

THE CONSTITUTION UNDER PRESSURE: THE AMENDMENT PROCESS

Marcia Lynn Whicker, Ruth Ann Strickland, and Raymond A. Moore

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Introduction

The ability of the United States Constitution to govern has often depended upon its flexibility. Through Article V, the Constitution has generally been amenable to change as elites respond to political crises and as ordinary citizens respond to economic and technological transformations in American society. The Framers were indeed wise to include an amendment process within the Constitution since these amendment procedures have allowed us to adapt the Constitution to changing conditions. They have established a routine way of reforming government. In this manner, moderate change has occurred when necessary, and radical upheavals have largely been avoided. Without these changes, the Constitution could not govern. With them, the Constitution can and still does govern our country.

The Amendment Process

Since the Constitution was ratified, many changes have occurred in the United States. Changes such as technological advances, the growing population of the country, the diverse standards of public morality, and the transformation of the party system have placed pressure on the Constitution. How does a document drafted 200 years ago accommodate a society which has undergone such dramatic change? Although the Founding Fathers deliberately drafted the Constitution as a broad document, they recognized that no amount of drafting skill could dispense with the need for revision; through revision, the Constitution could adapt to unforeseen circumstances. For this reason, the Founders inserted the amending clause into the Constitution.¹

Over the course of two hundred years two methods have been used to change the United States Constitution. The first is the formal amendment process which changes the actual language of the Constitution. The second is the process of judicial review, in which the courts reinterpret or expand the meaning of existing Constitutional language through opinions and rulings.²

The rarity of amendments in the twentieth century may support the supposition that Americans are satisfied with governance by legislation, administration and judicial review. In comparison with these routines, the infrequently used amendment process often appears hazardous. Because amendments become necessary only when other modes for change fail, they tend to address

extreme circumstances. In such instances, amendments can account for significant changes in methods of governance or in individual rights and freedom.³

Some legal scholars argue that the Founding Fathers included an amendment process in the Constitution to tame the right to revolution and to establish a routine method for reforming the government when change was needed. Article V delineated the ways by which the Constitution could be amended, granting a role in the process to both Congress and the states. There are two methods for proposing constitutional amendments. The first requires a two-thirds vote in both Houses of Congress, and is the only method employed to date. The other method requires Congress to call a constitutional convention at the request of two-thirds of the state legislatures. Controversy surrounds the second method: How would such a convention be run? Might delegates to such a convention try to establish a new form of government?⁴

Once an amendment has been proposed, it must be ratified by the states. There are two methods for ratifying amendments: first, by the approval of legislatures in three-fourths of the states, and second, by ratifying conventions in three-fourths of the states. The method of ratification by conventions in three-fourths of the states has been used only once. Thirty-six state conventions approved of the Twenty-First Amendment, which repealed prohibition in 1933.⁵ Many recent amendments include congressionally imposed time limits upon state ratification, typically seven years.

Structural Constitutional Amendments

There are two types of constitutional amendments: those which institute structural changes in the government and those dealing with individual liberties. The structural amendments are concerned primarily with the principles of limited government, such as the separation of powers doctrine, checks and balances and the principle of federalism. There are seven structural amendments, far fewer than the nineteen civil liberties amendments. The structural amendments are the Tenth, Eleventh, Twelfth, Sixteenth, Twentieth, Twenty-Second, and Twenty-Fifth Amendments. (See Table 1.)

Table 1.
CONSTITUTIONAL AMENDMENTS AFFECTING STRUCTURE OF GOVERNMENT

AMENDMENT	PURPOSE
1791 Tenth	Gives reserve powers to the states not specifically delegated to the national government.
1795 Eleventh	Prohibits equity suits initiated by citizens of one state against another state.
1804 Twelfth	Requires electors in the electoral college to cast separate sets of ballots for president and vice president.
1913 Sixteenth	Allows for a progressive federal income tax.
1933 Twentieth	Moves presidential inaugural from March 4 to January 20, and beginning of new Congress to January 3.
1951 Twenty-Second	Establishes a two term limit on presidents.
1967 Twenty-Fifth	Establishes a procedure for filling a vice presidential vacancy between presidential elections by allowing the president to nominate a candidate who must be confirmed by both houses of Congress; creates a procedure for temporary transfer of presidential authority when the incumbent president is disabled.

The Tenth Amendment, unlike the first nine, was a structural amendment, rather than one that addressed civil liberties. It was included to assuage states' rights advocates, and was important in ratification politics following the 1787 Convention. The Eleventh Amendment, which also dealt with the principles of federalism, was proposed in response to a Supreme Court decision in 1792 which extended the Court's jurisdiction to suits initiated by a citizen of one state against another state. Adherents of state sovereignty advocated an amendment prohibiting such suits.⁶ The Twelfth Amendment, another structural amendment, modified the electoral college by placing the election of the president and the vice president on separate ballots, requiring electors to cast one set of ballots for the president and a second set for the vice president.

In 1913, the Sixteenth Amendment modified Congressional taxing power to allow for a progressive income tax where tax revenues collected within a state were not proportionate to population. In the long run, this amendment greatly enhanced national power over the states by providing the federal government with an elastic tax whose revenues grew at a more rapid rate than the revenues from more regressive taxes employed by the states.

In 1933, the states ratified the Twentieth or, so-called "Lame Duck" Amendment. This amendment modified the Twelfth Amendment by moving the presidential inauguration from March 4 to January 20, thus shortening the "lame duck" period. The period between the election and the assumption of power by the newly elected Congress was also shortened by moving the beginning of the new Congress to January 3.

The last structure of government amendment, the Twenty-Fifth Amendment, ratified in 1967, established a procedure for selecting a vice president if the office became vacant between presidential elections. The Twenty-Fifth Amendment also created a procedure to transfer presidential power temporarily in the event of mental or physical disability.

Civil Liberties Constitutional Amendments

The remaining nineteen amendments generally expand individual liberties and protect the individual from excessive use of power by state and federal governments. Five of eleven constitutional amendments passed since 1900 have expanded individual freedoms by expanding the franchise.⁷

Amendments expanding individual liberties include the first nine amendments in the Bill of Rights and the Thirteenth, Fourteenth, Fifteenth, Seventeenth, Eighteenth, Nineteenth, Twenty-First, Twenty-Third, Twenty-Fourth, and the Twenty-Sixth Amendments. (See Table 2.)

Table 2.
CONSTITUTIONAL AMENDMENTS AFFECTING CIVIL LIBERTIES

AMENDMENT	PURPOSE
1791 1st	Freedom of religion, speech, press, assembly, and to petition the government for grievances.
1791 2nd	The right to bear arms.
1791 3rd	Prohibits peacetime quartering of soldiers.
1791 4th	Prohibits unreasonable searches and seizures.
1791 5th	The right to a grand jury, due process, protection against self incrimination and double jeopardy, and just compensation for property seizures for public use.
1791 6th	The right to a speedy trial and an impartial jury, to be informed of charges and to confront witnesses, and to counsel.
1791 7th	The right to trial by jury in common law cases.
1791 8th	Prohibits excessive bail and fines, and cruel and unusual punishment.
1791 9th	Provides protection of individual rights not specifically enumerated in the Constitution.
1865 13th	Abolishes slavery and involuntary servitude.
1868 14th	Provides due process and equal protection under the laws, and prohibits the abridgment of privileges and immunities of citizens.
1870 15th	Gives blacks the right to vote.
1913 17th	Provides for direct election of U.S. Senators
1919 18th	Prohibits the sale, manufacture, transportation, importation of, or exportation of alcoholic beverages.
1920 19th	Gives women the right to vote.
1933 21st	Repeals prohibition.
1961 23rd	Provides presidential electors for the District of Columbia.
1964 24th	Abolishes poll taxes.
1971 26th	Gives eighteen year-olds the right to vote.

The first nine amendments in the Bill of Rights, ratified in 1789, primarily restricted the power of the national government to intrude upon and restrict individual liberties. The Thirteenth Amendment, ratified in 1865; the Fourteenth, adopted in 1868; and the Fifteenth, approved in 1870 are often called the Civil War Amendments, and, together, significantly expand the rights of blacks and naturalized citizens. These Civil War Amendments also greatly expanded the power of the federal government over the states.

In 1913, ratification of the Seventeenth Amendment provided for direct election of the United States Senators, thus expanding citizen power at the national level. The Eighteenth Amendment, ratified in 1919, is an anomaly, not easily classified as affecting structure of government or civil liberties. Since this amendment prohibited the sale, manufacture, transportation, importation, or exportation of alcoholic beverages, it affects civil liberties, but unlike other civil liberties amendments, the Eighteenth restricted rather than expanded individual freedoms. The Eighteenth Amendment was repealed in 1933 with the ratification of the Twenty-First Amendment.

Not until 1920, with the ratification of the Nineteenth Amendment, did women in the United States secure the right to vote, an expansion of the electorate by approximately 100 percent. Another expansion of the electorate by constitutional amendment did not occur again until 1961 when the Twenty-Third Amendment provided presidential electors for the District of Columbia.

Until that time, residents of the nation's capital could not vote in presidential elections.

In 1964, the Twenty-Fourth Amendment was ratified, further expanding individual freedom to participate in governance by abolishing poll taxes, a method frequently used in the South to prevent blacks and poor people from voting. The last expansion of the electorate occurred in 1971, when the Twenty-Sixth Amendment granted the right to vote to eighteen year olds.

Some might argue that not all civil liberties amendments expand individual freedom. For example, slaveholders argued that the Thirteenth Amendment, which abolished slavery, infringed on their property rights. Even the First Amendment is sometimes interpreted ambiguously with respect to the expansion of individual liberty. Those who desire prayer in public schools claim the establishment clause, as interpreted by the Supreme Court, violates their freedom to pray. On the other hand, those who oppose prayer in public schools assert that the Supreme Court properly interpreted the establishment of religion clause in order to protect personal liberty.

There is further controversy over whether or not the Fourteenth Amendment was used to expand or contract individual liberties in the *Roe v. Wade* abortion case of 1973. Pro-choice advocates applaud the decision, stating that it expands liberty by giving women the freedom to choose what they can do with their bodies. On the other hand, pro-life advocates are concerned with the rights of the unborn, and protest the Supreme Court decision as infringing on those rights. Nevertheless, the argument can readily be made that the net effect of civil liberties amendments, including the First, Thirteenth, and Fourteenth, was to expand individual freedom.

Models of Constitutional Change

We propose two different models of constitutional change, one for structure of government amendments, and another for civil liberties amendments. Each has four stages, resulting in a constitutional amendment in stage four. The two models differ, however, in stages one, two and three. In stage one, the precipitating factor for structure of government amendments is a political triggering event, while the precipitating factor for civil liberties amendments is technological innovation. Since technological innovations are a major contributor to economic growth and are instrumental in significant long run improvements in productivity, economics is a major causal factor in the initiation and ratification of civil liberties amendments, while politics is a major causal factor in the initiation and ratification of structure of government amendments.

The process model for structure of government amendments is more elite based, while the model for civil liberties amendments is more popularly based. In stage two, for structure of government amendments, the political triggering event and recognition of a structural problem affects mostly politicians and other elites, while for civil liberties amendments, the precipitating technological innovation has a profound impact on the behavior and attitudes of average citizens.

In stage three, for structure of government amendments, elites in Congress and in state legislatures begin to form political coalitions. By contrast, for civil liberties amendments, grass roots political movements are formed or, if already existing, are given new life, by the attitudinal and behavioral changes brought about by the precipitating technological innovation. Stage four for both models results in constitutional change. (See Table 3.)

Table 3.
MODELS OF CONSTITUTIONAL CHANGE

STAGES OF CHANGE FOR STRUCTURE OF GOVERNMENT AMENDMENTS

(Elite-based constitutional change)

Political triggering event	Widespread awareness of structural problem	Formation of political coalition	Constitutional change
Stage I	Stage II	Stage III	Stage IV

STAGES OF CHANGE FOR CIVIL LIBERTIES AMENDMENTS

(Popular-based constitutional change)

Technological Innovation	Behavioral & attitudinal change	Political movements demands	Constitutional change
Stage I	Stage II	Stage III	Stage IV

The stage one political triggering event for structure of government amendments focuses attention upon the structural weakness in the government process. Spreading awareness of the problem and increasing motivation among relevant politicians and political elites to correct it characterizes stage two. As awareness and motivation spread, political coalitions build up in stage three to demand a formal systemic response to the problem highlighted by the political triggering event. A concern for good government, reflected in lobbying efforts, culminates in the initiation and ratification of a constitutional amendment in stage four. Clearly the process is a long one, not only in the number of stages, but also in the amount of time each stage can take. The length of time required may range from a few years to many years or even decades.

For civil liberties amendments, the precipitating event in stage one is technology, because technology provides a basis for social organization, which in turn, affects behavior and attitudes. New technologies affect the way individuals relate to each other as well as impact upon production. After technological innovation in stage one has induced behavioral and attitudinal changes in stage two, political movements arise in stage three to push for formal recognition of expanded opportunities. When successful, these movements result in legal and constitutional change in stage four.

Why are the first stages of the constitutional amendment process different for structure of government amendments on the one hand and civil liberties

amendments on the other? Structure of government amendments are usually technical in nature, refining and improving the process of government. These amendments have little immediate impact upon the daily lives of average citizens, but rather are designed to improve the efficiency and effectiveness of government. The precipitating event for these amendments is typically an outstanding political event or series of events highlighting an inadequacy in the current method of selecting public officials or administering governmental affairs. The weakness or problem in the governmental process may have been readily apparent before the occurrence of the political triggering event, but the motivation to overcome inertia and push through a constitutional reform was previously lacking. The precipitating political event highlights the importance of the problem, broadens recognition of the problem, and provides the motivation to correct the structural deficiency.

Civil liberties amendments deal with the basic and daily relationships between major groups in society. The general thrust of civil liberties amendments is to prevent the group or groups in power from exploiting or continuing to exploit less powerful groups. Why would a powerful group suddenly alter a pattern of dominance and interaction toward a powerless group, relinquishing control it once enjoyed? Such a shift in power is so major and so substantial that only fundamental changes in the economic, technological, and cultural bases of society make it possible.

Technological innovation, as one of the most important factors in economic growth and the major contributor to significant improvements in productivity, typically precedes and precipitates such a fundamental shift in power. The time lag may be lengthy between the development and dissemination of the technology, and the final constitutional change. Political coalitions in stage three, as well as behavioral and attitudinal changes in stage two, are a necessary part of the process. But the beginning event is a technological change which does one of two things: either the new technology makes the previous exploitation of the powerless group by the powerful group no longer economical and profitable, and therefore no longer desirable; or else the new technology provides the disadvantaged group with a new power base from which it can demand and force greater equality and recognition from the legal and governmental systems.

POLITICAL TRIGGERING EVENTS FOR STRUCTURAL CHANGE AMENDMENTS

Two amendments, the Twenty-Second and the Twenty-Fifth, will be used to illustrate the effect of political triggering events. These examples are used because they are fairly recent, important and deal with well-known presidents. (See Table 4 for a complete list.)

Table 4.
POLITICAL TRIGGERING EVENTS FOR STRUCTURE OF GOVERNMENT AMENDMENT

AMENDMENT	POLITICAL TRIGGERING EVENT
10th	Politics of ratification of the Constitution.
11th	U.S. Supreme Court case of <i>Chisholm v. Georgia</i> .
12th	Rising strength of political parties, president and vice president of opposite political parties in 1796, and the election tie of 1800.
16th	Increasing inadequacies of excise taxes and customs duties as methods of financing government, and Supreme Court blockage of federal income tax legislation.
20th	Unresponsiveness of Republican controlled Congress to the Great Depression.
22nd	Republican reaction to four terms for Roosevelt.
25th	Eisenhower's illnesses and Kennedy's assassination.

Roosevelt's Four Terms And The Twenty-Second Amendment

Franklin Roosevelt's extraordinary four term election to the office of President triggered the adoption of the Twenty-Second Amendment in 1951. Sometimes called "the Republicans' revenge on Roosevelt," the Twenty-Second Amendment states that "no person shall be elected president more than twice." Republicans resented being precluded from the White House and its perquisites of office, including the power to appoint federal judges and political appointees in the federal bureaucracy. Republican partisans were joined by Democrats who feared that the presidency could come to resemble a dictatorship if no formal constitutional limits were imposed on the length of service. Awareness of these problems spread through political elites and resulted in the Twenty-Second Amendment.

Eisenhower, Kennedy, And The Twenty-Fifth Amendment

Presidents had been disabled before the 1950s. When Woodrow Wilson suffered a stroke in his second term in office, his wife virtually became acting president. However, the immediate political triggering events for the Twenty-Fifth Amendment, which dealt with presidential disability and succession, were Eisenhower's illnesses while in the White House and Kennedy's assassination which left open the vice presidency once Johnson assumed the presidency. Eisenhower suffered a mild heart attack on September 24, 1955, causing him to be hospitalized for three weeks. Less than a year later, on June 9, 1956, he was hospitalized again after an attack of ileitis and underwent surgery. On November 25, 1957, he suffered a minimal stroke.⁸ These illnesses created a desire among political elites to develop appropriate and official procedures for dealing with presidential disabilities. Similarly, the vacancy in the vice presidency when John F. Kennedy was assassinated and Lyndon Johnson became president, drew attention to that problem. The Twenty-Fifth Amendment was designed to address both presidential disability and succession.

TECHNOLOGICAL INNOVATIONS TRIGGERING CIVIL LIBERTIES AMENDMENTS

Technology driven by social change eventually culminating in legal change is particularly appropriate to the civil liberties amendments and the Civil War Amendments. These two cases will be used to illustrate technological innovations triggering civil liberties amendments. See Table 5 for a complete list.

Table 5.
TECHNOLOGICAL INNOVATION TRIGGERING CIVIL LIBERTIES AMENDMENTS

AMENDMENT	TECHNOLOGICAL INNOVATION
First Nine Amendments	Beginning of the industrial revolution.
Civil War Amendments (13th, 14th, 15th)	Expansion of the industrial revolution.
Seventeenth	Enhanced communication and electricity.
Prohibition (18th & 21st)	Automobile
Nineteenth	Barrier methods of birth control.
Expansion of the electorate (23rd, 24th, 26th)	Television

The Beginning Of The Industrial Revolution And The Bill Of Rights

According to Thomas Jefferson, "Science is more important in a republican than in any other kind of government."⁹ Jefferson believed that technology was compatible with and conducive to a democratic republican government and also built up a sense of American nationalism. Technology achieved a new level of importance in America as well as throughout the rest of the world during the Industrial Revolution.

The precise dates of the Industrial Revolution are subject to debate, but most scholars consider the beginning period to last over a century between 1660 and 1815. During this period, the factory system began, experimentation started with steam power to pump water, coal mines reached new depths as pumping systems improved, and the first practical steam engines were invented. In the 1760s, a spinning jenny was perfected which greatly improved the speed with which raw cotton was transformed into thread, as well as the quality of the output. The mercantile system of commerce began to decline and the free enterprise system began to emerge.

With the decline of mercantilism and feudalism, attitudes and behavior evolved toward new liberal values emphasizing individual rights in the political sphere and private property in the economic sphere. Although many liberal philosophers, such as Locke and Adam Smith, were British, liberal values were particularly strong in America. By the time of the Philadelphia Convention, these values were so strongly held that many states refused to

ratify the new Constitution without a promise of the inclusion of civil liberties protections in the Bill of Rights.

In the case of the Bill of Rights, the technological changes brought about by the beginning of the Industrial Revolution in stage one contributed to the growth of a liberal political philosophy emphasizing individualism in stage two. In stage three, the ideals of the revolution supporting freedom from government oppression were supported by Anti-Federalists who desired a Bill of Rights and Federalists who feared the 1787 Constitution would be rejected by the states.

In this instance, the new technologies represented by the beginning of the Industrial Revolution held forth the promise, if not yet the actualization, of a more economically independent America. As technology spread, the colonies would no longer be dependent upon Britain for finished goods and finer manufactured products. Rather they could produce those products domestically. Technological innovations in this instance gave greater economic, and ultimately political, power to the formerly disadvantaged group, the colonists. This fueled the Revolution, the resulting liberal 1787 Constitution and the individual protections in the Bill of Rights.

The Expansion Of The Industrial Revolution And The Civil War Amendments

The Industrial Revolution expanded to a more mature phase between 1815 and 1918. The technological inventions in the early to mid-1800s contributed to cultural and economic changes underlying the American Civil War and the resulting Civil War Amendments to the Constitution. Dissemination of technology in the first half of the nineteenth century was not uniform throughout the country but was more widespread and dominant in the North. For example, the total output of pig iron in 1860 was approximately 859,000 tons, of which only 26,000 tons were produced in the South.¹⁰ Similarly, of over eleven thousand tons of steel produced nationwide, nine thousand were produced in Pennsylvania. Because of the dissemination of the sewing machine in the North, the section had a dominance in clothing production as well. Northern production of armaments also far outstripped Southern production.

These and other less dramatic technologies transformed the North from an agricultural to an industrial society, while the South remained primarily agricultural. The North was never dependent upon slave labor and instead used cheap immigrant labor. The expansion of the Industrial Revolution in the North in stage one contributed to the growth of urbanization and its accompanying attitudes and behaviors. Urban lifestyles in stage two provided fertile ground for the growth of the abolitionist movement in stage three. After the bloody, prolonged and extraordinarily costly Civil War, in which the industrial power of the North finally prevailed over the manpower of the South, the Thirteenth, Fourteenth, and Fifteenth Amendments were

passed. Most Southern states were forced to ratify these Civil War Amendments as part of Reconstruction.

In the case of the Civil War Amendments, the new technologies disseminated through the expansion of the Industrial Revolution in the North made the continued exploitation of blacks through the institution of slavery uneconomical in industrialized regions. Historians now disagree about how economical slavery was in the South, and how long its practice would have continued without the Civil War. However the industrialization of the North, which clearly made slavery unprofitable in that region, also gave the North the supplies and economic base to win the war and enforce its views through the Civil War Amendments.

CONCLUSIONS

Constitutional amendments may be one of two types: changes in the structure of government or expansions of civil liberties. In two hundred years of American history, the latter have outnumbered the former. Civil liberties amendments are driven by technological innovation while structure of government amendments are triggered by political crises. Since technology is constantly changing, the demands for expansions in civil liberties have been more numerous than the demands for alterations in the structure of government. Not only have amendments altering the structure of government been less numerous, but they have refined rather than radically restructured the basic governmental institutions and processes. Americans continue to revere the governmental framework set forth by the Founders and the concepts of separation of powers and checks and balances that it embodies.

In the future, we can anticipate that the role of technological change will only accelerate; thereby placing new and greater pressures on our constitutional system. Political crises over international trade deficits, budget deficits, interest payments and urban decay may trigger further structural changes. The Constitution's ability to govern in the years ahead depends on its capacity to adapt to necessary change. Although the strains have been many and the process complicated, the history of constitutional amendments gives hope that the future will be as responsive to change as the past.

NOTES

¹C. Herman Pritchett, *The American Constitutional System*. 3rd ed. (New York: McGraw-Hill, 1971).

²John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980); Robert S. Hirschfield, *The Constitution and the Court: The Development of the Basic Law Through Judicial Interpretation* (New York: Random House, 1962).

³Clement E. Vose, *Constitutional Change: Amendment Politics and Supreme Court Litigation Since 1900* (Lexington: D. C. Heath and Company, 1972).

⁴Wilbur Edel, *A Constitutional Convention: Threat or Challenge?* (New York: Praeger Publishers, 1981); Rexford G. Tugwell, *The Emerging Constitution* (New York: Harper's Magazine Press, 1974).

⁵Everett S. Brown, "The Ratification of the Twenty-First Amendment," *American Political Science Review* 29, 1008-1009; William S. Livingston, *Federalism and Constitutional Change* (Oxford: Clarendon Press, 1956).

⁶Edel, *A Constitutional Convention: Threat or Challenge*, 1981; Livingston, *Federalism and Constitutional Change*, 1956.

⁷Edel, *A Constitutional Convention: Threat or Challenge?*, 1981.

⁸Arthur M. Schlesinger, Jr., *The Almanac of American History* (New York: G.P. Putman's Sons, 1983).

⁹Hugo A. Meier, "Thomas Jefferson and a Democratic Technology," In *Technology in America: A History of Individuals and Ideas*, ed. Carroll W. Pursell, Jr. (Cambridge: MIT Press, 1981), p. 20.

¹⁰John W. Oliver, *History of American Technology* (New York: The Ronald Press Co., 1956), p. 278.