

# American Constitution: An Undemocratic, Flawed Document



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The core values of American Constitution are there in the 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 defense, 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.”*

Thus, the Constitution seeks to achieve the core values described in this preamble: Effective governance, democratic government, justice and liberty. Also, the preamble reminds us that the Constitution is created by “we the people.” The phrase “The people are sovereign” makes clear that the United States is to be a democracy, rather than a monarchy, theocracy or a totalitarian government, that were dominant forms of government throughout the world in 1787 and before. Thus the constitution had that great uniqueness in those times.

We must acknowledge the good features of American Constitution: It has stood the test of time because of its core values. It protects democratic governance ensuring regular elections for most key offices. It has created a structure of government that ensures checks and balances like the separation of powers at the federal level and the division of powers between the states and

the federal government. It promises justice by ensuring that no person is deprived of life, liberty or property without due process of law. It safeguards liberty. In the Bill of Rights, it protects fundamental rights such as freedom of speech and press, religious freedom, in civilian and criminal cases a trial by jury and protection from cruel and harsh punishment.

We must recognize the fact that the United States offered a living proof for all the world to see that a written constitution could inspire and help to create and maintain the resilient structures necessary for a representative democracy.

Yes, in these early times, American Constitution was a beacon of shining light.

But there is one key value not mentioned in the preamble: Equality. However, this omission should not surprise anyone for a Constitution that protected and institutionalized slavery and protected rights of only white men. Women had no voting rights until the 19<sup>th</sup> amendment was adopted in 1920. Adopted in 1868 after the civil war, they added the assurance of equal protection. Also, white men without property and blacks had no voting rights. Blacks were not even counted as full human!

In Declaration of Independence presented by Thomas Jefferson to the Continental Congress in 1776, he wrote these beautiful words:

*“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness”.*

Yet, at the time these wonderful words were written, more than 500,000 black Americans were slaves. Thomas Jefferson himself owned several hundred slaves, none of whom he freed during his lifetime. Of the 55 delegates to the Continental Convention, about 25 owned slaves. Slaves accounted for about 20 percent of the population in the American colonies. Most lived in the southern colonies, where slaves made up 40 percent of the population.

Most of the people who have grown up in America from their childhood are taught to believe that the American Constitution is an excellent document of democratic governance formulated by our founding fathers. As a result, naturally most Americans hold it in high esteem.

Unfortunately, the Constitution signed by all these “founding fathers” 233 years ago on that fateful day of September 17, 1787 is hopelessly flawed.

Regrettably, most of them were unaware of its underlying flaws and it is falling apart before our eyes. No wonder, we see the country suffering from a broken political system since many years but in extreme measure now a days.

Most Americans mistakenly believe that our Constitution has been the model for rest of the world. Yet, looking at all comparable democracies of the world, not one has adopted our constitutional system.

There were 55 framers who were appointed to be delegates to the 1787 Constitutional Convention and took part in drafting the Constitution of the United States. They were bright individuals ranging in age from 26 years to 80 years, Benjamin Franklin being the oldest.

The US Constitution is Federal, which means powers are shared between the Legislative, Executive and Judiciary branches of the government. It is also bicameral. This means a government with two legislative houses or chambers. The bicameral system originated in England (House of Commons and House of Lords), and the U.S. adopted that system upon its founding. That is why we have the House of Representatives and the Senate, collectively known as Congress. This has created huge problems as the Senate—if the opposition party has the majority—often comes in the way of laws passed by the Congress resulting in deadlocked legislature. Wisely, to avoid this, some countries have chosen a unicameral constitution for smoother functioning of the legislature. Unicameral Constitution in these countries have only one chamber or legislative body.

No doubt, American Constitution is the oldest written document for a “democratically representative government” that our framers envisioned. Out of 55 framers, only 39 signed the constitution in Philadelphia in 1787. The Bill of Rights, defending the rights of individual citizens (white men only) did not become part of it until 1791.

Of course, “The Bill of Rights” is an excellent feature of our Constitution. But is it enough?

Sanford Levinson, a professor of law at the University of Texas at Austin, elaborated his misgivings in a 2006 book, *“Our Undemocratic Constitution”*, and laid out a comprehensive critique.

The Constitution, Levinson wrote, places “almost insurmountable barriers in the way of any acceptable notion of democracy.” He wrote further, “the Constitution is both insufficiently democratic, in a country that professes to believe in democracy, and significantly dysfunctional, in terms of the quality of government that we receive.”

### Major Flaws in the US Constitution:

- **Two Chambers-The Congress and the Senate:** The question to ask is whose interest is second chamber, the Senate, supposed to serve? The obvious answer is it does not serve the interests of the majority. No wonder, Scandinavian countries—Norway, Denmark and Sweden—have done away with the second chamber and are doing quite well without it. According to Political Science Professor Robert Dahl of Yale University, in his excellent book: *“How Democratic Is the American Constitution”*, the main reason, perhaps the only reason, why second chamber exists in all federal systems is to preserve and protect unequal representation.
- **The Senate:** The Senate is the product of a raw power play by the smaller states as they existed in 1780s. They wanted unfair over-representation as the price of joining the new nation, and they got it.

In 1787, when the Constitution was drafted, Virginia, the largest state had about eleven times more people than Delaware, the smallest state. Yet, in the Senate, the way it had been formed, every state had equal representation, two Senators! Today California has 68 times more people than Wyoming, yet both states have equal number of Senators, two each! Does that make sense? In other words, if you lived in the state of Wyoming, your vote will count 68 times more than if you lived in California!

The Constitution requires that before the law reaches the president's desk, the Senate must approve it. In the Senate, each state gets two senators, or two votes, even though the states differ widely in population. Similar discrepancy exists between other smaller and larger states but all have two votes each. As population is increasing in urban centers and is decreasing in sparsely populated hinterland—a process that is playing out in increasing speed—these smaller states will dominate over where rest of us live in large urban areas. According to political scientist David Birdsell: “By 2040, 70 percent of Americans are expected to live in the 15 largest states, which are also home to the overwhelming majority of the 30 largest cities in the country. By extension, 30 percent of Americans will live in the 35 smaller states. That means that the 70 percent of Americans get 30 Senators and 30 percent of Americans get 70 Senators.” Does this make sense?

After all, whose interests this second chamber serving? More than two centuries of experience has shown that the unequal representation in the Senate unquestionably failed to protect the basic interests of the least privileged minorities. On the contrary, it has often times served to protect the interests of the most privileged minorities. In the old times, this unequal representation protected the rights of the slave owners, not the slaves. This has continued differently even today.

The likelihood of correcting extreme inequality of representation in the Senate is virtually zero.

- **The Supreme Court-Judicial Review of National Legislation:** Another anti-democratic feature in our system is the power of the Supreme Court to be our constitutional arbiter. The authority of the Supreme Court to declare unconstitutional legislation that has been properly enacted by the Congress and the President is quite controversial. If a law has been passed by the law making branches of a democratic government after much discussion and debate, why should judges have the power to declare it unconstitutional? It does not make sense. After all, the Congress is the supreme body of our representative government. The Supreme Court judges are unelected, appointed individuals. Why should they have a final say on laws passed by majority of elected representatives of the people?

In interpreting the Constitution, inevitably the judges opine as per their own ideology, biases, and preferences. That is why we see in our government the president whether a Republican or a Democrat, and his party desperately try to nominate their own candidates—conservative, liberal etc.—to the Supreme Court. Why should an unelected

body--our Supreme Court's five judges have the power to make policy decisions that affect the lives and welfare of the entire American population for generations?

Another major problem—why should these unelected Supreme Court judges stay in Supreme Court for their entire lifetime? Above the age of 80 to 90 years, how effectively can they work?

We are stuck with a system so weird that even the most sensible and widely supported policies legislated by peoples' representatives can be killed for a generation or more by five perverse judges. Our Supreme Court is drenched in politics and its decisions are the result of the political affiliations or leanings of five judges. Thus, the Supreme Court has the power to thwart the democratic process for decades on end through the lifetime tenure of the judges.

No wonder, the American form of judicial review has not been copied by many other democracies.

- **Electoral College:** This is the greatest drawback of American Constitution. In the current situation, as we have seen recently in 2000 and 2016 elections, whoever wins the highest number of electoral votes, becomes the president; even though he/she might have won lesser total number of votes than his/her opponent. Even if the presidential candidate wins a given state by a single vote, that candidate wins the whole state's all electoral votes and millions of people who voted for the other candidate get nothing. They have been robbed of their voice. That is how Al gore lost the election in 2000 and Hillary Clinton lost it in 2016 even though they had majority of votes than their opponents. In other words, majority of the people did not get their choice. Their votes had been thrown in the garbage bin.

About this flaw in our Constitution, Professor Robert Dahl of Political Science at Yale University, writes in his excellent book, *How Democratic Is the American Constitution?*: "The arrangement they (the framers) finally cobbled together at the last minute was adopted more out of desperation, perhaps, than out of any great confidence in its success. The framers settled on an Electoral College because they had run out of alternatives." Thus, the Electoral College preserves features that openly violate basic principles of democracy: Citizens of different states are unequally represented. How unfortunate for the future of America's political system!

In case of contested election like the one in 2000, Al Gore lost even though he had garnered several million more votes. The same thing happened—slightly differently—where Hillary Clinton lost the election to Donald Trump because Trump had more electoral votes but Clinton had majority of the votes. This shows how screwed up our elections are. In the past, five American presidents have been elected even though they had less total votes than their main opponent.

Solution to this problem can easily be implemented thus: Voters should be allowed to give their second choice to third party candidates. So like in 2000 election, in case of a contested election, Ralph Nader's votes would have gone to Al Gore and he would have been elected the president.

So what should be done? The best thing to do is to get rid of the Electoral College by having a constitutional amendment that would replace the Electoral College with the direct election of the president by popular vote; if neither candidate receives more than 50 percent of the votes, a run-off election between the top two candidates would be held shortly thereafter.

But the problem with this solution is that the smaller southern states will never agree to this change because they will lose their power. So these shenanigans will continue forever.

Utter chaos and mess created during Al Gore/George Bush 2000 election cycle, election of minority president Donald Trump in 2016 and the anarchy created during the 2020 Biden/Trump election cycle are clear recent examples of major problems with our Electoral College system.

- **Gerrymandering:** The Constitution allows the state legislatures to draw their own congressional boundaries. That means, self-interested politicians in many states draw the lines that control their electoral destiny favoring themselves. No wonder, cheating is rampant in many states. America is virtually alone in this among democratic nations.

Most Americans seem to believe that our constitution is a model for rest of the world. Yet, among the world's democracies, not one country has copied US Constitution.

The US Constitution is impossible to fix: It is almost impossible to change, requiring a two-thirds vote in the House and Senate and ratification by three-quarters of states; or a Constitutional Convention, but that has never even be attempted. The smaller states would never agree to reduce or cut off their power and privilege in the Senate. Amendment to abolish the Electoral College will never garner 67 votes out of 100 in the Senate needed to succeed. Three quarters of the states will never agree to reduce their power by voting for this amendment.

It has been amended several times in the past but the ones that made major changes to the basic structure were the Reconstruction Amendments that could not have happened except for the Civil War and the occupation of the defeated Confederacy. The last amendment which moderately changed the fundamental structure of American government was passed in 1913 that required direct election of Senators.

Professor Robert Dahl in his above mentioned book has pointed out some interesting facts. An amendment to abolish the Electoral College to pave the way for direct election of the president by popular votes or to change the Senate structure to have equal representation in that body as

per population of each state,—that amendment—can easily be blocked by 34 Senators from 17 smallest states with a total population of 22 million people—as per July 2019 census—or 6.855 percent of the population of the United States. If by a miracle, this amendment were to pass the Senate, it could then be blocked by 13 state legislatures in the smallest states with a total population of 13.3 million people or by 4.13 percent of the population of the United States.

This clearly shows that a small minority of people controls America’s antiquated and undemocratic political system. In conclusion, the American Constitution is not only badly designed but it can’t realistically be fixed.

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