

United States: Enduring Constitution, New Challenges

G. ALAN TARR

In its successful history, the United States Constitution has served as both inspiration and model for emerging federal democracies around the world. It has proven itself capable of responding to past challenges—including a divisive civil war. Now, more than two-hundred years after its drafting, the U.S. Constitution is facing another crop of challenges.

One of the most significant questions is how the constitutional system can accommodate globalization, as illustrated by the adoption of the North America Free Trade Agreement (NAFTA) and by aggressive state involvement in trade policy. A continuing source of dispute is how the constitutional system should deal with differences among the states on crucial moral issues such as same-sex marriage, the death penalty, and abortion. Are these matters of fundamental right, such that a single national standard must prevail, or are these matters in which diversity among the states is constitutionally warranted? Another concern is how to guarantee an appropriate role for the states in the constitutional system, as reflected in debates over recent Supreme Court rulings on sovereign immunity and the commerce power that sought to safeguard the “dignity of the states.”

While these ongoing challenges will continue to test the capacity of the United States’ Constitution to adapt to change, history demonstrates that it has been a remarkably enduring document.

Created in 1787 after the failure of the Articles of Confederation, the country's first constitution, the Constitution has survived for more than two centuries. Over this period, the United States has changed dramatically: from thirteen states clustered along the Atlantic seacoast to fifty states that span the continent (and in the case of Hawaii extend beyond it); from a relatively homogeneous country of a few million inhabitants to a diverse country of more than 270,000,000 people; and from a militarily and economically weak country to a superpower. Yet these changes have taken place largely within the confines of the Constitution--in more than two centuries, it has been amended only twenty-seven times. What accounts for its extraordinary durability?

The answer lies in part in the Constitution's origins. The movement for a new constitution emerged less than a decade after independence from Great Britain, in reaction to the deficiencies of the Articles of Confederation. The Articles failed both to promote economic prosperity, as the country suffered from internal trade barriers, and to protect rights from mob rule both within and outside state legislatures. In addition, it did not produce the strong government necessary for the United States to play a role on the world stage. The founders remedied these problems both by augmenting the powers of the federal government and by granting the federal government the power to act directly on citizens. **This shift from a confederal government acting on component units to a federal government acting on individuals marked a major innovation in federal theory that would influence later federal systems.**

The Constitution resolved many problems but failed to confront the issue of slavery, which divided North and South. Some founders believed that slavery was economically inefficient and expected--or at least hoped--that it would gradually disappear. Others feared that confrontation on the issue would split the union, which it nearly did.

The Civil War itself was, in part, a constitutional conflict. The South insisted that the states had the right to order their own internal affairs (including whether or not to have slavery), whereas the North insisted that the Constitution's compromises with slavery were temporary and that the document should be read in light of the principles of the Declaration of Independence, referring to its celebrated line: "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." The South also viewed the union as a compact among states, with each state having the right to withdraw from the compact if it so desired, whereas the North viewed it as an indissoluble union of the people, even if organized in states. While the union did hold together, and the country's unity has never been seriously threatened since the Civil War, the Constitution underwent major transformations in its wake. The amendments adopted after the Civil War have had a "nationalizing" effect, albeit not one that has precluded federal diversity.

The success of the U.S. Constitution owes itself, in part, to allowing for common values on one hand, and flexibility for interpretation and state-level input on the other. A distinctive aspect of the U.S. federal Constitution is a lack of detail in many (though not all) of its provisions. This generality permits a certain "play in the joints," affording future generations a role in constitutional design. When one compares the U.S. federal Constitution to its counterpart in other federal democracies, one is also struck by the fact that the U.S. Constitution leaves a great deal of choice about governance to the states. Each order of government is primarily responsible for designing its own institutions and raising its own revenues, and the Constitution does not prescribe a system of transfer payments. Local government, education, health care, and housing--all topics dealt with in most countries' federal constitutions--receive no express mention in the U.S. federal Constitution, though state constitutions deal with them in considerable detail. However, this lack of detail does not preclude the federal government from acting effectively.

Although the Constitution grants the federal government only limited powers, those powers enable it to perform its constitutionally prescribed functions, and it has all powers "necessary and proper" for carrying its granted powers into effect. Moreover, the federal government retains authority to legislate for individuals, and so it does not have to rely on state governments to carry out its policies. Furthermore, the federal government has expanded its powers considerably. Broad interpretation of federal powers, such as the power to regulate commerce, combined with the use of the spending power to pursue aims that could not be pursued directly under the powers granted to the federal government, have contributed to this expansion. This federal expansion does not necessarily mean a diminution of state responsibility, rather, it reflects the fact that the scope of responsibilities has increased on all levels of government.