratified; 10 amendments establish individual rights.

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## 1800s *Turmoil over slavery, Civil War, Reconstruction.*

### 1804

Twelfth Amendment separates election of president, vice president.

### 1861-1865

Civil War breaks out after Southern states secede over slavery, states' rights.

### 1865-1870

Thirteenth Amendment abolishes slavery (1865); 14th Amendment prohibits states from violating due process, equal-protection rights (1868); 15th Amendment prohibits racial discrimination in voting (1870).

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## 1900s *Federal government expands in size, scope; Bill of Rights applied to states.*

### 1913

Sixteenth Amendment authorizes federal income tax. . . . Seventeenth Amendment establishes direct election of U.S. senators; amendment was proposed by Congress after nationwide campaign to force action on issue.

### 1919

Nineteenth Amendment grants women right to vote nationwide.

### 1920s, '30s

First Supreme Court decisions applying Bill of Rights provisions (freedom of speech, press, religion, assembly) to states.

### 1933-1936

Supreme Court strikes down parts of President Franklin D. Roosevelt's New Deal program.

### 1937-1941

Roosevelt fails with "court-packing" plan (1937); succeeds in shifting court's ideological balance with new appointments as vacancies arise.

### 1951

Twenty-Second Amendment limits president to two full terms.

### 1954-1969

Supreme Court decisions under Chief Justice Earl Warren stir constitutional debates over desegregation, civil liberties, school prayer, reapportionment, criminal procedure; efforts to curb rulings by constitutional amendment fail.

### 1971

Twenty-Sixth Amendment guarantees 18-year-olds right to vote.

### 1973

Abortion-rights ruling in *Roe v. Wade* provokes opposition; protracted campaign to overturn decision by constitutional amendment fails.

### 1980s

Balanced budget amendment proposed, falls short.

### 1997-1998

President Bill Clinton impeached by House on obstruction, perjury counts; acquitted by Senate.

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## 2000-Present

***Constitutional confrontations under presidents Bush, Obama.***

### 2000

Supreme Court ruling in *Bush v. Gore* assures election of George W. Bush as president; election contest highlights pitfalls of Electoral College system.

### 2001-2009

Bush tests presidential power after al Qaeda's Sept. 11, 2001, attacks; domestic surveillance expanded by USA Patriot Act; courts rebuff legal challenges to Patriot Act; Supreme Court decisions require habeas corpus review for Guantánamo detainees.

### 2009-Present

Obama retreats from broad claims of presidential power but leaves some policies in place; Obama, congressional Democrats assailed by conservatives, Republicans over constitutionality of Affordable Care Act; Supreme Court upholds legislation but rejects broadest claims for congressional power.

### 2012

Calls for amending major features of Constitution continue as its 225th anniversary on Sept. 17 approaches; some groups on left and right favor new convention to consider changes.

## Rewriting the Constitution: Some Modest Proposals

**W**hen the online magazine Slate asked readers this summer to propose amendments to the Constitution, 343 people rose to the challenge. Based on more than 6,000 votes in the so-called “Constitution Smackdown,” Slate picked a set of winners and runners-up whose ideas ranged from requiring term limits for politicians to allowing states to secede. Meanwhile, The New York Times tapped a bevy of scholars for their views on the Constitution, and they too did not hold back. Here are edited excerpts from both publications.

### From Slate:

*“Telecommute, Congress!” by MeterReader*

“Why are there quorum requirements still in place for Congress? Why must members of Congress be present in the Capitol to vote on legislation? . . . The current process creates huge waste in travel, security, staff and other support expenses. It also facilitates the kind of ‘backroom’ deals, concentrated lobbying and lack of transparency that voters hate. Send Congress home, but give them the tools to do their job from there.”

*“Abolish Geographic Representation” by Steve Robertson*

“In a global economy, the idea that we should have representatives of New York or Wyoming, as opposed to representatives of union workers, gays or cat fanciers, seems completely arbitrary. At least one house of the legislature should be composed of anyone who can collect enough online votes (yes, this proposal would have to wait for something like universal broadband) to reach a threshold for representation that is pegged off the census.”

*“Elect the President and V.P. by Direct Vote — No More Electoral College” by RadOwl*

“The Electoral College system for electing the president skews the national focus to a few all-important states and their issues. By replacing the Electoral College with direct election of the president and V.P., campaigns would have to treat states

more equally. Plus, the ability to influence national results through corruption at the state level would be reduced.”

*“Supermajority To Overturn Laws” by KC64*

“A supermajority of at least seven Supreme Court Justices should be required to overturn laws as unconstitutional. When a law is passed by Congress or a state legislature, and signed by a governor or the president, it has already been deemed constitutional by all those who approved it. If the law is to be deemed unconstitutional, it shouldn’t be a close call. It should be obvious.”

*“Weight Voting by Age with Younger Voters’ Votes Having More Weight” by Winn*

“By giving the votes of younger voters greater weight than those of their older counterparts, the membership of the executive and legislative branches can be structured to look out for the long-term health of the country rather than for the short-term benefits of older voters at the cost of the long-term health of the country and the future earnings of younger voters. The mechanism through which this will work is that the vote of an 18-year-old . . . will count 100 times more than the vote of someone who somehow makes it to age 118 or older. The vote of a 19-year-old will be worth 99 percent that of an 18-year-old, the vote of a 43-year-old will be worth 75 percent of that of an 18-year-old, the vote of a 68-year-old will be worth half of that of an 18-year-old, and so on.”

### From The New York Times

Akhil Reed Amar (Professor of Law, Yale University), *“Allow Naturalized Citizens to be President”* [www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-allow-naturalized-citizens-to-be-president](http://www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-allow-naturalized-citizens-to-be-president).

“[M]odern-day naturalized citizens are barred from the presidency simply because they were born in the wrong place to the wrong parents. . . . Opening the door of presidential eligibility to naturalized Americans will redeem the Constitution’s

*Continued from p. 750*

absurd to elect as vice president the runner-up in the balloting for president — as happened in 1796 with the election of rivals Adams and Jefferson in the two offices. The 12th Amendment separated the two contests, but it left the House’s deadlock-breaking role in place and made no move toward popular election.

The slavery issue unsettled American politics for a half-century despite the Framers’ make-peace accord. Con-

gress banned the importation of slaves in 1808; the Missouri Compromise of 1820 went further by prohibiting slavery in new territories north of Missouri’s southern border. But the slaveholding states used their power in Congress to stifle any discussion of abolishing the practice and to win enactment of a strengthened Fugitive Slave Act in 1850 as part of another attempted compromise on the issue. The Supreme Court’s infamous *Dred Scott* decision in 1857 undid the compro-

mise by ruling that, under the Constitution, Congress could not limit slavery nor recognize blacks — slave or free — as citizens. Inflamed abolitionist sentiment spurred fearful Southern states to secede and then to provoke the armed confrontation that drew the North into a war to save the Union. “The Founders’ Constitution failed,” Yale’s Amar writes.<sup>25</sup>

With the Union victorious in the Civil War, three Reconstruction Congresses approved and states ratified

grand trajectory, adding a new chapter true to the spirit of the story thus far. The founders promised more equality than had existed in 1775; later amendments brought blacks and women into the fold; and full equality for naturalized Americans is the logical next step.”

Melynda Price (Associate Professor, University of Kentucky College of Law), “*Get Rid of the Right to Bear Arms*,” [www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-do-we-really-need-the-second-amendment](http://www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-do-we-really-need-the-second-amendment).

“I am not naïve enough to believe that doing away with the Second Amendment would do away with gun violence, but I know firsthand the impact of guns and gunshots on children. This nation was constructed and reconstructed in the aftermath of violent and bloody conflicts. Still, the Framers believed that not only the Constitution, but also the peaceful way the document was created, would penetrate the Americans’ minds. . . . The Second Amendment acknowledged the vulnerability of a nation in its infancy but could not predict a world where some would move through life feeling more like targets than citizens.”

Rachel E. Barkow (Professor of Regulatory Law and Policy, N.Y.U.), “*Clarify What’s Cruel and Unusual*” [www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-clarify-whats-cruel-and-unusual-punishment](http://www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-clarify-whats-cruel-and-unusual-punishment).

“Sometimes prison sentences — even the most severe — are a rational response to crime. But often, sentences are the product of a political process in which politicians are scared of appearing soft on crime so they do not even question the reasonableness of a proposed criminal law. . . . The Constitution has failed to check this pathological process. The Eighth Amendment bans ‘cruel and unusual punishments.’ But some justices do not think this bans excessive prison terms. And the requirement that a sentence be ‘unusual’ has meant that

the justices often do little more than count up states with similar sentences without looking at how states reached those outcomes. . . . [C]larifying and expanding the Eighth Amendment could help. It should specifically state that excessive terms of incarceration are prohibited, just as it bans excessive fines. It should expressly prohibit mandatory sentences so that every case gets the benefit of individualized attention by a judge. And it should insist that legislatures create a record showing that they considered empirical evidence about the law’s likely impact.”

Pauline Maier (Professor of American History, M.I.T.), “*Rewrite the First Amendment*” [www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-rewrite-the-first-amendment](http://www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-rewrite-the-first-amendment).

“ ‘Congress shall make no law’ is a peculiarly stingy way to begin an amendment that protects the rights of conscience, speech, press, assembly and petition. James Madison proposed more capacious language for those rights. He would have said, for example, that ‘the civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed.’ He would also have stated that ‘the people shall not be deprived of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.’ . . . Keeping Madison’s language would make the First Amendment like most of the first eight amendments, which affirm basic rights in general terms, not as restrictions on the federal government.”

Sources: Kevin Bleyer, “The Winners of Constitution Smackdown,” *Slate*, July 5, 2012, <http://hive.slate.com/hive/how-can-we-fix-constitution/article/the-winners-of-constitution-smackdown>; “Room for Debate: Another Stab at the Constitution,” *The New York Times*, July 8, 2012, [www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-rewrite-the-first-amendment](http://www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-rewrite-the-first-amendment).

successive amendments that collectively have been called the nation’s “Second Founding.” (See box, p. 755.) The 13th Amendment, abolishing slavery, was ratified less than eight months after the war’s end. The 14th was more complex and more contentious. Congress approved it on a party-line vote and declared it ratified in July 1868 only by counting the votes of military governments installed in Southern states that had previously rejected it. The amendment granted citizenship to all

persons “born or naturalized” in the United States and laid the groundwork for federal supervision of state laws with the Privileges and Immunities, Due Process and Equal Protection clauses. The 15th Amendment, added in 1870, prohibited the states from denying the right to vote on the basis of race. It said nothing about women’s suffrage.

Significantly, each Reconstruction amendment included a section authorizing Congress to enforce its provisions through “appropriate” legislation.

Congress exercised the power first in 1866 with a law — the first ever enacted over a presidential veto — aimed at guaranteeing blacks the same contract and property rights as whites. Two subsequent civil rights acts, in 1870 and 1871, sought to safeguard blacks in exercising voting and other political rights; an 1875 law barred racial discrimination in public accommodations. But Congress and the president stepped away from Reconstruction policies after 1876. And the Supreme

Court ruled the public accommodations statute unconstitutional in 1883.

Despite the limitations now apparent, the nation was in a self-confident and self-congratulatory mood as it marked the Constitution's centennial in 1887. President Grover Cleveland embodied the national sentiment as he spoke of the Constitution's "trials" and "triumphs" at a celebration staged in front of Independence Hall in Philadelphia. The Constitution "has been found sufficient in the past," Cleveland declared. "And in all the future years it will be found sufficient if the American people are true to their sacred trust."<sup>26</sup>

### Progressive Eras

The Constitution, in its second century, became an instrument of sweeping changes in a succession of progressive eras broken up by periods of political and legal backlash. The federal government grew in size and scope, with the Supreme Court's constitutional blessing. Mass politics emerged with the extension of the right to vote to women and the successful struggle to make real the right to vote for African-Americans. The Constitution itself became a subject of political debate as grassroots movements lobbied for amendments — sometimes successfully, sometimes not — and politicians regularly invoked it to justify their positions or criticize their opponents'.

Congress and the states approved four constitutional amendments in the first two decades of the 20th century; each represented the culmination of hard-fought political struggles by mass political movements. The Sixteenth, authorizing a federal income tax, was ratified in 1913 to overturn the Supreme Court's 1895 decision barring such a levy. Also that year the 17th instituted direct election of senators nationwide, a goal of the Progressive movement that had already been adopted in a majority of states. The temper-

ance movement won ratification of the ill-fated 18th Amendment — Prohibition — in 1919, only to see it repealed 14 years later. The women's suffrage movement achieved a more lasting success the next year, with ratification of the 19th Amendment — again, after many states had already acted to give women the right to vote.

The Supreme Court became the focal point of intensified constitutional debates during the next two decades as a conservative majority struck down economic regulations supported by labor and opposed by business. Two decisions, in 1918 and 1922, striking down federal laws to ban child labor nationwide led to an unsuccessful effort to overturn the rulings by constitutional amendment. Labor unions and progressive groups also supported an unsuccessful constitutional amendment pushed by Sen. Robert M. La Follette Sr., of Wisconsin, to allow Congress itself to override a Supreme Court decision striking down a federal law simply by re-enacting it.

The court continued to take a narrow view of Congress' powers under the Commerce or Tax and Spending clauses in the 1930s as it struck down several major parts of President Franklin D. Roosevelt's New Deal program. The clash inspired FDR's unsuccessful "Court-packing" scheme in 1937 — Roosevelt's transparent effort to change the balance of power on the court by providing for the appointment of additional justices for any over the age of 70. The plan failed in Congress, but a series of vacancies beginning that year allowed the president to remake the court into a tribunal more supportive of federal power and more protective of individual rights.

Beginning in the 1950s, the Supreme Court became the target of a conservative backlash tied to liberal rulings on diverse issues including desegregation, internal security, school prayer, reapportionment, criminal procedure and abortion — all based on new interpretations of constitutional provi-

sions. As early as the 1950s, the court under Chief Justice Earl Warren prompted efforts to curb its powers with rulings that limited Congress' power in internal-security investigations; bills to limit the court's jurisdiction over such cases were introduced but failed. The reapportionment rulings of the 1960s prompted unsuccessful proposals to overturn them by constitutional amendment. Opponents of the Warren Court's school prayer rulings and the later abortion-rights ruling by the court under Chief Justice Warren E. Burger have waged more protracted fights to overturn them by constitutional amendment, but those too have fallen short.

By contrast, the Constitution was amended three times in a decade to enlarge voting rights. The 23rd Amendment (1961) gave the District of Columbia three electoral votes in presidential and vice presidential balloting; broader proposals to grant statehood or give the District voting representation in Congress have failed. The 24th (1964) abolished poll taxes. And the 26th (1971) gave 18-year-olds the right to vote, nationwide; Congress had passed a law in 1970 lowering the voting age to 18, but the Supreme Court ruled Congress had no authority to set age requirements for state and local elections. In the meantime, Congress had passed the Voting Rights Act of 1965, a law enacted under the 15th Amendment's enforcement clause that gave the federal government broad powers to break down racial barriers to voting in state and local elections.

Four other 20th-century constitutional amendments reflected urges to tinker. The 20th (1933) moved the inauguration of the president from March 4 to Jan. 20, shortening the post-election lame-duck period. The 22nd (1951) limits the president to two full terms — a return to George Washington's precedent after FDR's elections to third and fourth terms. The 25th (1967), approved in the wake of the assassination of

President John F. Kennedy, provides for a new president to nominate and Congress to confirm a vice president after the death of the president; it also establishes a mechanism for the vice president to act as president in the event the president is disabled. And the 27th, proposed in 1789 as part of the Bill of Rights but ratified only in 1992, prevents a pay raise for Congress from taking effect until after the next congressional election.

The flurry of amendments and proposed amendments suggested a measure of discontent with the governing charter. But the Bicentennial observances in 1987 were almost uniformly celebratory, climaxing in a nationally televised parade and gala in Philadelphia. Speaking outside Independence Hall, President Ronald Reagan recalled the country's perilous state as the Framers met to lay the foundation of a new, stronger national government. In a real sense, Reagan said, the American Revolution truly began in 1787. It was only with the writing of the Constitution, he said, "that the hopes and dreams of the revolutionists could become a living, enduring reality."<sup>27</sup>

## Constitution in Turmoil

The Constitution has been in turmoil for much of its third century, an era marked by divided government, partisan polarization and public discontent. Congress and the president have clashed almost continuously over fiscal policy, twice taking the government to the edge of a fiscal cliff. The Supreme Court defined limits of presidential power in politically charged cases involving two chief executives: Republican George W. Bush and his Democratic predecessor, Bill Clinton. The court was also thrust into deciding the razor's-edge 2000 election between Bush and Gore. And critics of presidential and congressional power have found frequent fault with Obama

## The 'Second Constitution'

*Three amendments passed soon after the Civil War — during Reconstruction — have been called "the Second Constitution" because of the profound effects they had, over time, in recognizing individual rights and in subordinating the powers of the states to federal law. Each of the amendments significantly included a final section specifying that Congress has the power to enforce the amendment "by appropriate legislation." Here are the amendments, with dates of ratification and major provisions:*

**Thirteenth (Dec. 6, 1865):** Prohibits "slavery or involuntary servitude," except as punishment for crime, within the United States "or any place subject to their [sic] jurisdiction."

### **Fourteenth (July 9, 1868):**

**Section 1:** Recognizes "all persons born or naturalized in the United States, and subject to the jurisdiction thereof" as citizens of the United States and their state of residence; prohibits any state from abridging "the privileges or immunities" of citizens of the United States, depriving any person of life, liberty, or property without due process of law, or denying any person "the equal protection of the law."

**Section 2:** Apportions members of the House of Representatives according to population "counting the whole number of persons in each State, excluding Indians not taxed;" basis of representation to be reduced proportionately if suffrage was denied or abridged to "any male inhabitants," age 21 or older.

**Section 3:** Bars anyone who "engaged in insurrection or rebellion" against the United States, or gave "aid or comfort" to enemies of the United States, from serving as member of Congress, elector for president or vice president or other civil or military officer of the United States; Congress "may remove such disability" by two-thirds vote of each chamber.

**Section 4:** Validates all public debts of the United States incurred in Civil War, including pensions and bounties; rejects as "illegal and void" all public debts of the Confederacy and "any claim for the loss or emancipation of any slave."

**Fifteenth (Feb. 3, 1870):** Prohibits any state from denying or abridging the right of U.S. citizens to vote "on account of race, color, or previous condition of servitude."

and Congress, focused most dramatically on Obama's health care plan as enacted by a Democratically controlled Congress.

Divided political control of the White House and Congress, once the exception in U.S. history, has been the norm under the last four presidents, two

from each major political party. Neither of the Bush presidents nor Clinton served with a Congress with both chambers controlled by his party for most of his time in the White House; Obama faces the same fate even if re-elected, unless Democrats can defy the oddsmakers and regain control of the House.

The partisan divisions have contributed to the growing sense of a “dysfunctional” federal government. An ABC-*Washington Post* poll in February 2011 found only 26 percent of respondents optimistic about “our government and how well it works” — the lowest figure since the question was first asked in 1974.<sup>28</sup>

The partisan divisions have played out most dramatically in budget battles between Democratic presidents and Republicans in Congress. A budget impasse between Clinton and Republicans, who then controlled both the House and the Senate, resulted in two government shutdowns, in late 1995 and early 1996, totaling 28 days. In summer 2011, Obama and the GOP-controlled House locked horns over a debt limit increase, reaching agreement only barely in time to avert the first ever federal government default. Throughout the period, Republicans and some Democrats urged passage of a proposed balanced budget constitutional amendment. The House approved an amendment in January 1995, but the measure fell just short of the needed two-thirds majority in the Senate. The House voted on the issue in November 2011, but it fell short of a two-thirds majority (261-165).

Clinton also faced politically charged investigations raising constitutional issues during much of his presidency that included an inquiry by an independent counsel, a sexual harassment lawsuit and, ultimately, the second presidential impeachment in U.S. history. The Supreme Court in 1997 rejected Clinton’s effort to defer the sexual harassment lawsuit while he was president. Independent counsel Kenneth Starr summoned Clinton before a federal grand jury to answer allegations of sexual behavior with a White House intern. Starr submitted his conclusion that Clinton had committed perjury to the House, which voted in December 1998 to impeach him on two counts: perjury and obstruction of justice. The

Senate trial, with Chief Justice William H. Rehnquist presiding, ended in February 1999 with Clinton’s acquittal on both counts.

The close partisan divisions played a part in exposing the potential pitfalls in the Electoral College system when Bush and Gore fought to a near draw in the 2000 presidential election.<sup>29</sup> The outcome hinged on Florida’s 25 electoral votes, but Bush’s apparent election night victory was narrowed to only 327 votes after a recount. Gore contested the results, spawning litigation that reached the Supreme Court twice. Gore won the popular vote nationwide, but news coverage during the litigation noted that Florida’s GOP-controlled legislature could award the electoral votes without regard to the vote tabulation in the state or that the election could wind up in the House of Representatives. The Supreme Court’s 5-4 decision to cut off the recount in Florida effectively ended the election with Bush the winner.

Just nine months after his inauguration, Bush faced a test of presidential leadership that turned into a test of presidential power: al Qaeda’s Sept. 11, 2001, terrorist attack on the United States. Bush responded by winning congressional approval of legislation, the USA Patriot Act, expanding domestic surveillance powers. He also launched a war in Afghanistan that resulted in the capture of hundreds of prisoners who were brought to the U.S. Naval Base at Guantánamo Bay, Cuba. Civil liberties groups and others unsuccessfully challenged provisions of the Patriot Act in court, but they won some modifications when it was renewed in 2006. Human-rights lawyers representing the Guantánamo prisoners won a Supreme Court decision establishing the right to judicial review, but as Bush left the White House more than 200 were still being held.<sup>30</sup>

Obama took office in 2009 promising to undo some of the Bush administration’s anti-terrorism policies, but he

disappointed civil liberties and human-rights groups by continuing to claim broad presidential authority to detain foreigners suspected of anti-American terrorism. He arguably went beyond Bush’s policies by claiming the power to direct lethal attacks against U.S. citizens abroad if linked to al Qaeda. In domestic politics, Obama and congressional Democrats have been under nearly constant attack for three years over the health care bill, enacted in March 2010 as the Patient Protection and Affordable Care Act. Constitutional attacks centered on provisions requiring individuals to obtain health insurance and expanding coverage of the joint state-federal Medicaid program.

Legal challenges that spanned two full years ended on June 28 with a closely divided Supreme Court leaving the law largely intact while rejecting the administration’s major rationale for the insurance mandate. Obama claimed victory with the ruling, while conservatives and Republicans consoled themselves by pointing to aspects of the court’s ruling suggesting limits on Congress’ commerce and spending powers.<sup>31</sup> ■

## CURRENT SITUATION

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### Convention Talk

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Interest in calling a convention to amend the Constitution is stirring among some unlikely political bedfellows on the left and the right, but the odds still appear to be heavily against the first-ever use of this alternate process of writing and ratifying a constitutional amendment.

Some conservatives want to use the convention route to limit federal spending policies by adding a balanced

*Continued on p. 758*



# At Issue:

## Should a constitutional convention be called?



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WRITTEN FOR *CQ RESEARCHER*, SEPTEMBER 2012

**W**e very much need a new constitutional convention, for two reasons. The first is simply that our 18th-century Constitution, remarkably unchanged with regard to our basic institutional structures, contributes to the widespread perception, across political and ideological lines, that our political system is “broken,” “dysfunctional” or “pathological.” Many causes are assigned to the contemporary unhappiness with our politics — 24-hour confrontational news programs, the ever-bigger role of money and ever-stronger “partisanship,” where loyalty to one’s political party often seems to take precedence over genuinely striving to work for the public good (if credit might go to members of the other party). All bear some of the blame, but it is past time to realize that the Framers, drafting a constitution for a substantially different world, made their own contribution to today’s dysfunction.

They would not be surprised to learn that the Constitution might need changing. Article V speaks to the certainty of imperfections in the design by providing a mechanism for change, including, crucially, a new constitutional convention. James Madison, even when supporting ratification of the new constitution, emphasized the necessity of paying strong attention to “the lessons of experience” that might suggest ways of improving our system. One might expect the Framers to be shocked that so many modern Americans treat them as demigods, making decisions for all time, rather than gifted, but necessarily imperfect, men doing their best in troubled times to solve what they thought was the crisis facing the young country at the time. We best honor their spirit by asking the tough questions they did in 1787 — precisely what might need to be changed in order to confront our own challenges?

But there is a second reason for a convention: It is foolish to expect Congress to take the time to address the multiple and complex questions that a convention would have to confront. Even if one suspends all cynicism about whether political “ins” would ever seriously contemplate changes that would threaten their own power, they just don’t have the time. Congress is faced with too many other issues to expect them to suspend their regular work to take off a year for serious debate about how to make the Constitution more functional for the 21st century. Only an independent body — a constitutional convention — with no legislative or executive duties could take the time for study, hearings and intense debate that We the People would legitimately expect before embarking on needed constitutional changes.



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WRITTEN FOR *CQ RESEARCHER*, SEPTEMBER 2012

**W**e live in very interesting times. The federal government appears to be failing. The state governments are not faring much better. And the political parties seem broken beyond repair. Amid this dysfunctional backdrop are calls for change. Radical change. Scholars and activists alike are calling for resort to a little known constitutional provision, Article V.

Since the first constitutional convention in 1787, Article V has lain dormant. Article V provides states with an avenue to amend the Constitution when the federal government is unable or unwilling to do so. Many welcome the current gridlock as an opportunity to call an untested, unregulated and unconfined Article V constitutional convention (“Con-Con”). A growing chorus sees the Con-Con as the solution to our failing government. I do not.

I strongly oppose wading into the Con-Con experiment during the current political climate. My opposition is based on the fact that under any Article V Con-Con experiment, Congress — and all its toxicity — will undoubtedly play a significant role in the convention process. Congress, not the states, will be the first to interpret Article V and establish the Con-Con parameters. And when the states challenge Congress’ role, as they assuredly would, they would be forced to turn to an equally divided, and divisive, branch of our government, the Supreme Court. This process, undertaken at this particular time, has all the markings of a true constitutional crisis.

Our Constitution has endured for generations because, while large on democratic ideas and principles, it has always remained short on detail. The Constitution, including Article V, is but a rough outline of an ideal government. It was intentionally crafted to be difficult to amend.

The Con-Con advocates cannot assure us what an Article V convention would look like, who would be in charge or how business would be conducted. There are no guarantees that the Con-Con would be limited to amendments upon which the requisite states agree, or whether it would be open to the sentiments of the attendees and their respective agendas.

The problem, quite simply, is that there is no way to predict how this revolutionary idea would take shape. After all, the only constitutional convention this country has witnessed, the original Constitutional Convention, immediately abandoned its limited mandate and proved to be the very runaway convention that Con-Con opponents now fear. If history repeats itself, we have reason to be fearful.

## RE-EXAMINING THE CONSTITUTION

*Continued from p. 756*

budget provision to the Constitution or, in a more recent proposal, requiring approval by state legislatures to increase the national debt ceiling. Some liberals want to amend the Constitution to enact campaign finance reform — most specifically, to overrule the Supreme Court's controversial *Citizens United* decision to allow limits on corporate spending in political campaigns.<sup>32</sup>

Both sides want to use the convention route because they despair of winning approval of their proposals from two-thirds majorities in both chambers of Congress, as required in the procedure used for all 27 amendments to date. "Congress is captured by so many interests," David Segal, a former Democratic state representative from Rhode Island, said as he opened a two-day conference on a constitutional convention at Harvard Law School in late September 2011.<sup>33</sup>

Advocates of a constitutional convention, however, run up against opposition from others on both the left and the right, who raise fears of a "runaway convention" that would repeal rights-protecting provisions viewed as sacrosanct by one side or the other: free speech for the left, gun rights for the right. "This is almost literally the first thing you hear," says Levinson, the University of Texas professor who has been a leading proponent of a convention.

The Harvard conference featured speakers from such conservative and libertarian organizations as the Cato Institute, the Arizona-based Goldwater

Institute and the Tea Party Patriots and others from liberal groups such as Common Cause and the Green Party.

In opening the conference, Lawrence Lessig, a left-leaning professor at the law school, said the Framers deliberately included the convention route to an amendment to allow circumventing roadblocks in Congress. "The Framers recognized that there might be times when Congress might not be capable of proposing the kinds of amendments that the nation needs," Lessig said.



*President Obama signs the Patient Protection and Affordable Care Act on March 23, 2010. Constitutional attacks on the law centered on provisions requiring individuals to obtain health insurance and expanding coverage of Medicaid. On June 28 a closely divided Supreme Court left the law largely intact while rejecting the administration's major rationale for the insurance mandate. Conservatives and Republicans consoled themselves by pointing to aspects of the court's ruling suggesting limits on Congress' commerce and spending power.*

The conference was co-sponsored by Tea Party Patriots, largest of the Tea Party organizations. Mark Meckler, a California attorney and co-founder of the group, told the gathering that he was "neither for or against a convention." But he batted away concerns about a runaway convention. Meckler said he was "confident" that debate at the convention would be both "reasoned" and "heated," but "in the end we would do the right thing."

Only minimal concrete progress has been made in getting states to request

Congress to call a convention, as the Article V amendment procedure outlines. The Goldwater Institute lobbied in 26 states over the past two legislative seasons in favor of calling a convention to consider the national-debt amendment, but only two approved the proposal: Louisiana and North Dakota. Nick Dranias, director of constitutional studies for the Goldwater Institute, says the proposal was "overwhelmingly" opposed by two other conservative groups: the Eagle Forum and the John Birch

Society. "They proved to be quite the foe," he says.

On the left, Segal, who also served as a Green Party representative on the Providence, R.I., City Council, also acknowledges scant progress on the issue. "A few resolutions have passed, but activity isn't as robust as one might hope, given the intransigence of Congress," he says. Segal says he wants to see the convention address "election reform and money in politics — very worthy causes."

Further complicating the push for a convention are the many unknowns associated with a procedure never successfully invoked. Questions discussed but left unresolved at the conference include whether a convention could be limited in scope, how the rules for the convention would be established and how delegates would be elected.

Supporters of a convention note, however, that pushing the procedure could itself pressure Congress into acting. They note that Congress approved the 17th Amendment, which established direct election of U.S. senators, after proponents of the change had gotten nearly enough states to call for a convention to force Congress to act.

Getty Images/Alex Wong

Despite the interest from different ideological groups, many constitutional experts remain profoundly skeptical, especially on the political left. “I have trust issues,” says Browne-Marshall, the John Jay College professor. “I do not trust those people in that room to put the interests of the country above their own or whatever group to which they owe their allegiance.”

Interest appears to be somewhat greater among conservative constitutional experts. “I’ve sort of come to a conclusion that it’s not such a bad idea,” says Reynolds, the University of Tennessee professor. “We really need to focus on why our system is not working.”

“A convention might lead to useful change even if were a failure,” Reynolds adds. “That’s not a failure. That might be a success in that it would cause people to focus on [needed constitutional changes].”

## Constitution Talk

Interest in the Constitution is spiking as the 225th anniversary approaches, but many experts say Americans fall short in their knowledge and understanding of a founding document that they nevertheless celebrate and revere.

“Americans appear to love and absolutely revere the Constitution, to regard it as the thing that defines who they are and what we stand for in this nation,” says Richard Beeman, a professor of history at the University of Pennsylvania in Philadelphia and author of a recent history of the writing of the Constitution, *Plain Honest Men*.<sup>34</sup>

Even so, Beeman says, “Americans’ ignorance of the specifics of the Constitution is quite vast.” For that reason, he sees “a kind of obvious disjunction about what Americans know and their apparent reverence for it.”

Baruch College historian Berkin agrees. “I’m willing to bet you that 99 and 44 one-hundredths of a percent

of Americans have never read the Constitution,” Berkin says. “There’s just so much uninformed discussion that it makes your head spin.”

The ignorance and misunderstandings about the Constitution extend to matters both small and large, the historians say. Berkin says she once had an argument with someone who insisted Abigail Adams was a delegate to the Philadelphia convention. She was not, nor was her husband John Adams or Adams’ later political rival, Jefferson. They were both posted abroad in 1787 as ambassadors to Britain and France, respectively.

More broadly, Beeman says Americans misunderstand the Framers’ basic reason for establishing a new national government. “For most Americans, the Constitution is the Bill of Rights — those amendments that speak about what Congress is not allowed to do,” he explains. Beeman agrees that the Framers had “a healthy distrust of concentrations of power,” but says the delegates “gathered to establish a stronger government.”

“The best statement of that is in the preamble,” Beeman continues, referring to the six grand purposes set out at the start of the Constitution. “To do the things in the preamble, you needed a strong, central government.”

Conservative experts and commentators view the purpose of the Constitution differently. “The pushback against the great expansion of government spending and regulations that began in the Bush administration and continued in the Obama administration is being organized around the Constitution as the main argument against these measures,” says Barnett, the Georgetown law professor. Author Freedman sees a need to amend the Constitution “in a way that is likely to produce results consistent with the original design.”

Americans interested in viewing the original Constitution itself can see it on display in the central rotunda of

the National Archives building in Washington along with the Declaration of Independence and the Bill of Rights. The Archives museum receives about 1 million visitors per year, a spokeswoman says.

The National Constitution Center in Philadelphia drew 817,727 visitors in 2011, according to a spokeswoman. The center is sited across Independence Mall from Independence Hall, the former Pennsylvania statehouse where the Constitutional Convention met.

The center’s introductory presentation for visitors, entitled “Freedom Rising,” tells the history of the Constitution in celebratory tones but recognizes some aspects less worthy of celebration. A live narrator acknowledges that the Framers’ commitment to equality “did not include all the people.” The Constitution left slavery up to the states, without ever using the word itself. It took 75 years and a Civil War to abolish slavery, the narrator says, and another century to overcome racial segregation. Women were not granted the vote nationwide until the 20th century.

Some visitors on a recent weekend in August picked up on some of the points. “It’s amazing to me as a woman that we weren’t able to vote until 1920,” said Mary Wicker, a homemaker from Runnemede, N.J. All the delegates, she said, “were rich, white males.” Floyd Smith, an African-American security officer visiting from Chicago, said he would have voted against the pro-slavery provisions if he had been a delegate, even at the risk of some slave-holding states walking out.

Other visitors left with fewer reservations about the Framers’ work. “It’s really quite amazing how they figured it out,” said Pat Aurand, a teacher in Philadelphia. “They were up against some tough stuff.” Wicker also ended with approving remarks. The Constitution, she said, “is the thing that ties us together.” ■

## OUTLOOK

### The 'Durable' Constitution

The Constitution is “the oldest governing document still in existence today,” actor-commentator Ben Stein tells visitors to the National Constitution Center in a video. The important point, Stein adds, “is not how old it is, but how durable it is.”

With only 27 amendments in 225 years, the Constitution does appear to have stood up remarkably well over time. But it has also been the focus of all but continuous struggle from the moment it was written up to the present day. “The history of the Constitution shows that it has been a constant focus of the American people in the question of who we are as a nation and who do we want to become,” says Frederickson with the American Constitution Society.

The debates over ratification themselves were contentious and the outcome far from certain as the delegates left Philadelphia in September.<sup>35</sup> Three states ratified before the end of the year. But when New Hampshire became the ninth to ratify on June 21, 1788, two states crucial to the Union — Virginia and New York — remained to be heard from. Virginia voted to ratify on June 25 and New York on July 26, but the margins were close in both states. The last two states, North Carolina and Rhode

Island, voted to ratify only after the new government had been formed. And the price for winning ratification was the Bill of Rights, the package of amendments proposed and submitted to the states by the First Congress in order to satisfy the fears of the Anti-Federalists of an overreaching central government.

Echoes of the debates between the Federalists and Anti-Federalists can be heard in the sharp arguments in Washington and across the nation today over the scope and powers of the federal government. Historian Bodenhamer finds the arguments neither surprising nor disturbing. “The Constitution invites us to struggle over issues of power and rights,” Bodenhamer says. “This is what makes the Constitution a radical document. It puts the responsibility of that struggle back on the people because we hold popular sovereignty.”

Fellow historian Beeman is disturbed, however, by the tone of some of the arguments. “A lot of the passion that one hears in the current debate over how to interpret the Constitution is generated by the fact that Americans may feel very strongly about it but don’t know much about it,” he says. “They don’t know what’s in it.”

The Constitution is also taking some of the blame for the political gridlock in Washington — wrongly in the view of some of the experts. “We have a terrible political culture in this country,” says University of Tennessee professor Reynolds. “It’s difficult to blame the Constitution for that.” Yale law profes-

sor Amar agrees. “Am I critical of our system?” he asks, rhetorically. Yes, he says, but “more of our culture than the formal world of the Constitution.”

The Framers themselves had only limited hopes for the Constitution, historian Berkin notes. “They knew that all Republics devolve into tyranny,” she says. “What they wanted to do is to delay this as long as possible.” She says they would be surprised at how long it has lasted with so few changes. “They didn’t envision that changing the Constitution would be so extraordinarily difficult,” she says.

Those who favor changing the Constitution have a decidedly uphill struggle to do so. “It’s hard for me to imagine any major structural changes,” Bodenhamer says. Reynolds tentatively agrees. A quarter-century from now, he says, “I would say it would look more like what we have today than something different.”

Still, the arguments go on. “Americans have been arguing about the Constitution from the very, very beginning,” says Penn professor Beeman. “I regard that in general as a sign of its health rather than its infirmity.” ■

### Notes

<sup>1</sup> The full text of the original Constitution is on the National Archives’ website: [www.archives.gov/exhibits/charters/constitution\\_transcript.html](http://www.archives.gov/exhibits/charters/constitution_transcript.html). For a compact account of the Constitutional Convention, see Robert K. Landers, “Bicentennial of the Constitution,” *Editorial Research Reports*, March 27, 1987, <http://library.cqpress.com/cqresearcher/document.php?id=cqresre1987032700&type=hitlist&action=print>.

<sup>2</sup> Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (2006), pp. 4-7. See also Sanford Levinson, *Framed: America’s 51 Constitutions and the Crisis of Governance* (2012).

<sup>3</sup> Text of Marshall’s speech, May 6, 1987, to the San Francisco Patent and Trademark Law Association, [www.thurgoodmarshall.com/speeches/constitutional\\_speech.htm](http://www.thurgoodmarshall.com/speeches/constitutional_speech.htm). For coverage, see Stuart Taylor Jr., “Marshall Sounds Critical Note on Bicentennial,” *The New York Times*, May 7, 1987, p. A1.

### About the Author



Associate Editor **Kenneth Jost** graduated from Harvard College and Georgetown University Law Center. He is the author of the *Supreme Court Yearbook* and editor of *The Supreme Court from A to Z* (both CQ Press). He was a member of the *CQ Researcher* team that won the American Bar Association’s 2002 Silver Gavel Award. His previous reports include “States and Federalism” and “Abortion Debates.” He is also author of the blog *Jost on Justice* (<http://jostonjustice.blogspot.com>).

<sup>4</sup> David J. Bodenhamer, *The Revolutionary Constitution* (2012).

<sup>5</sup> See Kenneth Jost and Greg Giroux, "The Electoral College," *CQ Researcher*, Dec. 8, 2000, pp. 977-1008.

<sup>6</sup> See Akhil Reed Amar, *The Unwritten Constitution: The Precedents and Principles We Live By* (2012); *America's Constitution: A Biography* (2005).

<sup>7</sup> Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004).

<sup>8</sup> See Maggie Clark, "States Look to Article V to Limit Federal Power," in Kenneth Jost, "States and Federalism," *CQ Researcher*, Oct. 15, 2010, pp. 845-868.

<sup>9</sup> Carol Berkin, *A Brilliant Solution: Inventing America's Constitution* (2002).

<sup>10</sup> "Muhammad Ali: 2012 Liberty Medal Recipient," National Constitution Center, [http://constitutioncenter.org/libertymedal/recipient\\_2012.html](http://constitutioncenter.org/libertymedal/recipient_2012.html).

<sup>11</sup> Account drawn from Berkin, *op. cit.*, pp. 96-112.

<sup>12</sup> Levinson, *op. cit.*, pp. 58-59. The study is "The Potential for Minority Rule in U.S. Congressional Elections," FairVote: The Center for Voting and Democracy, February 2005, <http://archive.fairvote.org/library/geog/congress/minorityrule2004.htm>.

<sup>13</sup> Adam Freedman, *The Naked Constitution: What the Founders Said and Why It Still Matters* (2012). Freedman covers legal affairs for Ricochet.com, a conservative news site.

<sup>14</sup> See Niels Lesniewski, "GOP Senate Candidates Advocate 17th Amendment Repeal," *Roll Call*, Aug. 13, 2012, [www.rollcall.com/news/GOP-Senate-Candidates-Advocate-17th-Amendment-Repeal-216856-1.html](http://www.rollcall.com/news/GOP-Senate-Candidates-Advocate-17th-Amendment-Repeal-216856-1.html); John Yoo, "Repeal the 17th Amendment?," *National Review Online*, Oct. 22, 2010, [www.nationalreview.com/comer/250726/repeal-17th-amendment-john-yoo](http://www.nationalreview.com/comer/250726/repeal-17th-amendment-john-yoo).

<sup>15</sup> Account drawn from Berkin, *op. cit.*, pp. 136-146.

<sup>16</sup> See Levinson, *op. cit.*, pp. 85-98.

<sup>17</sup> Akhil Reed Amar, "A Constitutional Accident Waiting to Happen," *Constitutional Commentaries*, Vol. 12, p. 143 (summer 1995), [www.law.yale.edu/documents/pdf/1995Constitutional.pdf](http://www.law.yale.edu/documents/pdf/1995Constitutional.pdf).

<sup>18</sup> See "Americans Would Swap Electoral College for Popular Vote," Gallup, Oct. 24, 2011, [www.gallup.com/poll/150245/Americans-Swap-Electoral-College-Popular-Vote.aspx](http://www.gallup.com/poll/150245/Americans-Swap-Electoral-College-Popular-Vote.aspx).

<sup>19</sup> See Berkin, *op. cit.*

<sup>20</sup> Levinson, *op. cit.*, pp. 123-139.

<sup>21</sup> Steven G. Calabresi and James Lindgren, "Term Limits for the Supreme Court: Life Tenure Reconsidered," *Harvard Journal of Law and*

## FOR MORE INFORMATION

**American Constitution Society**, 1333 H St., N.W., 11th Floor, Washington, DC 20005; 202-393-6181; [www.acslaw.org](http://www.acslaw.org). Liberal-leaning organization promoting constitutional values of individual rights and liberties, equality, access to justice, democracy and rule of law.

**Cato Institute**, 1000 Massachusetts Ave., N.W., Washington, DC 20001; 202-842-0200; [www.cato.org](http://www.cato.org). Libertarian think tank supporting limited government and free markets.

**Constitution Project**, 1200 18th St., N.W., Suite 1000, Washington, DC 20036; 202-580-6920; [www.constitutionproject.org](http://www.constitutionproject.org). Nonprofit think tank seeking bipartisan consensus on constitutional and legal issues.

**The Federalist Society**, 1015 18th St., N.W., Suite 425, Washington, DC 20036; 202-822-8138; [www.fed-soc.org](http://www.fed-soc.org). Organization of conservatives and libertarians seeking to reform the American legal system in accordance with an originalist interpretation of the Constitution.

**National Constitution Center**, Independence Mall, 525 Arch St., Philadelphia, PA 19106; 215-409-6600; [constitutioncenter.org](http://constitutioncenter.org). Independent nonprofit institution — largely funded by federal and state government entities — dedicated to educating the American public about the Constitution.

*Public Policy*, Vol. 12 (summer 2006), pp. 770-877, <http://epstein.usc.edu/research/supctLawCalabresi.pdf>.

<sup>22</sup> See Linda Greenhouse, "New Focus on the Effects of Life Tenure," *The New York Times*, Sept. 10, 2007, p. A20. See also Paul Carrington and Roger C. Cramton (eds.), *Reforming the Court: Term Limits for Supreme Court* (2005). Levinson was one of the contributors to the volume; it also includes an earlier version of Calabresi and Lindgren, *op. cit.*

<sup>23</sup> For longer accounts of the Constitutional Convention, see Berkin, *op. cit.*; Catherine Drinker Brown, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787* (1986; first published 1966). Some subsequent background drawn from Amar, *op. cit.*

<sup>24</sup> Washington's letter to his nephew (and future Supreme Court justice) Bushrod Washington is quoted in Levinson, *op. cit.*, p. 21.

<sup>25</sup> Amar, *op. cit.*, p. 360.

<sup>26</sup> *Public Papers of Grover Cleveland* (1889), pp. 263-264, [http://books.google.com/books?id=p35RAAAAYAAJ&pg=PA266&lpg=PA266&dq=constitution+centennial+celebration+1887+grover+cleveland&source=bl&ots=B-MMDTeqJF&sig=T\\_XjMmHeNSq7JnVxkgdZjUJlkFY&hl=en#v=onepage&q=constitution%20centennial%20celebration%201887%20grover%20cleveland&f=false](http://books.google.com/books?id=p35RAAAAYAAJ&pg=PA266&lpg=PA266&dq=constitution+centennial+celebration+1887+grover+cleveland&source=bl&ots=B-MMDTeqJF&sig=T_XjMmHeNSq7JnVxkgdZjUJlkFY&hl=en#v=onepage&q=constitution%20centennial%20celebration%201887%20grover%20cleveland&f=false).

<sup>27</sup> *Public Papers of Ronald Reagan*, Sept. 17, 1987, [www.reagan.utexas.edu/archives/speeches/1987/091787a.htm](http://www.reagan.utexas.edu/archives/speeches/1987/091787a.htm).

<sup>28</sup> "Economy, Gas, Partisanship and War Gang Up on Confidence in Government," ABC News-*Washington Post* poll, March 15, 2011, [www.langerresearch.com/uploads/1121a2%202011%20Politics.pdf](http://www.langerresearch.com/uploads/1121a2%202011%20Politics.pdf).

<sup>29</sup> For a comprehensive account, see Kenneth Jost, *Supreme Court Yearbook 2000-2001*.

<sup>30</sup> The case is *Boumediene v. Bush*, 553 U.S. 723 (2008). See Kenneth Jost, *Supreme Court Yearbook 2007-2008*.

<sup>31</sup> The case is *National Federation of Independent Business v. Sebelius*, 567 U.S.—(2012). For a comprehensive account, see Kenneth Jost, *Supreme Court Yearbook 2011-2012* (forthcoming).

<sup>32</sup> The decision is *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010). For an account, see Kenneth Jost, *Supreme Court Yearbook 2009-2010*.

<sup>33</sup> Account and quotes taken from the archived proceedings. See "Conference on the Constitutional Convention," Harvard Law School, Sept. 24-25, 2011, [www.conconcon.org/archive.php](http://www.conconcon.org/archive.php). For coverage, see James O'Toole, "Constitutional Convention Call Gains Traction," *Pittsburgh Post-Gazette*, Dec. 12, 2011, p. A1; Gregory Korte, "Balanced budget push brews debate," *USA Today*, Nov. 30, 2011, p. 4A.

<sup>34</sup> Richard Beeman, *Plain Honest Men: The Making of the American Constitution* (2009).

<sup>35</sup> For a history, see Pauline A. Maier, *Ratification: The People Debate the Constitution, 1787-1788* (2011).

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The well-known Yale law professor “seeks to reacquaint twenty-first century Americans with the written Constitution” in a comprehensive “biography” from its birth to the present. Includes illustrations, detailed notes. Amar’s most recent book is *America’s Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books, 2012).

**Barnett, Randy E., *Restoring the Lost Constitution: The Presumption of Liberty*, Princeton University Press, 2004.**

A Georgetown law professor who later played a major role in the legal challenges to President Obama’s health care plan forcefully argues that courts have read key provisions of the Constitution in a way that reduces or eliminates protections for liberty against governmental power. Includes notes.

**Beeman, Richard, *Plain, Honest Men: The Making of the American Constitution*, Random House, 2009.**

A history professor at the University of Pennsylvania provides a detailed, day-to-day account of the Constitutional Convention. Includes detailed notes.

**Berkin, Carol, *A Brilliant Solution: Inventing the American Constitution*, Harcourt, 2002.**

A historian at Baruch College, City University of New York, gives a compact account of events from the call for the Federal Convention and the writing of the Constitution through ratification and the inauguration of President George Washington. Includes short biographies of all delegates to the Constitutional Convention.

**Bodenhamer, David J., *The Revolutionary Constitution*, Oxford University Press, 2012.**

A professor of history at Indiana University traces the evolution of the Constitution from its ratification to the present day in regard to such “core concepts” as federalism, equality, rights and security. Includes notes.

**Freedman, Adam, *The Naked Constitution: What the Founders Said and Why It Still Matters*, Broadside, 2012.**

A conservative commentator argues for returning to what he calls the “original meaning” of the Constitution and for calling a new constitutional convention to limit the growth of government. Includes select bibliography.

**Levinson, Sanford, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*, Oxford University Press, 2006.**

A law professor at the University of Texas-Austin argues in favor of considering major structural changes to provisions in the Constitution regarding Congress, the president, the Supreme Court and the amendment process. Includes notes.

**Liu, Goodwin, Pamela S. Karlan and Christopher Schroeder, *Keeping Faith With the Constitution*, American Constitution Society, 2009, [www.acslaw.org/pdf/ACS\\_Keep-Faith\\_FNL.pdf](http://www.acslaw.org/pdf/ACS_Keep-Faith_FNL.pdf).**

The book examines, from a progressive perspective, application of the Constitution in such areas as equality, democracy, criminal justice and liberty. Liu was a law professor at the University of California-Berkeley and is now a justice on the California Supreme Court; Karlan is a professor at Stanford Law School, Schroeder a professor at Duke University School of Law.

**Maier, Pauline A., *Ratification: The People Debate the Constitution, 1787-1788*, Simon & Schuster, 2010.**

A prominent history professor at the Massachusetts Institute of Technology provides the first comprehensive history of what she calls “one of the greatest and most probing public debates in American history.” Includes detailed notes.

**Monk, Linda R., *The Words We Live By: Your Annotated Guide to the Constitution*, Hyperion, 2003.**

A constitutional scholar illustrates the Constitution, section by section, with historical and contemporary accounts of issues and controversies arising under the provisions. Includes illustrations, notes, selected bibliography.

### On the Web

**“Centuries of Citizenship: A Constitutional Timeline,” National Constitution Center, <http://constitutioncenter.org/timeline/>.**

The online resource traces significant events in U.S. constitutional history from the signing of the Magna Carta in 1215 to the present day.

**“Charters of Freedom,” National Archives, [www.archives.gov/exhibits/charters/](http://www.archives.gov/exhibits/charters/).**

The site allows a virtual visit to the principal exhibit at the National Archives in Washington with its displays of the Declaration of Independence, Constitution and Bill of Rights and exhibit cases tracing the “making” of the charters and their impact. Includes links to additional historical material.

### From CQ Press

**Maddex, Robert L., *The U.S. Constitution A to Z* (2d ed.), CQ Press, 2008.**

The 731-page volume provides easy-to-find entries examining provisions of the Constitution and their application in U.S. society today. Includes selected bibliography, online resources, other appendix material. Maddex is an attorney specializing in constitutional law. The book is part of CQ Press’ five-volume American Government A to Z series. Other titles are *Congress A to Z*, *Presidency A to Z*, *Supreme Court A to Z* and *Elections A to Z*.

# The Next Step:

## *Additional Articles from Current Periodicals*

### **Constitutional Convention**

Korte, Gregory, "Balanced Budget Push Brews Debate," *USA Today*, Nov. 30, 2011, p. A4, [www.usatoday.com/NEWS/usaedition/2011-11-30-constitutional-convention\\_ST\\_U.htm](http://www.usatoday.com/NEWS/usaedition/2011-11-30-constitutional-convention_ST_U.htm).

Supporters of a balanced-budget amendment believe a constitutional convention is the best hope for passage.

O'Toole, James, "Constitutional Convention Call Gains Traction," *Pittsburgh Post-Gazette*, Dec. 12, 2011, p. A1, [www.post-gazette.com/stories/news/us/constitutional-convention-call-gains-traction-223813/](http://www.post-gazette.com/stories/news/us/constitutional-convention-call-gains-traction-223813/).

A growing number of scholars and activists are calling for a constitutional convention to curb political bickering.

Shea, Christopher, "Unconventional Meeting of Minds," *The Chronicle of Higher Education*, Sept. 18, 2011, [chronicle.com/article/An-Unconventional-Meeting-of/129048/](http://chronicle.com/article/An-Unconventional-Meeting-of/129048/).

Tea Party members say Americans don't have to agree on what a constitutional convention should do in order to call for one.

### **Electoral College**

Lane, Charles, "Keep the Electoral College," *The Washington Post*, Jan. 24, 2012, p. A19, [www.washingtonpost.com/opinions/electoral-college-may-not-be-popular-but-it-works/2012/01/23/gIQApsj6LQ\\_story.html](http://www.washingtonpost.com/opinions/electoral-college-may-not-be-popular-but-it-works/2012/01/23/gIQApsj6LQ_story.html).

The Electoral College helps stabilize U.S. politics by encouraging a two-party system, says a columnist.

Southwick, Albert B., "Is Electoral College History?" *Telegram & Gazette (Mass.)*, June 21, 2012, p. A9, [www.telegram.com/article/20120621/COLUMN21/106219838/0](http://www.telegram.com/article/20120621/COLUMN21/106219838/0).

The National Popular Vote movement doesn't call for an amendment to the Constitution but provides an agreement among states to bypass provisions of the Electoral College.

Tryon, Thomas, "Electoral College and Primary Systems Need to Change," *Sarasota (Fla.) Herald Tribune*, Oct. 9, 2011, p. A18, [www.heraldtribune.com/article/20111009/COLUMNIST/111009658](http://www.heraldtribune.com/article/20111009/COLUMNIST/111009658).

The Electoral College skews the results of presidential elections because it does not allow Americans to directly elect the president, says an opinion editor.

### **Prospects**

Dinan, Stephen, "Don't Hold Your Breath for a 28th Amendment," *The Washington Times*, Nov. 14, 2011, p. A1, [www.washingtontimes.com/news/2011/nov/13/dont-hold-your-breath-for-a-28th-amendment/?page=all](http://www.washingtontimes.com/news/2011/nov/13/dont-hold-your-breath-for-a-28th-amendment/?page=all).

Political gridlock in Washington makes any amendments to the Constitution unlikely anytime soon, says a political scholar.

Gorham, Will Short, "Of 11,000 Attempts to Amend U.S. Constitution, Only 27 Amendments Have Passed," *Tampa Bay (Fla.) Times*, Aug. 30, 2011, [www.politifact.com/truth-o-meter/statements/2011/aug/30/xavier-becerra/11000-attempts-amend-us-constitution-only-27-amend/](http://www.politifact.com/truth-o-meter/statements/2011/aug/30/xavier-becerra/11000-attempts-amend-us-constitution-only-27-amend/).

Amendments are approved by Congress and ratified by states only when there is broad national consensus on an issue.

Levinson, Sanford, "Our Imbecilic Constitution," *The New York Times*, May 29, 2012, p. A23, [blogs.nytimes.com/2012/05/28/our-imbecilic-constitution/](http://campaignstops.blogs.nytimes.com/2012/05/28/our-imbecilic-constitution/).

Article V makes the Constitution the most difficult to amend of any in the world, says a University of Texas law professor.

### **Supreme Court**

"Term Limits for Judiciary Intriguing Idea," *Albany (Ga.) Herald*, Feb. 21, 2012, [www.albanyherald.com/news/2012/feb/21/term-limits-for-judiciary-intriguing-idea/](http://www.albanyherald.com/news/2012/feb/21/term-limits-for-judiciary-intriguing-idea/).

It is difficult to believe that the Founders expected Supreme Court justices to serve up to 40 years on the bench, says an editorial board.

Cohn, Douglas, and Eleanor Clift, "The Founding Fathers Got It Wrong," *Evening Telegram (N.Y.)*, April 9, 2012, p. 4.

Supporters of abolishing lifetime tenure for Supreme Court justices say the current system does not create a politically free high court.

Gillman, Todd J., "Perry Is Building His Case for High Court Term Limits," *Dallas Morning News*, Aug. 30, 2011, p. A1.

Republican Gov. Rick Perry of Texas says lifetime tenure should be abolished for Supreme Court justices.

### **CITING CQ RESEARCHER**

Sample formats for citing these reports in a bibliography include the ones listed below. Preferred styles and formats vary, so please check with your instructor or professor.

#### MLA STYLE

Jost, Kenneth. "Remembering 9/11," *CQ Researcher* 2 Sept. 2011: 701-732.

#### APA STYLE

Jost, K. (2011, September 2). Remembering 9/11. *CQ Researcher*, 9, 701-732.

#### CHICAGO STYLE

Jost, Kenneth. "Remembering 9/11." *CQ Researcher*, September 2, 2011, 701-732.

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