The American Constitution

Origins and Influences
The Symbol of “Higher Law”

- Almost political “scripture”
- Unconstitutional = “unholy”
- Catherine Drinker Bowen’s *Miracle At Philadelphia* (1986)
- Yet, written as political compromise
  - to launch a new nation
  - agricultural society huddled along the coast of a wild new land . . .
- Today: Longest Lasting Written Constitution
  - Almost the same 4300-word document governs a massive urban society and a global superpower in the post-nuclear age
Feudalism: The European Legacy

- Priority of community
- “Partness”
- Tradition
- Authority
- Hierarchy
- Organic cooperation
- Government as burden of aristocratic dignity
Enlightenment “Liberalism

- Priority of Individualism
- “a-partness”
- Reason
- Liberty
- Equality
- Competition (at times friendly)
- Government as necessary, but a necessary “evil” (more-so for some writers than others)
Influence of John Locke (1632-1704)

- Classic *Two Treatises on Government*
- God had “given the Earth to the Children of Men, . . . To mankind in common”
- Natural human rights (recognition of “higher” law)—inherent in human nature itself
- Following from this: relative EQUALITY
- Limited Government
Locke’s Influence (cont’d)

- Labor invested, property
- Accumulation, but not to spoil
- Invention of Money (as exchange) shifts the spoilage argument to the consumer
- Some will be industrious and rational; others quarrelsome and contentious
- Industrious property owners have a stake in maintaining order and are “in” civil society, not just “of” it—they can VOTE
“Contract Theory”

☐ Contract of Society

- People give up total freedom to create a *civil society*

☐ Trust Agreement

- Agreement to create government (which has only obligations, no rights)
- Created by majority of property owners
- And held accountable to the majority
Public and Private

- Public Life (Political Society)
- Civil Society
- Individual
  - Private Life
  - Not Subject to Political
  - Individual Rights Immune from Governmental Regulation
  - “Minority Rights”
The “Political Theory” and Practices of the Revolutionary Era

- Conflicts over the meaning of democracy and liberty in the new nation
- Revolution was fought (initially) to preserve an existing way of life.
- Traditional rights of “life, liberty, and property” seemed to be threatened by British policies on trade and taxation.
- The Revolution was inspired by a concern for liberty together with the development of sentiments for popular sovereignty and political equality.
Prelude to the Declaration of Independence

- Delegates to the Second Continental Congress did not originally have independence in mind.
- By the spring of 1776, delegates concluded that separation and independence were inescapable.
- A special committee was appointed to draft a declaration of independence.
- The Declaration of Independence was unanimously adopted by the Second Continental Congress on July 4, 1776.
Political (“Lockean”) Ideas in the Declaration of Independence

- Human beings possess rights that cannot be legitimately given away or taken from them.
- People create government to protect these rights.
- If government fails to protect people’s rights or itself becomes a threat to them, people can withdraw their consent from that government and create a new one.
Omissions in the Declaration of Independence

- Slavery
- Women, Native Americans, or African Americans who were not slaves
The Articles of Confederation

- Adopted by Continental Congress on November 15, 1777, but not ratified . . .
- “The First Constitution” (March 1, 1781, when all 13 states adopted it)
  - 3 years of the Revolutionary War fought, in effect, without government
- A loose confederation of independent states
- Weak central government
Principal Weaknesses

- Powers of national government were only those “expressly delegated”
- No power to tax
- No independent executive (president was merely presiding officer of the congress)
- No power to regulate commerce
- No amendments without unanimous agreement of congress and all states
- Each state—regardless of size—had one vote
“Shays’s Rebellion” (1786)

- Widespread economic problems among farmers at the end of the Revolutionary War
- Daniel Shays was a Revolutionary War veteran
- Nonpayment of taxes and debts led to foreclosure proceedings and imprisonment for debt.
- High interest rates and high state taxes
- Farmers in western Massachusetts took up arms to prevent courts from meeting
- Armed farmers led by Captain Daniel Shays forced the ill-equipped state militia to withdraw.
- By the spring of 1787, special armed forces recruited from the Boston area defeated the rebels.
Impact

- Reinforced the fears about ineffective state governments and of popular democracy out of control.
- Growing concern about democratizing and egalitarian tendencies
- Leaders issued a call to meet in Philadelphia to correct defects in the Articles of Confederation.
- To meet in Philadelphia to propose revisions for the Articles of Confederation, but they wrote an entirely new constitution instead.
Why the Founders Were Worried

An Excess of Democracy in the States

- In the mid-1780s, popular conventions were established to monitor and control the actions of state legislators.
- The Pennsylvania state constitution replaced the property qualifications as a requirement to vote with a very small tax.
The Constitutional Convention

- By 1787, most of America’s leaders were convinced that the new nation was in great danger of failing.

- Delegates to the Constitutional Convention
  - Wealthy men, well-educated
  - Young, but with broad experience in American politics
  - Familiar with the great works of Western philosophy (such as Locke) and political science
Intentions of the Framers

- Historian Charles Beard
  - The framers were engaged in a *conspiracy* to protect their personal economic interests.

- Reality is more complex
  - But broad economic and social-class motives were likely important.
Consensus Among the Delegates

- Agreement that a new constitution must replace the Articles of Confederation
- Support for a substantially strengthened national government
- Concern that a strong national government is potentially tyrannical
- Belief in a republican form of government based on popular consent
- Desire to insulate government from public opinion and popular democracy
Disagreement Among the Delegates

- Representation of the states in the legislature
- Status of slavery
- Selection of the President
- Overall, Conflict Often Centered Around Disagreements Between Large and Small States
Compromise and Calculated Ambiguity

- “Starting Up”
- Providing For Development and Growth
- Ambiguity + Judicial Review =
  - Adaptability, Flexibility, Longevity, Durability
Examples of Compromise: The Nature of “the Union”

- Fundamental Nature of the New Government
- *Confederal* (Articles of Confederation) or *National* (Unitary System such as France)
- RESULT: *Federalism*
Another Example: Representation

- Big States v. Small States (New York, Virginia, etc. vs. Delaware, New Jersey)
- RESULT: Bicameralism
The Problem of Slavery

- Contradicted the Declaration of Independence: The Principle of Equality
- Should Slaves be Included?
- For Taxation?

RESULT: "Three-Fifths Compromise," the 20 year grace period, fugitive slave obligation on states.
The Presidency

- A single executive
- Indirect election by an electoral college
- The House of Representatives would choose a president if no one received a majority of electoral votes.
“Limited” Government

☐ Specific powers of the national government (Article I, Section 8) and specifically denies others (Article I, Section 9)

☐ The Bill of Rights imposes restraints on the national government by protecting fundamental rights of citizens

☐ 10th Amendment—but “expressly” is deleted
Property and Free Enterprise

- Concern that a system too democratic would threaten private property
- Constitutional protections for property rights
  - Article VI, Section 1
  - Article IV, Section 2
  - 5th Amendment of the Bill of Rights
- Constitutional provisions aiding the emergence of a national free enterprise economy
  - Article 1, Sections 8-10
Examples of “Calculated” Ambiguity

- Powers of the President
- Powers of the Judicial Branch
- “Enumerated Powers” of Congress
- “Necessary and Proper Clause” (the *elastic* clause)

**RESULT:** Reducing the need for formal amendments
Democracy and Majority Rule

- The Problem of “Majority Tyranny”
- The “Madisonian” Dilemma
- “Majority Rule” v. “Minority Rights”
- The *Federalist* Papers
  - Written to persuade New York to ratify
  - the work of John Jay, Alexander Hamilton, and James Madison
Preventing Majoritarian Tyranny:

- **LEGAL**—e.g., the Bill of Rights and the idea of a “limited” government of “enumerated” powers

- **SOCIOLOGICAL**—the “extended Republic” (*Federalist #10*)

- **POLITICAL**—”separation of powers” and “checks and balances” (*Federalist #51*)

- **PSYCHOLOGICAL**—”ambition must be made to counteract ambition”
The people rule only indirectly

- Bicameral legislature, with varying terms of office and different constituencies
- Indirect election of the President and Senate (changed by Amendment XVII)
- Presidential appointment of judges and confirmation by the Senate

Cumbersome and difficult amendment process
Separation of Powers and Checks and Balances

- During the American Revolution, American leaders worried primarily about the misrule of executives and judges.
- Those who drafted the Constitution were more afraid of the danger of legislative tyranny.
- The framers turned to the idea of mixed or balanced government, which had been popularized by the French philosopher Montesquieu.
RESULT: “Who Governs”? 

- Dispersion and Fragmentation of Power (multiple places where minorities can block the majority)
- Indirect Majority Input
- Inefficient Government
- The “Power Elite”? The “Monied Class”?
How Democratic Was the Constitution?

- The Right to Vote
  - Limited Franchise--White Males, Over 21, with Property

- The “Electoral Connection”
  - Electoral College for President
  - “Staggered” Terms for Senate and Election by State Legislatures
How Democratic? (cont’d)

- Modifications in the Course of American Development
- For example
  - 15th Amendment (race)
  - 19th Amendment (sex)
  - 26th Amendment (age)
  - 17th Amendment (direct election of Senate)
  - Custom: the Electoral College
Powers and Limits in the Constitution

- Powers of the National Government
  - Commerce, Taxing, Spending

- Limitations
  - Bill of Rights (e.g., free speech)
  - Other Amendments (13th, 14th, 15th, e.g.)
  - Federalism, Separation of Powers, Checks & Balances

- Judicial Review
  - *Marbury v. Madison* (1803)
The Bill of Rights

- Ratification Agreement
- Madison opposed a Bill of Rights
  - Unnecessary
  - Dangerous
- Jefferson Influences Madison
- “Danger” Averted by 9th Amendment
The First Amendment: Freedom of Speech and Press

☐ “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”

☐ Is this an ABSOLUTE right? (for example, Justice Hugo L. Black)

☐ If not, what are the limits?

☐ How much “expression” should be protected?
The Religion Clauses in Collision

- One clause demands that the government not recognize religion
- The other clause demands that the government allow free exercise of religion
- The two clauses are in tension
- Most Chaotic Field of Constitutional Law
No “Unreasonable” Searches and Seizures

- Warrantless searches and seizures are *presumed* to be unconstitutional
- But, there are “Exigent” Circumstances
- Limits to Excused Searches
- Exclusionary Rule—the Price of Violation
- Technology and the 4th Amendment
  - What is “unreasonable”?
- “Liberal” and “Conservative” Courts
Compulsory Self-Incrimination

- Originally TOTALITY of the FACTS
- Miranda Warnings: “You have the right to remain silent, . . .”
- Court “Absolutizes” the Inquiry
  - Facts are Unreliable
  - Facts are Unnecessary
- “Liberal” and “Conservative” Courts
Cruel and Unusual Punishments

- Is the Death Penalty Unconstitutional?
- 5th Amendment Due Process Clause
  - No deprivation of “life, liberty, or property” without due process of law
- Evolving Standards
The “Fundamental” Right of Privacy

☐ Not in the Text of the Constitution
☐ 1960’s: The Court “found” Marital Privacy
☐ Whether to Have an Abortion is a Decision Protected by the “Privacy” Right that is part of “Liberty” in Due Process
☐ Heated Political Issue in 1970’s-present
Right of Privacy: Part II

- Does “Privacy” Protect More Choices?
- The Right of “Sexual Intimacy”?
- Can Government Punish Gays?
  - Court Limits Privacy to “Family Matters” and “Reproductive” Rights
- What About the “Right to Die”—with “Dignity”?