

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 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”
-

Checks on Majority Rule

- Checks on majority rule
 - 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
 - ❑ 1970’s: Abortion (Roe v. Wade [1973])
 - ❑ 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?
 - ❑ *Bowers v. Hardwick* (1986)
 - Court Limits Privacy to “Family Matters” and “Reproductive” Rights
 - Court “overrules” *Hardwick* in *Lawrence v. Texas* (2003)
 - ❑ What About the “Right to Die”—with “Dignity”?
-