

CH. 1 – CONSTITUTIONAL UNDERPINNINGS

The Founders created the Constitution during the late 18th century - an era when European philosophers were strongly criticizing governments dominated by imperialism and monarchy. The design of the Constitution reflected the influence of the European Enlightenment and the newly emerging beliefs in democracy, liberty for more individuals in society, and the importance of checking the self-interest inherent in ordinary human interactions. At the same time, the founders were far from unanimous in their admiration for direct democracy, and the Constitution they created reflects restraints on democracy. While they believed that monarchies were repressive, they knew that complete freedom would lead to disorder. Their main challenge was to fashion a government that struck a balance between liberty and order.

THE INFLUENCE OF THE EUROPEAN ENLIGHTENMENT

The European Enlightenment grew out of the Scientific Revolution of the 16th and 17th centuries, a time of amazing discoveries that form the basis of modern science. Scientific success created confidence in the power of reason, which enlightenment thinkers believed could be applied to human nature in the form of natural laws. Every social, political, and economic problem could be solved through the use of reason.

THE SOCIAL CONTRACT

A seventeenth century English thinker of the 1600s - John Locke - believed that in the state of nature people are naturally free and equal, but that freedom led inevitably to inequality, and eventually to chaos. Locke agreed with other philosophers of the day (such as Thomas Hobbes) that the state of nature changes because humans are basically self-centered. However, he believed that they could be rational and even moral. Even though people serve self-interests first, they fear violence, particularly violent death. He argued that people have natural rights from the state of nature that include the right to "life, liberty, and property." In his *Second Treatise of Government*, Locke stated that people form governments to protect these natural rights, giving up their freedom to govern themselves through a social contract between government and the governed. The only valid government is one based on the consent of the governed. This consent creates a social contract - an agreement between rulers and citizens - that both sides are obligated to honor. If for any reason the government breaks the contract through neglect of natural rights, the people have the right to dissolve the government.

LOCKE IN THE DECLARATION OF INDEPENDENCE

The founders generally were educated men who had read Locke and Hobbes, as well as French philosophers, such as Montesquieu, Voltaire, and Rousseau, who were concerned with freedom, equality, and justice. John Locke, in particular, directly influenced the thinking of the founders, as reflected in the Declaration of Independence. Compare the words of Jefferson with those of John Locke:

LOCKE IN SECOND TREATISE OF CIVIL GOVERNMENT	JEFFERSON IN THE DECLARATION OF INDEPENDENCE
"When any one, or more, shall take upon them to make laws whom the people have not appointed so to do, they make laws without authority, which the people are not therefore bound to obey; by which means they come again to be out of subjection, and may constitute to themselves a new legislature."	"When in the course of human events, it becomes necessary for one people to dissolve the political bands that have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them..."
"Whosoever uses force without right...puts himself into a state of war with those against whom he so uses it, and in that state all former ties are canceled, all other rights cease, and every one has a right to defend himself, and to resist the aggressor..."	"But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government..."
"A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another..."	"We hold these truths to be self-evident: That all men are created equal;"
"[men] have a mind to unite for the mutual preservation of their lives, liberties, and....property."	"that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness."
"To great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property...."	"that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

THEORETICAL PERSPECTIVES

John Locke and other Enlightenment thinkers, such as Voltaire, Montesquieu, and Jean Jacques Rousseau, created theories of democracy, republican government, pluralism, and elitism that guided the Founders as they shaped the new government of the United States in the late 18th century.

DEMOCRATIC THEORY

At the time of the founding of the United States almost all other political systems in the world were authoritarian regimes in which rulers fully controlled the government, and often held sway over economic and social institutions as well. Ironically, the European country with the most controls on the power of its monarchs was England, the very political system that the Americans so protested for its oppressiveness. In fact, democratic theory has very strong roots in British history, although it may be traced back to much earlier civilizations, such as Ancient Greece. Democracy is a form of government that places ultimate political authority in the hands of the people. Democratic theory has two basic models:

- Direct democracy - In this form of democracy, citizens debate and vote directly on all laws. In Ancient Athens, the legislature was composed of all of the citizens, although women, slaves, and foreigners were excluded because they were not citizens. Direct democracy requires a high level of participation, and is based on a high degree of confidence in the judgment of ordinary people. Many of the Founders of the United States were skeptical about the ability of the masses to govern themselves, being too prone to the influence of demagogues (charismatic leaders who manipulate popular beliefs) and too likely to overlook the rights of those with minority opinion. The latter leads to majoritarianism, or the tendency for government to do what the majority of people want.
- Representative Democracy - The Founders chose to establish a republic, or an indirect democracy in which people elect representatives to govern them and to make laws and set policies. This form is also referred to as an indirect democracy. In the United States, the people came to hold the ultimate power through the election process, but all policy decisions were to be made by elected officials or those that they appoint. A representative democracy, then, is a compromise between a direct democracy and an authoritarian rule, and has become the most accepted form of democracy in the world today.

ELITE THEORY

How can a republic claim to be a democracy if only a few people actually make political decisions, even if they are elected by the people? Elite theory holds that a representative democracy is not really based on the will of the people, but that there is a relatively small, cohesive elite class that makes almost all the important decisions for the nation. Another version of elite theory argues that voters choose from among competing elites. New members of the elite are recruited through a merit-based education system, so that the best and brightest young people join the ranks of the elite. Elite theorists argue that the founders believed that a privileged majority should rule in the name of the people with a controlled amount of input from citizens.

PLURALIST THEORY

Another theoretical perspective is pluralism, the argument that representative democracies are based on group interests that protect the individual's interests by representing him or her to the government. The theory is grounded in the notion that in a diverse society such as the United States, too many interests exist to allow any one coherent group of elites to rule. Government decisions are made in an arena of competing interests, all vying for influence and struggling to speak for the people that they represent. Some pluralists have argued that the founding fathers represented different interests (such as rural vs. urban, or north vs. south), and that many points of view were actually represented. The model still works today, as pluralists argue, creating strong links between government officials and their popular base.

THE CONSTITUTION

The Constitution reflects the founders' attempt to balance order with freedom. They generally did not believe that people were fully capable of ruling themselves, but they also wanted to check any tendency toward monarchy. The Constitution is based on five great principles designed to achieve this balance:

- Popular Sovereignty - the basic principle that the power to govern belongs to the people and that government must be based on the consent of the governed.
- Separation of Powers - the division of government's powers into three separate branches: executive, legislative, and judicial.

- Checks and Balances - a political system in which branches of government have some authority over the actions of the others.
- Limited Government - the basic principle that government is not all-powerful, and that it does only those things that citizens allow it to do.
- Federalism - the division of governmental powers between a central government and the states.

These principles resulted from the agreements and compromises made at the Constitutional Convention in 1787.

BACKGROUND TO THE CONVENTION

During the Revolutionary War, the Continental Congress wrote the Articles of Confederation to provide unity for the separate states that loosely formed the new country. The Articles allowed state governments to retain their powers, and the newly formed central government had severe limitations:

- The central government consisted only of a Congress in which each state was represented equally.
- No executive or judiciary branches were created.
- The central government could not levy taxes. It could only request money from the states.
- The central government could not regulate commerce between states. The states taxed each other's goods and negotiated trade agreements with other countries.
- No law enforcing powers were granted to Congress.
- Unanimous vote for amending the Articles was provided.
- 9 of 13 states were necessary to pass legislation.
- States retained all powers not specifically granted to Congress.

When the war was over, the immediate need for unity was past, and chaos threatened to undo the new nation. States quarreled over borders and tariffs, the country was badly in debt, and foreign countries saw the lack of a strong central government as weakness that could easily be exploited. Many leaders began to push for a government strong enough to settle disputes, to regulate commerce, and levy limited taxes. An important turning point occurred when farmers in western Massachusetts, in debt and unable to pay their taxes, rebelled against foreclosures, forcing judges out of court and freeing debtors from jails. Shays' Rebellion was eventually controlled, but it encouraged leaders to seek a stronger central government.

THE CONSTITUTIONAL CONVENTION

Fifty-five delegates arrived from the thirteen states in May 1787. Most were important men in their states: planters, bankers, businessmen, and lawyers. Many were governors and/or Congressional representatives, and most had read works by Hobbes, Locke, and French philosophers, such as Voltaire and Montesquieu. Several famous delegates were:

- Alexander Hamilton, the leading proponent of a strong, centralized government.
- George Washington, the chairman of the Convention, and the most prestigious member, who also was a strong supporter of a centralized government.
- James Madison, a young, well-read delegate from Virginia, who is usually credited with writing large parts of the Constitution.
- Benjamin Franklin, the 81-year-old delegate from Pennsylvania, who had also attended the Continental Congress in 1776.

Absent were Thomas Jefferson, serving as ambassador to France, and John Adams, ambassador to England. Other absent leaders were Patrick Henry, who refused to come because he "smelt a rat," and Samuel Adams, who was not selected by Massachusetts to attend. The absence of Patrick Henry and Samuel Adams almost certainly tilted the balance of the convention toward order and freed the delegates from criticism as they created a stronger central government.

AGREEMENTS AND COMPROMISES

The founders' common belief in a balanced government led them to construct a government in which no single interest dominated. They were concerned with the "excesses of democracy" (Elbridge Gerry, delegate from Massachusetts), demonstrated by Shays' Rebellion, and they agreed with Locke that government should protect property.

Benjamin Franklin - a strong proponent of liberty and equality - proposed that all white males have the right to vote, but most delegates believed that only property owners should have the franchise. In their view, ordinary people would either scheme to deprive property owners of their rights or become the "tools of demagogues." In the end the founders did not include specific voting requirements in the Constitution, leaving each state to decide voter qualifications for its citizens.

A major issue at the convention was the balance of power between the large states and the small. The large states favored a strong national government that they believed they could dominate, and the small states wanted stronger state governments that could avert domination by the central government. These different interests are apparent in the first discussions of representation in Congress. Most favored a bicameral, or two-house, legislature, similar to the organization of most state legislatures since colonial times.

THE GREAT COMPROMISE (THE CONNECTICUT COMPROMISE)

The delegates from Virginia opened the Convention with their Virginia Plan that called for a strong central government. Although proposed by James Randolph, the plan was almost certainly the work of James Madison, who, along with Alexander Hamilton, reasoned that a suggestion as boldly different from the current government would not be accepted, but might at least inspire major revisions. Their plan succeeded beyond their hopes. The delegates took the plan seriously, and began the debate with the assumption that the central government would be strengthened greatly. The plan called for a bicameral legislature: the larger house with members elected by popular vote and the smaller, more aristocratic house selected by the larger house from nominees from state legislatures. Representation in both houses was to be based on wealth or numbers, giving the large states a majority in the legislature. The Virginia Plan also called for a national executive and a national judiciary.

Delegates from the small states countered with the New Jersey Plan, presented by William Paterson. Just as Madison and Hamilton had hoped, the counter plan did not argue with the need for a stronger central government, giving Congress the right to tax, regulate, and coerce states. The legislature would be unicameral, and each state would have the same vote. The delegates from small states were determined that the new legislature would not be dominated by the large states, and the debate between large and small states deadlocked the Convention. Finally, a committee was elected to devise a compromise, which they presented on July 5.

The Great Compromise (also called the Connecticut Compromise) called for one house in which each state would have an equal vote (The Senate) and a second house (The House of Representatives) in which representation would be based on population. Unlike the Virginia Plan, the Senate would not be chosen by the House of Representatives, but would be chosen by the state legislatures. The House of Representatives would be directly elected by all voters, whose eligibility to vote would be determined by the states. The Compromise was accepted by a very slim margin, and the Convention was able to successfully agree on other controversial issues.

OTHER COMPROMISES

Another disagreement at the Convention was based on North/South differences, particularly regarding the counting of slaves for purposes of apportioning seats in the House. The South wanted to count slaves in order to increase its number of representatives, and the North resisted. The delegates finally agreed on the Three-fifths Compromise, which allowed southern states to count a slave as three-fifths of a person, allowing a balance of power between North and South.

Another debate concerned the selection of the president. The initial decision was for the president to be selected by Congress, but the delegates were concerned about too much concentration of power in the legislature. On the other hand, they feared direct election by the people, especially since the House of Representatives were to be popularly elected.

The Compromise was to leave the selection of the president to an electoral college - people selected by each state legislature to formally cast their ballots for the presidency.

All but three of the delegates signed the document on September 17, 1787, with others who opposed it leaving before that. The drafting of the Constitution took about three months, but the document has lasted for more than two hundred years, making it the longest lasting Constitution in world history.

AMENDING THE CONSTITUTION

The Founders designed the amendment process to be difficult enough that Congress could not add so many amendments that the original document would end up with little meaning. The process requires action by BOTH the national government and the states before an amendment may be passed.

Formal Amendments

The Constitution may be formally amended in four ways:

- Amendments may be proposed by a 2/3 vote of each house of Congress and ratified by at least 3/4 of the state legislatures. All but one of the amendments have been added through this process.
- Amendments may be proposed by a 2/3 vote of each house of Congress and ratified by specially called conventions in at least 3/4 of the states. This method was used once - for the 21st Amendment that repealed Prohibition - because Congress believed that many state legislatures would not vote for it.
- Amendments may be proposed by a national constitutional convention requested by at least 2/3 of state legislatures and ratified by at least 3/4 of the state legislatures.
- Amendments may be proposed by a national constitutional convention and ratified by specially called conventions in at least 3/4 of the states.

The last two methods have never been used to amend the Constitution.

Informal Amendments

The Constitution is written broadly enough that change can occur within our political system through interpreting the words to fit changing needs and events. All three branches have contributed to informal amendment of the Constitution.

- Legislature - Congress has passed laws that reinterpret and expand Constitutional provisions. For example, the Commerce Clause allows Congress to regulate and promote interstate and international commerce. Over time, Congress has passed many laws that define the Commerce Clause, including regulations on forms of commerce that didn't exist in 1789, such as railroad lines, air routes, and internet traffic.
- Executive Branch - Presidents may negotiate executive agreements with other countries, an authority not mentioned in the Constitution. The Constitution requires that foreign treaties be ratified by the Senate, but executive agreements do not. These agreements are used to circumvent the formal process, especially for routine matters that might simply slow the work of the Senate down.
- Judicial Branch - Of all the branches, the judiciary has been the most influential in interpreting the Constitution. Article III defines the power of the judiciary very broadly, but does not specifically mention judicial review - the power of the courts to declare statutes unconstitutional and interpret the Constitution when disputes arise. That power was first established in *Madison v. Marbury* in 1803, when Chief Justice John Marshall claimed judicial review as a prerogative of the court in his famous majority opinion issued in the case.

BEARD'S CRITICISM OF THE FOUNDERS

The founders' interest in protection of property has led some scholars to question their personal interests as motives in writing the Constitution. Charles Beard argued in *An Economic Interpretation of the Constitution*, written in 1913, that the founders created a constitution that benefited their economic interests. According to Beard, the major conflicts and compromises resulted from the clash of owners of land as property, and owners of business or commercial interests. Many scholars today disagree with Beard because voting at the Convention did not follow these divisions closely. For example, Elbridge Gerry, a wealthy Massachusetts merchant and politician, refused to sign the Constitution. James Madison and James Wilson, men of modest means, were two of its biggest proponents. However, the founders did tend to base their votes on the economic interests of their states, as reflected in the famous compromises at the convention.

FEDERALISTS VERSUS ANTI-FEDERALISTS

The delegates agreed that the Constitution would go into effect as soon as popularly elected conventions in nine states approved it. The debate over ratification - the formal approval of the Constitution by the states - raged throughout the country, with supporters of the new government calling themselves Federalists, and their opponents, the Anti-Federalists. Federalists supported the greatly increased powers of the central government and believed that the Constitution adequately protected individual liberties. The Anti-Federalists believed that the proposed government would be oppressive and that more individual freedoms and rights should be explicitly guaranteed. Pamphlets, newspapers, and speeches supported one view or the other.

THE FEDERALIST PAPERS

Ratification of the Constitution was defended by the *Federalist Papers*, written by Alexander Hamilton, James Madison, and John Jay. These documents contain some of the most basic and brilliantly argued philosophical underpinnings of American government. Two famous papers are *Federalist #10* and *Federalist #51*.

The *Federalist #10* argued that separation of powers and federalism check the growth of tyranny: If "factious leaders...kindle a flame within their particular states..." leaders can check the spread of the "conflagration through the other states." Likewise, each branch of the government keeps the other two from gaining a concentration of power. *Federalist #10* also argues that Constitutional principles guard against the dangers of a direct democracy, or the common passion or interest felt by a majority of the whole such [direct] democracies have ever been spectacles of turbulence and contention. Madison argues that a long-lived democracy must manage its interest groups, even though these factions can never be eliminated.

The *Federalist #51* explained why strong government is necessary: If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.

THE BILL OF RIGHTS

A compromise between Federalists and Anti-Federalists was reached with the agreement to add ten amendments that guaranteed individual freedoms and rights. With this agreement, the Constitution was finally ratified by all the states in 1789, and the Bill of Rights was added in 1791. Without these crucial additions, the Constitution would not have been ratified in several key states. Many of the recommendations from state ratifying conventions were considered by James Madison as he wrote the Bill, and he and a specially appointed committee submitted seventeen amendments to Congress. Congress eliminated five of them, and two were not immediately ratified by the states. These two did not become part of the original Bill of Rights, with one (dealing with apportionment of representatives) later clarified by Supreme Court decisions, and one (addressing salaries of members of Congress), added as an amendment 203 years later in 1992.