



The Constitution

American National Government
Topic Two

How to view the US Constitution

- Lots of people think the US Constitution was handed down to us from on high by demigods
- But it wasn't.
 - The framers of the Constitution were only human, dealing with the politics of their own day and with their own limitations and agendas
 - They were ignorant of hugely important things, like political parties and electoral system design, causing major problems later
 - There were remarkable features to their achievement, but it is a mistake to think they didn't err

An engineer's view of the US Constitution

- I invite you to look at the Constitution like a **political engineer**
- Take it down off its pedestal and turn it over in your own hands
 - Learn: how does it work?
 - Consider: does it work well?
 - Imagine: how could it work better?



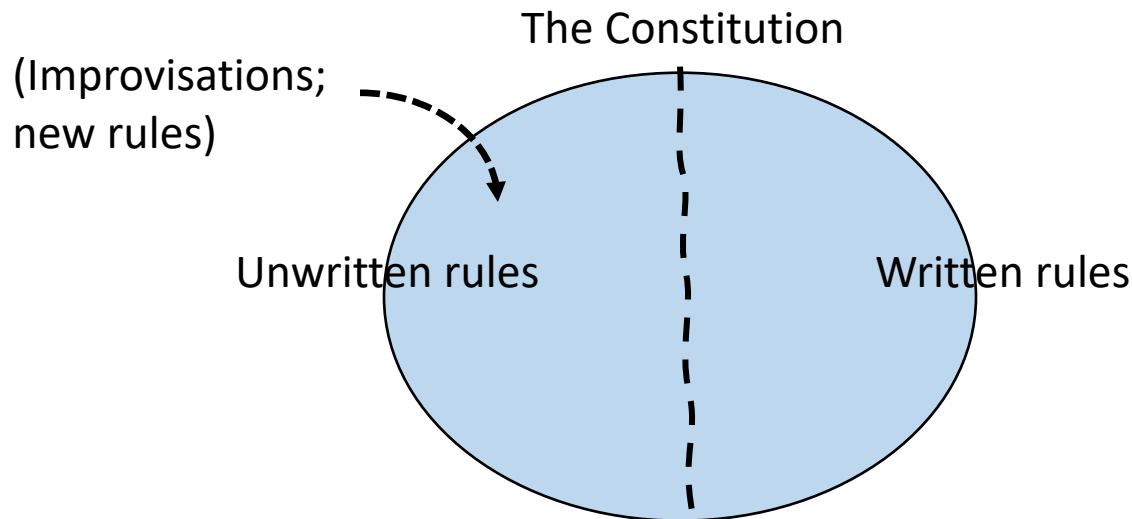
Overview

- Why a constitution?
- What choices were made (and not made) in the US Constitution that shape politics today?
- How does the US Constitution compare with other democratic constitutions?

I – Why a constitution?

What is a constitution?

- Constitutions are the basic rules that govern a country
 - Lay out the design of legislative, executive, and judicial power and how authority is exercised, limited, & divided btwn central & local govts, etc.
 - This provides a set of rules for the game of politics, but!:
 - 1. Not all these rules are written down
 - Many rules are informal norms; just how we've done things
 - 2. These rules are **always** necessarily incomplete
 - New situations arise that the rules don't provide for



The Innovation of a Written Constitution

Since ancient times,
'constitution' just meant the
basic organization of political
communities

Written constitutions become
more important with the
invention of popular
sovereignty in the American
and French Revolutions

The Innovation of a Written Constitution

The United States provides innovative model of writing a single document summarizing basics of government

In Federalist No. 1, Hamilton writes:

- “It seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”

The Constitution is important in world history as the first such act of ‘reflection and choice’ aimed at establishing good government

What is the
value of a
constitution
to
democracy?

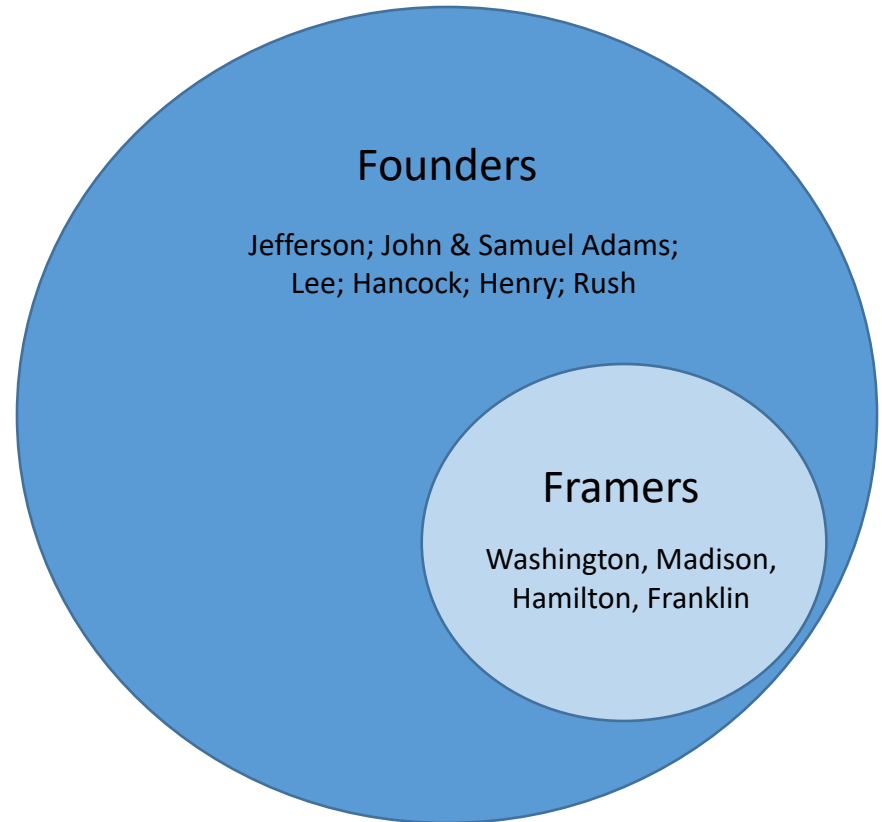
Spelling out the rules
of the game makes
democratic
government possible

Constitutions are a
primary tool for
limited government

II – What choices were made (and not made) in the Constitution that shape politics today?

Founders vs. Framers

- Founders vs Framers
 - Founders = patriot leaders during the revolutionary era
 - Framers = present at the 1787 Constitutional Convention in Philadelphia
- **THE CONSTITUTION WAS POLITICS**



Constitutional Convention

- The framers of the Constitution were PARTISAN political engineers trying to accomplish three things:
 1. Fix the Articles of Confederation
 2. Vastly strengthen the national government
 3. Prevent states from making policy that's popular but harms the interests of the rich



Constitutional Convention

- During the Convention, the framers grappled with:
 - Accomplishing their shared goals within the confines of the politically possible
 - Constraints: Couldn't abolish states; gov't had to be 'republican,' or nominally democratic
 - Political disagreement between factions and states

Articles of Confederation

Articles of Confederation was the nation's first constitution (1777-1789)

- Created a loose confederation of states

Structure of government under the Articles:

- No executive or judicial branches
- Unicameral Congress with equal representation of states
 - Difficult decision rule: 9/13 (69% supermajority) to raise/spend money, approve treaties, war; simple majority for everything else
 - Difficult amendment rule: Unanimity to change the constitution
- Central government possessed very limited, enumerated powers
 - As opposed to plenary, or unlimited, power
- Congress had to rely on states to implement laws

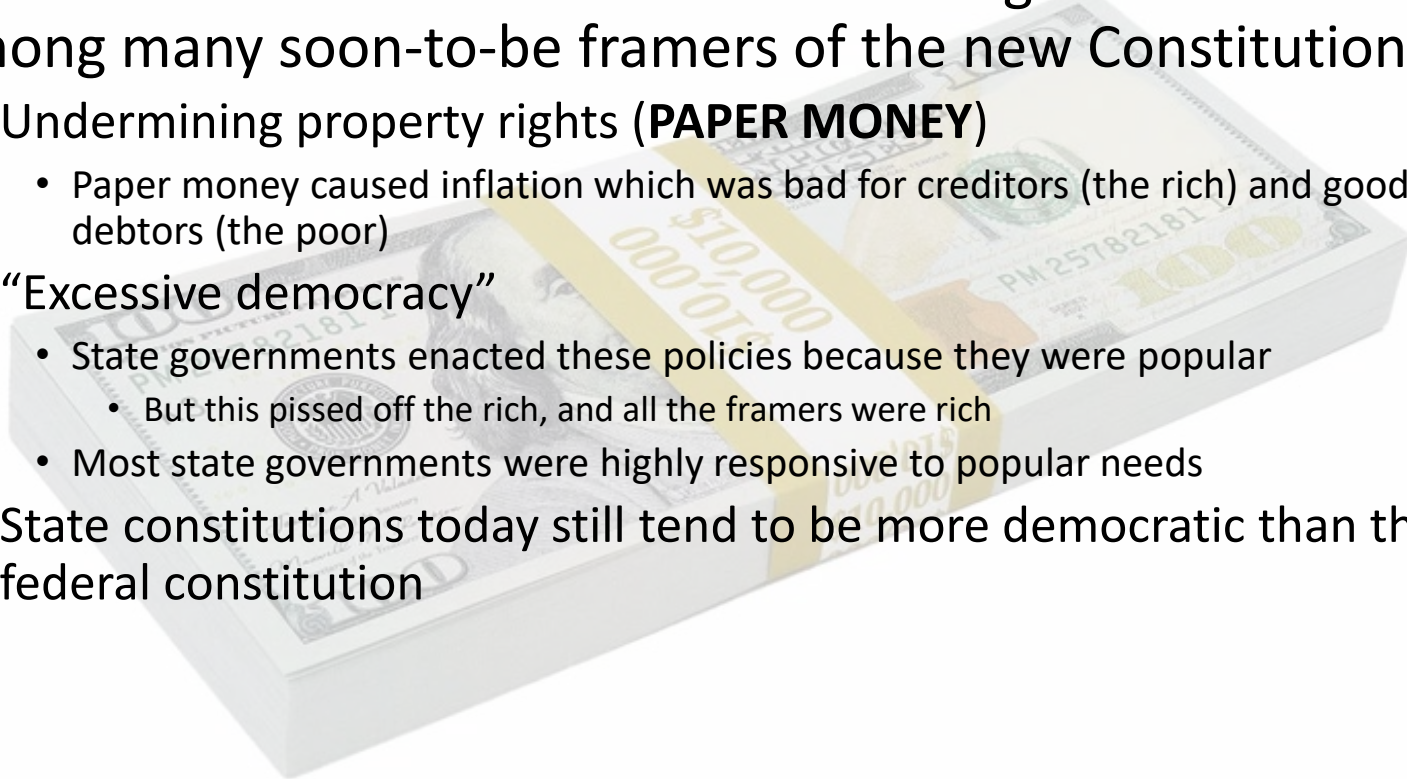
Articles of Confederation

- Many problems suggested the Articles needed reform:
 - Trade conflicts between states
 - Competition between states over foreign commerce ('race to the bottom')
 - Inability to raise revenues
 - No method of executing policy decisions
- Many, but not all, were unhappy with the government of the Articles
 - Inability to stop Shays Rebellion, which shut down one of the biggest state governments, Massachusetts, showed these weaknesses starkly



“Failure” of State Governments

- Also there was disillusionment with state governments among many soon-to-be framers of the new Constitution
 - Undermining property rights (**PAPER MONEY**)
 - Paper money caused inflation which was bad for creditors (the rich) and good for debtors (the poor)
 - “Excessive democracy”
 - State governments enacted these policies because they were popular
 - But this pissed off the rich, and all the framers were rich
 - Most state governments were highly responsive to popular needs
- State constitutions today still tend to be more democratic than the federal constitution





Convention of 'demigods,' painted 1940

Who were the Framers of the Constitution?

- Who was at the Constitutional Convention in Philadelphia 1787?
 - Most were wealthy
 - Young & well-educated, but experienced politicians
 - About half were slave owners
 - Similar political views
 - Shared belief the Articles of Confederation had to be scrapped
 - Dissenters did not attend; didn't want to legitimize an illegal rewriting of the Articles/constitution

Constitutional Convention

- Virginia plan

- Developed by James Madison
- Bicameral legislature
 - Lower house elected by population
 - Upper house members nominated by state legislatures, selected by the lower house
- Single executive elected by the legislature
- Council of Revision made up of executive and senior judiciary members had veto power
- National government could make any law necessary (plenary power)
- Veto of state laws
- Supporters?
 - Large states
 - Nationalists



James Madison in 1792

Constitutional Convention

- **New Jersey plan**
 - Developed by William Patterson
 - Unicameral legislature, like Articles
 - Equal representation of states
 - Same power as under Articles plus authority to levy taxes and regulate commerce
 - Executive
 - Plural & elected by Congress
 - Supporters?
 - Small states
 - Advocates of state sovereignty



Constitutional Convention

- (British plan)
 - Alexander Hamilton
 - Legislature
 - Bicameral
 - Lower house elected by citizens for 3-year terms
 - Upper house chose by electors, life tenure
 - Executive
 - Life tenure
 - Absolute Veto
 - Virtually proposed doing away with state sovereignty
 - Supporters?
 - None



Lin-Manuel Miranda as Alexander Hamilton

Constitutional Convention

- Basis of representation: *States or population?*
 - Proposals
 - Equal state representation (like under the Articles)
 - Population
 - Symmetrical bicameralism: “Great Compromise” or Connecticut Compromise
 - Representation in lower chamber (House of Representatives) based on population
 - Equal representation in upper chamber (Senate)
 - House given sole authority to originate revenue legislation (taxes)



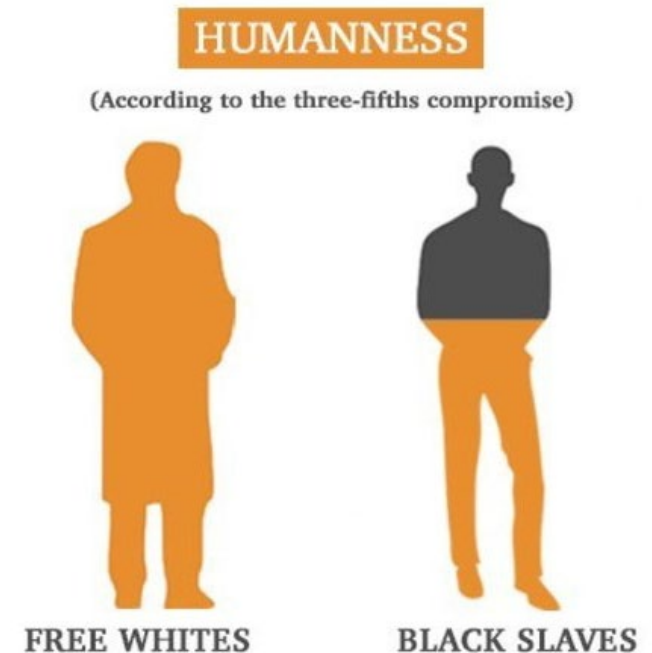
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Constitutional Convention

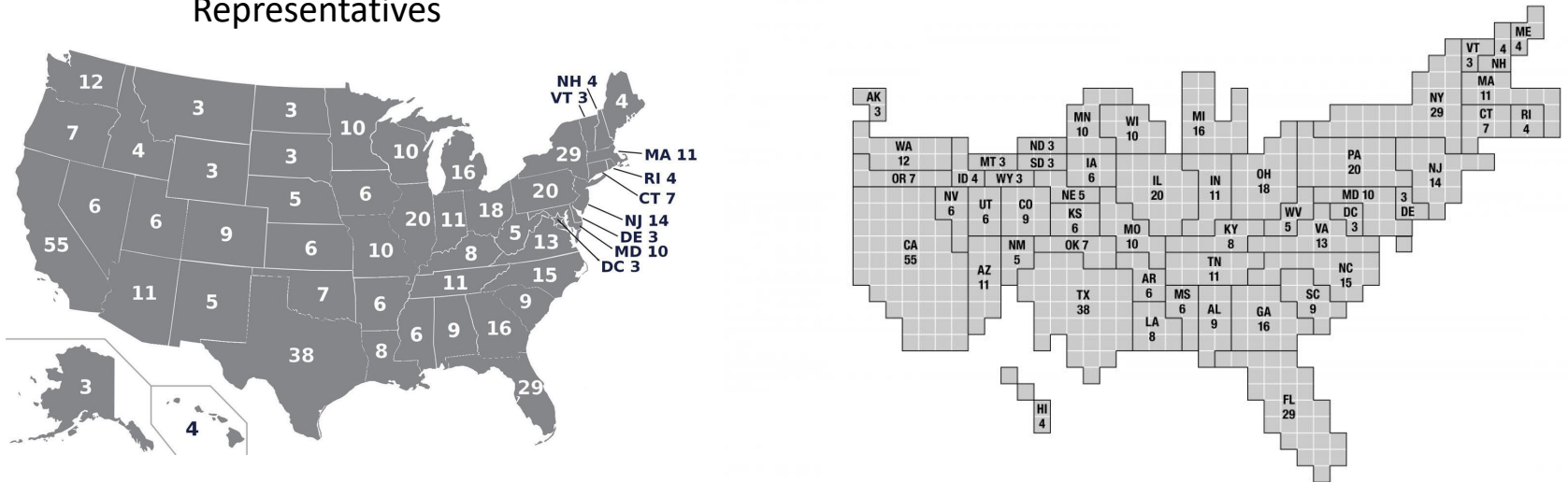
- *Slavery*

- How should slaves be counted in allocating representation?
 - South and North each wanted to maximize its representation
- Who would be allowed to regulate slavery?
 - South wanted unrestricted right to continue to import slaves
 - Northern states wanted gov't to have power to regulate it
- Choices
 - **Three-Fifths Compromise**: Each slave counts as 3/5 a citizen
 - Ban on regulation of slave trade until 1808
 - Northern states must return fugitive slaves (Article IV, Section 2)



Constitutional Convention

- *Design and selection of the executive?*
 - Proposals
 - Direct election by the people
 - Selection by House of Representatives (Madison)
 - Selection by state governors
 - Compromise: **Electoral College**
 - Everybody received a piece of the pie
 - State legislators had the right to determine the mode of selection for electors
 - If no candidate receives a majority, president is selected by House of Representatives



Structure of the Constitutional Text

Article I

- Congress
- Basics of offices; some rules of chambers
- Enumerated powers (Section 8)
- Limits on states; limits on Congress

Article II

- Presidency
- Basics of office; Electoral College; Commander-in-chief

Article III

- Federal Judiciary
- Appointment; terms of service; jurisdiction; trial by jury; treason

Article IV

- Relations between states and with federal government; new states

Article V

- Amendment

Article VI

- Supremacy Clause
- Oath of office and no religious test

Article VII

- Ratification

Constitutional Convention

- Choices made at the Convention
 - **Federalism**
 - Two levels of government, constitutionally protected
 - Americans invented this new division of power; didn't have a name for it
 - **Symmetric bicameralism**
 - Two chambers that can both veto any proposed law
 - **Shared powers**
 - NOT separated powers
 - Presidentialism
 - The executive is chosen independently of the legislature
 - (Uneasy) protection of slavery

Constitutional Convention

- Key consequences of these choices for American politics
 1. Tension between central government and subunits (states)
 - Perennial source of political conflict ultimately leading to Civil War; a tremendous constitutional failure
 2. System of inter-institutional transactions
 - Institutional need for president to transact (cut deals) with Congress and Congress to transact between its chambers
 - Huge amount of politics and political news is simply this!
 3. Overrepresentation of small states in the Senate
 - Permanent enshrinement of minority privilege
 - Very consequential because of symmetric bicameralism
 - Other countries' upper houses have much less authority

Constitutional Convention

- Choices NOT made at the Convention
 1. Electoral System
 - No debate over how representatives should be selected
 - Total ignorance about competing ways to translate votes into seats/power
 2. Party System/Interest Groups
 - No debate over role of parties or interest groups; no prior experience of representative democracy to draw on

Constitutional Convention

- Choices NOT made at the Convention

- 3. Judicial review

- Debate over federal judiciary did not consider power of judicial review
 - Total ignorance about how unelected judges could usurp power

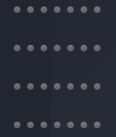
- 4. Filibuster

- In first Congresses both houses governed exclusively by majority rule
 - No decision for a supermajority threshold in the Senate
 - Emerged gradually over the 20th and 21st centuries

III – How does the US Constitution compare with other democratic constitutions?



The Constitution in Comparative Perspective



How do the framers' choices and the constitution as it stands today compare with those of other countries?

The US Constitution is **short, old, and very hard to change**



The Constitution in Comparative Perspective: Length

- The Constitution is about 8,000 words long (with amendments)
 - Only two other constitutions are shorter
 - It is less than half the median length
- Brevity means fewer rules are spelled out
 - More is left to interpretation or just left out

Japan	5
Denmark	7
United States	8
Korea	9
Italy	10
Netherlands	10
France	11
Czech Republic	11
Hungary	13
Argentina	13
Finland	13
Australia	14
Belgium	14
Switzerland	18
Israel	19
Spain	19
Canada	21
Poland	21
Germany	26
Greece	29
Chile	30
Portugal	38
Sweden	42
Austria	43
Colombia	51
South Africa	51
Brazil	60
Mexico	78
India	118
<i>Median</i>	<i>19</i>

Length of constitutions (in thousands of words) of twenty-nine democracies

The Constitution in Comparative Perspective: Length

- Key consequence of shortness is many vital constitutional principles aren't in it (also caused by difficulty of amendment)
 - Many rights vital for proper functioning of system, such as the right to vote, not explicitly protected
 - Many rights currently protected do not appear
 - Enables courts and legislatures to chip away at these rights
- A big problem with written constitutions is that any important constitutional rule or principle that is not spelled out in them is easily ignored or eroded
 - Shorter constitutions leave more things out, enabling violations of implicit but important constitutional rights and norms
 - Example: Supreme Court's *Dobbs* decision abolishing abortion rights relies on them not being explicitly protected

The Constitution in Comparative Perspective: Age

- The US Constitution is the oldest still-operating constitution in the world
 - We still have the same constitution from 1789, plus 27 amendments
 - The next oldest is more than forty years younger

United States	1789
Belgium	1831
Netherlands	1848
Canada	1867
Australia	1901
Mexico	1917
Austria	1945
Japan	1946
Italy	1947
Israel	1948
Korea	1948
Germany	1949
Hungary	1949
India	1949
Denmark	1953
France	1958
Sweden	1974
Greece	1975
Portugal	1976
Spain	1978
Chile	1980
Argentina	1983
Brazil	1988
Colombia	1991
Czech Republic	1993
South Africa	1996
Poland	1997
Finland	1999
Switzerland	1999

Date of origin of current constitutions in
twenty-nine democracies

The Constitution in Comparative Perspective: Age

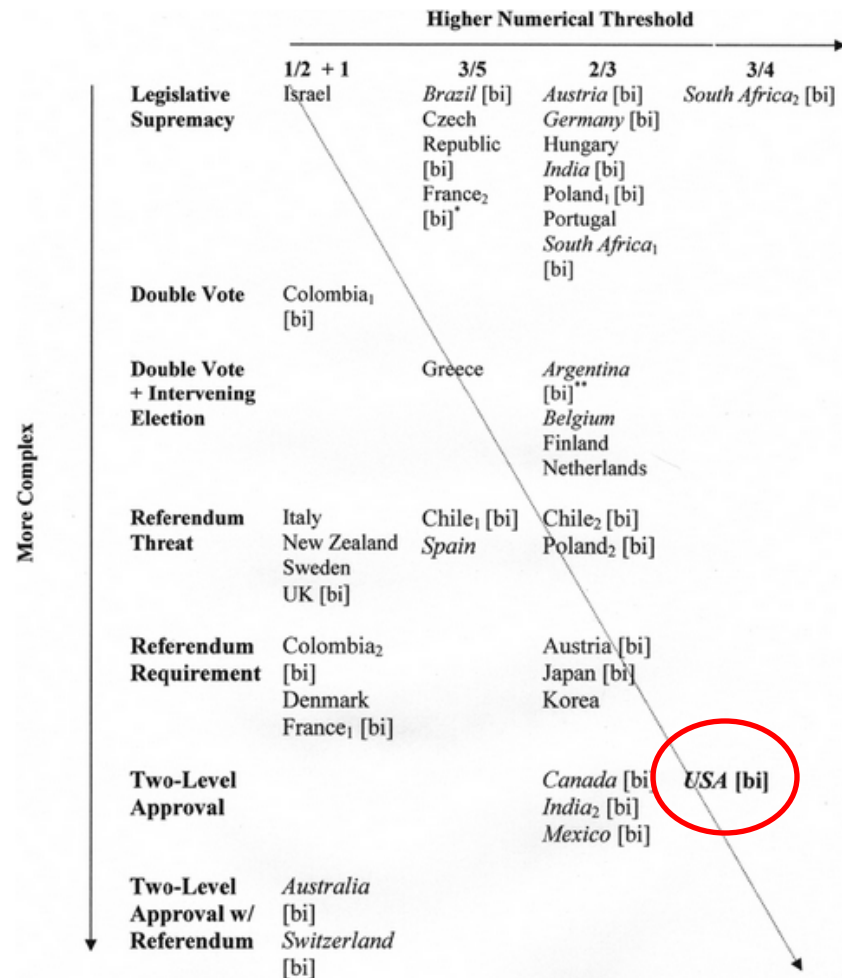
- Key consequence of age is American gov't hasn't been able to take advantage of learning about how democratic institutions work that's accumulated since 1789 (!)
 - Framers were flying blind; didn't know about parties; couldn't anticipate challenges of governing large industrial societies or inclusive electorates
- Many options for making democracy work well were not even imagined in 1789
 - Majoritarian vs. PR electoral systems
 - Multiparty vs. Two-party systems
 - Pluralist vs. corporatist interest group systems



Is America governing itself with the constitutional equivalent of a horse and buggy?

The Constitution in Comparative Perspective: Amendment

- Some say the genius of the framers was in creating a document that could change with the times
- These people are wrong. The US Constitution is the most difficult constitution to amend among major democracies, hindering change
 - Article V requires 67% supermajorities in both houses of Congress, plus 75% of states
- Also wildly out of step with US state constitutions, which are easy to amend



The Constitution in Comparative Perspective: Amendment

Thomas Jefferson, who was not present at Philadelphia in 1787, wanted to hold a convention every 19 years to create a new constitution, one appropriate for the times:

- “...It may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, and consequently may govern them as they please...Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right.” – *Thomas Jefferson to James Madison, 6 Sept 1789*

Jefferson's worry that people today would be ruled by the 'dead hand of history' has been borne out, due in large part to the difficulty of amendment

The Constitution in Comparative Perspective: Amendment

- Extraordinary difficulty of formally amending the Constitution has led to 'hacks' to informally amend it
 - Interbranch transactions can stably change balance of power
 - Ex: Supreme Court bowing to FDR and New Deal Congress; 20th century Congress delegating enormous power to president
 - Major legislation ambiguously 'constitutionalized'
 - Ex: Social Security, Medicare popular but not protected; Voting Rights Act would never have been repealed by Congress, but was by Supreme Court since it's formally only a law
 - Supreme Court decisions
 - Five votes can create rights or deny them out of thin air, whether written out or not
 - Ex: 4th Amendment protection against unreasonable searches has been decimated during Wars on Crime, Drugs, & Terror
- These hacks are inherently unstable and so cause major political conflict. They also leave basic constitutional rights & principles at risk

Summary

- Constitutions contain the institutional basics of government and help democracy by spelling out the rules of the game and limiting government
- The Constitution is the product of political compromises made by politicians, not the wisdom of godlike men, and these choices have profoundly shaped American politics
- By comparison with other countries' constitutions, the US Constitution is short, old, and very difficult to amend, sticking us with a potentially obsolete government structure and leaving vital rights and constitutional principles vulnerable