Name: _____ Date: _____

Ratified on a Promise

Reading level 14 · 1239 words

On February 6, 1788, Massachusetts ratified the Constitution by 187 votes to 168, and it did so on a condition. Federalists, the plan's supporters, had agreed to recommend a list of amendments amounting to a bill of rights. Six of the states that voted afterward attached similar recommendations, so the promise did not belong to the state of Massachusetts alone. Alexander Hamilton figured that most New Yorkers opposed the Constitution, and one historian of the convention judges it probable that most Americans did. Only the promise of amendments, that account concludes, ensured a Federalist victory. Ratification and amendment were bargained together, which is an unusual way to begin a rulebook: by promising to change it.

Why had the delegates left rights out? A bill of rights was barely mentioned in Philadelphia, because most delegates thought the state constitutions already secured individual rights. James Wilson held that one was superfluous, since powers not given to the new government stayed with the people. Opponents answered with memory, for Britain's violations of civil rights before and during the Revolution were still fresh. George Mason, who had written the Virginia Bill of Rights, wanted one. So did Thomas Jefferson, who mostly favored the new government. He wrote to Madison that a bill of rights was what the people are entitled to against every government on earth. The states offered a flood of suggestions, and one scholar counts 124.

By the fall of 1788 Madison had decided that a bill of rights was needed to win acceptance of the Constitution. He wrote that such fundamental maxims of free government would be a good ground for an appeal to the sense of the community, and would counteract the impulses of interest and passion. In the First Congress he pushed seventeen amendments through the House, and the Senate trimmed the list to twelve. The twelve were numbered as Articles 1 to 12. The ten that three fourths of the states ratified on December 15, 1791, were Articles 3 to 12, so they became Amendments 1 to 10. The first two were left behind, which is why the Bill of Rights begins at One.

The machinery for change sits in Article V. Congress may propose amendments whenever two thirds of both houses think it necessary. It may also call a convention when two thirds of the state legislatures apply. Either way, three fourths of the states must then ratify, through their legislatures or through special conventions. The framers meant this to be different from, and harder than, making an ordinary law, with two hurdles to clear, the proposal and the vote of the states, and the record bears them out. Picture two locks on one door, each needing its own key: first Congress turns one, then three fourths of the states must turn the other. The

first ten amendments took a little over two years to ratify. After the 12th Amendment in 1804, no new amendment came for sixty-one years, until the 13th in 1865.

An amendment rewrites the text without erasing it. The 17th Amendment, ratified in 1913, changed Article I so that senators are elected by the people of each state. The original text had their state legislatures choose them. Article I still shows the old words, with a note saying the 17th Amendment changed them. Even repeal works by addition, since the only way to undo an amendment is to add another, and only one has ever been repealed, the 18th, which banned alcohol, by the 21st. Its words stay in the document, with a note. That keeps the history of the text in view, and the note stops a reader from mistaking an old rule for a current one.

The original compromises carried a moral cost. In a bargain over the slave trade, importing enslaved people was allowed to go on for twenty years. In exchange, southern delegates accepted a rule that navigation laws need only a simple majority. In George Mason's later account, delegates from South Carolina and Georgia, who most feared federal action on the slave trade, made that deal with delegates from New England. The minister and abolitionist Samuel Hopkins charged that the convention had sold out, and one account calls the bargain a crippling blow to those working to abolish slavery. The clauses on slavery and the slave trade were made obsolete, one by a time limit and the other by the Civil War. A portion of Article IV, section 2, was superseded by the 13th Amendment.

The promise did not finish the job, because words need someone to say what they mean. The case of Marbury v. Madison began in 1801, as a quarrel over a single government job. Outgoing President John Adams had issued William Marbury a commission as justice of the peace, and the new Secretary of State, James Madison, refused to deliver it. The Supreme Court gave its opinion on February 24, 1803, and the vote was unanimous, with two justices taking no part. Chief Justice John Marshall wrote the opinion, and in it he stated that a law repugnant to the Constitution is void. Marshall's sentence is short, and it carried a great deal, since it set a standard against which every later law could be held.

The Court held that it could not give Marbury what he asked for, because the law that would have done so was unconstitutional. Nothing stated in the Constitution gave the Court that specific power, which is now called judicial review. Yet once Marshall had written the sentence, the document had a referee. No other act of Congress was struck down until the Dred Scott decision of 1857. An amendment changes the text, but a ruling like this one changes who gets the last word about the text. Congress and the President make laws and carry them out, but here a third branch, the courts, claimed a role in checking them, and the Constitution's text does not name that role.

Even the first words raise a question, and on the parchment those first three words, We the People, are written larger than all the rest, as though to say whom the document belongs to.

The Preamble is the famous first 52 words, and it names six goals, from forming a more perfect Union to securing the blessings of liberty. But who counted as the people in 1787? Enslaved people could not vote. The 14th Amendment made all persons born or naturalized in the United States citizens in 1868. The 15th said in 1870 that race or color could not deny the vote, and the 19th did the same for sex in 1920, while the 26th set the voting age at 18, which shows how slowly the answer to that question widened.

A last problem remains open. The Ninth Amendment says that listing certain rights in the Constitution shall not be construed to deny others retained by the people, and the Tenth says that powers not given to the United States are reserved to the states or the people. Article VI makes the Constitution and the laws made under it the supreme law of the land. The text does not say what the other rights are, or how to tell. Today scholars who disagree with one another still explain each clause side by side. How would you decide which rights belong on that list, and who should decide? Careful readers have given different answers for more than two centuries.

Questions

1. What promise helped Massachusetts ratify the Constitution in 1788?

A. Lower taxes

B. A list of amendments amounting to a bill of rights

C. A new capital

2. Why were the ten ratified amendments numbered 1 to 10 when they had been Articles 3 to 12?

A. They were renumbered for fun

B. They were written first

C. The first two of the twelve were left behind, so the rest moved up

3. According to Article V, how many states must ratify an amendment?

A. Three fourths

B. Two thirds

C. All of them

4. In this book, what does superfluous mean?

A. Dangerous

B. Not needed

C. Secret

5. How can an amendment be repealed?

A. By a court

B. By adding another amendment

C. By a vote of Congress alone

6. Why did Marbury v. Madison matter beyond who got the job?

A. It showed the Court could void a law that conflicts with the Constitution, a power the text does not name

B. It ended the Civil War

C. It added a new amendment

Words to know

ratified: formally approved
amendment: added change
superfluous: not needed
obsolete: out of use
repealed: canceled by law
unconstitutional: against the Constitution

Answer key: Ratified on a Promise

1. B. A list of amendments amounting to a bill of rights
2. C. The first two of the twelve were left behind, so the rest moved up
3. A. Three fourths
4. B. Not needed
5. B. By adding another amendment
6. A. It showed the Court could void a law that conflicts with the Constitution, a power the text does not name