

THE BILL OF (TWELVE) RIGHTS: CONTINGENCY AND THE CONSTITUTION



Convention at Philadelphia, 1787. There were many different potential outcomes of this meeting of representatives in 1787.

Think of a time when a small change altered your entire day. Perhaps it was a time when you caught a bus to school just in the nick of time. Had you stopped to talk to a friend or neighbor for even half a minute on your way to the bus stop, you would have missed the bus.

That possibility of things going a different way is called *contingency*. In the example above, catching the bus on time was *contingent* on you not delaying yourself on the way to the bus stop. If you had missed the bus, then things could have gone a different way. Who knows how?

History is the same: we may be familiar with one set of events, but things could have turned out differently. Historians also call this presence of other possible outcomes contingency. And the story of the Constitution and the Bill of Rights is a story with many contingencies . . .

On March 4, 1789, soon after the ratification of the new United States Constitution, the members of the First Congress of the United States gathered in the recently renovated Federal Hall in downtown Manhattan in New York. Or at least some of them did. ▶

IN THIS ISSUE

U.S. History: *The Bill of (Twelve) Rights: Contingency and the Constitution* by contributor Emily Brooks, Ph. D.1

World History: *Tlaxcalan: The Indigenous Democracy of Mexico* by longtime contributor Carlton Martz8

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Federal Hall on Wall St. N.Y. and Washington's installation 1789. *How the first representatives of the new American government came to meet here could have happened differently.*

It would be weeks before enough representatives arrived for the newly formed Senate and House of Representatives to begin their work. Even though these political leaders had won their revolution against Britain and drafted and ratified the U.S. Constitution, questions remained about how the new national government would work.

During the ratification process of the Constitution, many Americans wanted revisions or amendments introduced to the Constitution. Some sought to create clearer limits on the powers of the federal government. It was up to this First Congress to try to hammer out what those amendments would be.

Today, a contemporary visitor to Federal Hall could, in just a few minutes, walk to the nearby National Museum of the American Indian, the African Burial Ground National Monument, the Museum of Jewish Heritage, or Zuccotti Park where the Occupy Wall Street movement began in 2011. These neighboring sites, and what they represent, could hardly have been imagined by the men who met in Federal Hall in 1789. They were not time travelers who knew the future of their new nation, nor were they representatives of all segments of colonial society. They were members

of an elite class of men who sought to address what they saw as the challenges of their time. Identifying and meeting these challenges was an uncertain process whose outcome was far from preordained.

In this essay we will examine the historical context surrounding the drafting of the Constitution's first amendments. A record of the first 12 proposed amendments is held at the New York Public Library. This essay will also consider how the first ten amendments that were ultimately adopted came to be known as the Bill of Rights.

Like the timing of arrivals of the senators and representatives to the First Congress, or your attempt to catch the school bus, the events that led to the creation of the Bill of Rights were not entirely predictable. They could have played out in a different way.

The American Revolution and its Uncertain Aftermath

The spring meeting of the nation's First Congress was part of a larger decision-making process. That process would decide the rules that would govern relations within the now independent United States, as well as between the new nation and other nations.

By challenging the power of the British king and Parliament, American revolutionaries had opened up space for other challenges to power. As John Adams of Massachusetts, who would later become one of the drafters of the Constitution, the first vice president and later the second president of the United States, put it in a letter to his wife, Abigail:

We have been told that our struggle has loosened the bands of government everywhere; that children and apprentices were disobedient; that schools and colleges were grown turbulent; that Indians slighted their guardians, and Negroes grew insolent to their masters.

To many revolutionaries, these threats to the established social order proved worrisome.

Leaders of the Revolution, like John Adams, generally favored a republic (a government of elected representatives) rather than a pure democracy (more decisions made directly by the people instead of their elected representatives) or a hereditary monarchy or aristocracy. But they only envisioned a republic in which some white men, mostly property owners, had the right to choose the rulers of the new nation.

They wrote about the new republic using language of equality and natural rights, but they did not apply these concepts to the majority of the population. For example, many of them thought that the new nation had a right to seize Indigenous land, sometimes through violence. Some of them, in fact, had become wealthy buying and selling land that had been taken from Indigenous communities. Enslaved people, too, were deprived of the equality and natural rights that the Revolution's leaders claimed as "unalienable" (that cannot be taken away by anyone) in the Declaration of Independence in 1776.

The Revolution's leaders, in general, were also opposed to granting political rights to women and poor white men who were not property owners. They argued that both groups were economically and intellectually dependent on propertied white men and, therefore, could not cast independent votes. Some of these ideas found their way into the new state constitutions that were written after the Revolution. Most of these constitutions included property requirements for voting.

Had the leaders applied the values of freedom, equality, and natural rights universally (to everyone), the new government they formed would have looked very different. This is another moment of contingency.

The Articles of Confederation

Before the ratification of the Constitution, the federal government was limited in what it could do by the Articles of Confederation, a set of rules written during the Revolution in 1777. The Articles prohibited many important national government functions, like collecting taxes.

War is expensive, and after the Revolution, the fact that the Articles of Confederation did not grant the federal government the power to collect taxes proved nearly catastrophic. Congress had sold government bonds to finance the war and paid soldiers and suppliers in notes (not cash) that could only be redeemed in the future. Without the right to raise taxes, the federal government could not pay any of these debts. A letter-writer expressed Congress's main problem with the Articles neatly to George Washington: "no money."

The ability of the national government to raise taxes and pay its debts was no abstract matter. In 1786, during the time period the Articles of Confederation were in effect, indebted farmers, some of whom had received only notes and little pay for serving in the Continental Army and state militias, occupied the courthouses in western Massachusetts. They were trying to prevent the seizure of their farms for failure to pay state taxes. The uprising, which became known as Shays' Rebellion, pitted the indebted farmers against Massachusetts's governor. Both sides claimed to be upholding the spirit of the Revolution.

Shays' Rebellion convinced many political leaders that the union was vulnerable under the weak Articles. Unless the nation strengthened the powers of the federal government, the union could dissolve. In 1787, representatives from every state except Rhode Island met in Philadelphia to revise the Articles.

The discussions around the Articles and Shays' Rebellion reveal moments of contingency. Had the Articles provided more power to the federal government, or had farmers in Western Massachusetts stayed home, this Philadelphia meeting would have likely unfolded very differently, or not at all.

The Constitutional Convention

The Constitutional Convention in the spring and summer of 1787 was not destined to happen. It was partly the result of a poor showing at a gathering earlier that year in which state delegates had hoped only to revise the Articles of Confederation, not replace them with an entirely new document. ▶

At that earlier meeting, which representatives from only five of the thirteen states attended, the representatives set in motion what became the Constitutional Convention. They voted in favor of a resolution from Alexander Hamilton, a delegate from New York, that delegates from all the states would meet in Philadelphia and make necessary changes to “render the constitution of the Federal Government adequate to the exigencies of the Union.” Had delegates from the other eight states participated, the vote in favor of holding a Constitutional Convention might have turned out differently.

When representatives gathered in Philadelphia, they shared some views, but they also disagreed over many issues. The men who crafted the Constitution (the Framers) clashed at the convention over several key questions including: the balance of power between state governments and the federal government, expanding democracy or protecting private property, the representative power of small states versus big states, and the issue of slavery.

In drafting this new document many Framers wanted to create balance with the many already existing state constitutions, which they viewed as too democratic (granting too much power to regular people, rather than their representatives). As Massachusetts Representative Elbridge Gerry put it, the state constitutions had an “excess of democracy.”

Democracy, to most men at the Constitutional Convention, was a word with negative connotations. They associated democracy with a governing system in which regular people had an unacceptable amount of power. They preferred a republican system in which a portion of the people, in this case a small group of largely property-owning white men, chose the leaders who would then govern the entire nation.

The issue of slavery played a role in many debates at the convention. Though the words “slave” and “slavery” are not mentioned anywhere in the Constitution, the document references slavery many times. Framers deliberately used other language to describe enslaved people, like “persons.” But they could not avoid discussing slavery as it was a central economic institution and political question for the former colonies. The Constitution as ratified granted significant power to slaveholding states and the interests of slaveholders.

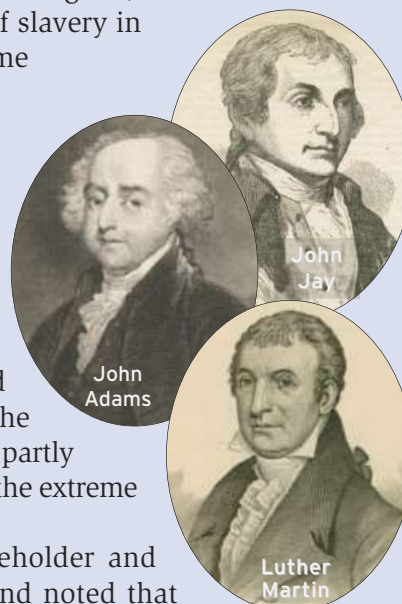
One example of this was the Three-Fifths Compromise. The Compromise granted slave states far greater power in the House of Representatives than free states. It allowed states to count three-fifths of their enslaved population when calculating the number of representatives allocated to each state in the House of Representatives. Although enslaved people could not vote, their bodies were used to expand the political power of enslavers.

The Framers' Attitudes Toward Slavery

The Framers held varied perspectives on slavery. About half of the participants in the Constitutional Convention were enslavers. Some of these men, like Thomas Jefferson of Virginia, later the third president of the United States, acknowledged the immorality of slavery in their speeches and writing but continued to own slaves themselves. Some enslavers, like New Yorker John Jay, would later advocate for gradual emancipation (policies that freed enslaved people after decades-long periods of continued servitude).

Other Framers demanded that slavery and the slave trade be protected in the Constitution. Powerful Southern representatives were vehemently opposed to any weakening of slavery. In response to one delegate's condemnation of the slave trade, John Rutledge of South Carolina bluntly said that “the true question at present is whether the Southern States shall or shall not be parties to the Union.” Rutledge implied that his state would not join a union that restricted the slave trade. George Washington, the nation's most revered political leader and first president, wore dentures partly made of teeth taken from enslaved people, illustrating the degree to which the extreme cruelties of slavery were woven into accepted political life.

Not all Founders supported slavery. John Adams was not a slaveholder and supported gradual emancipation. Others like Luther Martin of Maryland noted that allowing enslaved people to be brought into the new country was “inconsistent with the principles of the revolution and dishonorable to the American character.”



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In the Compromise, enslaved people were also to count as three-fifths of a person for the purposes of a head tax that each state was to pay the federal government. But the head tax was never implemented. The Three-Fifths Compromise was not the only win for enslavers in the Constitution, but it was perhaps the most significant because of its anti-democratic nature. It gave proslavery forces disproportionate power to push their own interests in government moving forward.

After four months of hashing out revisions and compromises, the details of which could have gone many other ways, the participants of the convention agreed on a draft of the Constitution. It was signed by every member of the Constitutional Convention but three.

Ratification

After the drafting of the Constitution came the process of ratification, in which electors in each state, voted on whether to ratify the Constitution. The question of whether to ratify the Constitution was hotly debated across the new nation's then thirteen states. As historians Edwin G. Burrows and Mike Wallace have put it: "no one, it seemed, could talk of anything else." Historian Pauline Maier described the excitement with which people approached the debates around ratification as similar to the last games of the World Series but with "greater intensity." It was a "nail biter," according to historian Jill Lepore.

In these discussions and debates, Federalists, who supported the ratification of the Constitution and a strong central federal government, faced off against those who opposed the ratification of the Constitution. Historians have referred to opponents of the ratification as "Anti-Federalists," but this was considered an insult at the time and was not a term that those against the Constitution would have used to describe themselves.

The popularity of the term "Anti-Federalists" in describing those who opposed the Constitution is partly a reflection of Federalists' wealth and power. The Federalists tended to be wealthier, more well-



Exciting scene in the House of Representatives, Jan. 31, 1865, on the announcement of the passage of the amendment to the Constitution abolishing slavery forever.

educated, and better connected than their opponents, and so they often influenced or directly financed press coverage of the constitutional debates and ratification process, including the adoption of the term Anti-Federalists.

Despite the power of the Federalists, the ratification of the Constitution was not guaranteed. Ratification was contingent on a large number of men who initially opposed the Constitution changing their minds. Opponents worried that the Constitution granted too much power to the federal government. In some places, like New York, the vote in favor of ratification only squeaked by with the assumption that a set of amendments, which later became the Bill of Rights, would be added on to further limit federal power.

The Amendments

After the "nail-biter" of a ratification process, we return to where we opened this essay: with the newly established First Congress arriving in New York in ▶

The Two Amendments That Didn't Make the Cut

Two of the 12 proposed amendments presented to the House of Representatives in 1789 did not make the cut. The original First Amendment dealt with the number of representatives in Congress. It proposed a formula in which there would be at least 200 representatives.

The original Second Amendment specified when Congress could adjust its own pay. In essence, any change in pay that Congress would vote on could not take effect until after the next congressional election.

Neither of these two proposals were ratified by enough states to become amendments to the Constitution. But the original Second Amendment was eventually ratified in 1992 — over 200 years later! It is now the 27th Amendment to the Constitution.

August 1789 to begin the business of governing under the recently ratified Constitution. One of their first orders of business was to address the constitutional amendments that many Americans thought were so necessary to restrict federal power.

In August of 1789 the House of Representatives agreed to a list of 17 amendments and sent them to the Senate. The Senate rejected all of them before approving a revised list of 12 proposed amendments, a copy of which is preserved at the New York Public Library.

After another round of revisions, the 12 proposed amendments were sent to President Washington who in turn sent them on to the states (and Rhode Island and North Carolina, which were not yet states) for ratification. Different states ratified different amendments, illustrating that the amendments were understood by some as just a menu of possible changes, rather than a cohesive Bill of Rights to be adopted together. In the end, only ten of them received the necessary votes. Again, we see another contingency in how easily amendments other than the ones we are now familiar with could have been adopted and embraced.

Finally, the way that lawmakers, judges, lawyers, citizens, and residents have understood and used the Bill of Rights has changed over time. Today, we regularly refer to the ten amendments that were

ratified by the states as the Bill of Rights. These amendments are considered to be foundational for the protection of individual freedoms against the government.

At the time that these amendments were written, however, they were not referred to as a Bill of Rights. Neither the amendments' supporters nor their detractors referred to them in this way. Some people, in fact, complained that the nation did not have a Bill of Rights even after the passage of these amendments. And many turned instead to the Declaration of Independence as an affirmation of the rights of the people with certain unalienable rights.

Our conception of the Bill of Rights was contingent on later events in U.S. history. It was not until the period known as Reconstruction after the Civil War (1865-1877) that these first ten amendments began to be labeled a Bill of Rights. During those years, with supporters of slavery driven from the national government, proponents of freedom and equality for African Americans began arguing that the Constitution guaranteed rights for individuals that neither the federal nor state governments could violate.

WRITING & DISCUSSION

1. Describe at least three examples of contingencies in the article.
2. Imagine the Constitutional Convention had included more delegates than just property-owning white men. How might the Constitution and Bill of Rights have turned out differently? Explain.
3. Why did historian Jill Lepore's call the ratification process a "nail-biter"? What does the term "nail-biter" tell you about the contingencies at play at the time?

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Standards Addressed

The Bill of (Twelve) Rights: Contingency and the Constitution

McREL National U.S. History Standard 8: Understands the institutions and practices of government created during the Revolution and how these elements were revised between 1787 and 1815 to create the foundation of the American political system based on the U.S. Constitution and the Bill of Rights. **High School Benchmark 1:** Understands influences on the ideas established by the Constitution (e.g., the ideas behind the distribution of powers and the system of checks and balances; the influence of 18th-century republican ideals and the economic and political interests of different regions on the compromises reached in the Constitutional Convention). **High School Benchmark 3:** Understands the Bill of Rights and various challenges to it (e.g., arguments by Federalists and Anti-Federalists over the need for a Bill of Rights . . .).

California History Social-Science Standard 11.1: Students analyze the significant events in the founding of the nation and its attempts to realize the philosophy of government described in the Declaration of Independence. (2) Analyze the ideological origins of the American Revolution, the Founding Fathers’ philosophy of divinely bestowed unalienable natural rights, the debates on the drafting and ratification of the Constitution, and the addition of the Bill of Rights.

Tlaxcalan: The Indigenous Democracy of Mexico

HSS Framework, Ch. 11 (Grade Seven), p. 214: The Aztec Empire emerged in the fifteenth century. Initially, students focus on the following question: Why did the Aztec Empire gain power over people and territories? The Aztecs, a people who originally migrated from northern Mexico, owed a strong cultural debt to the Maya, Teotihuacán, and the Toltec cities in Mesoamerica. The Aztecs won their power by warfare. They unified much of central Mexico by defeating all other powerful cities and states. They created a state based on ingenious methods of farming, collection of tribute from conquered peoples, and an extensive network of markets and trade routes.

California HSS Standard 7.7: Students compare and contrast the geographic, political, economic, religious, and social structures of the Meso-American and Andean civilizations. (3) Explain how and where each empire arose and how the Aztec and Incan empires were defeated by the Spanish.

McREL World History Standard 29: Understands the economic, political, and cultural interrelations among peoples of Africa, Europe, and the Americas between 1500 and 1750. **Middle School Benchmark 1:** Understands the consequences of European interaction with indigenous populations of the Americas.

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