“The Nature of American Constitutionalism”  
*The Origins of the American Constitution*  
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“Like the Bible, it ought to be read again and again.” Franklin Delano Roosevelt made that remark about the U.S. Constitution in March 1937, during one of those cozy “fireside chats” that reached millions of Americans by radio. “It is an easy document to understand,” he added. And six months later, speaking to his fellow citizens from the grounds of the Washington Monument on Constitution Day - a widely noted speech because 1937 marked the sesquicentennial of the Constitution, and because the President had provoked the nation with his controversial plan to add as many as six new justices to the Supreme Court Roosevelt observed that the Constitution was “a layman's document, not a lawyer's contract,” a theme that he reiterated several times in the course of this address.

It seems fair to say that Roosevelt's assertions were approximately half true. No one could disagree that the Constitution ought to be read and reread. Few would deny that it was meant to be comprehended by laymen, by ordinary American citizens and aspirants for citizenship. Nevertheless, we must ponder whether it is truly “an easy document to understand.” Although the very language of the Constitution is neither technical nor difficult, and although it is notably succinct - one nineteenth-century expert called it “a great code in a small compass” - abundant evidence exists that vast numbers of Americans, ever since 1787, have not understood it as well as they might. Even the so-called experts (judges, lawyers, political leaders, and teachers of constitutional law) have been unable to agree in critical instances about the proper application of key provisions of the Constitution, or about the intentions of those who wrote and approved it. Moreover, we do acknowledge that the Constitution developed from a significant number of compromises, and that the document's ambiguities are, for the most part, not accidental.

Understanding the U.S. Constitution is essential for many reasons. One of the most urgent is that difficult issues are now being and will continue to be settled in accordance with past interpretations and with our jurists' sense of what the founders meant. In order to make such difficult determinations, we begin with the document itself. Quite often, however, we also seek guidance from closely related or contextual documents, such as the notes kept by participants in the Constitutional Convention held at Philadelphia in 1787, from the correspondence of delegates and other prominent leaders during the later 1780s, from *The Federalist Papers*, and even from some of the Anti-Federalist tracts written in opposition to the Constitution. In doing so, we essentially scrutinize the origins of American constitutionalism.

If observers want to know what is meant by constitutionalism, they must uncover several layers of historical thought and experience in public affairs. Most obviously we look to the ideas that developed in the United States during the final quarter of the eighteenth century - unquestionably the most brilliant and creative era in the entire history of American political thought. We have in mind particularly, however, a new set of assumptions that developed after 1775 about the very nature of a constitution. Why, for example, when the colonists found themselves nearly in a political state of nature after 1775, did they promptly feel compelled to write state constitutions, many of which contained a bill of rights? The patriots were, after all, preoccupied with fighting a revolution. Why not simply set up provisional governments based upon those they already had
and wait until Independence was achieved? If and when the revolution succeeded, there would be time enough to write permanent constitutions.

The revolutionaries did not regard the situation in such casual and pragmatic terms. They shared a strong interest in what they called the science of politics. They knew a reasonable amount about the history of political theory. They believed in the value of ideas applied to problematic developments, and they felt that their circumstances were possibly unique in all of human history. They knew with assurance that their circumstances were changing, and changing rapidly. They wanted self government, obviously, but they also wanted legitimacy for their newborn governments. Hence a major reason for writing constitutions. They believed in the doctrine of the social contract (about which Jean-Jacques Rousseau had written in 1762) and they believed in government by the consent of the governed: two more reasons for devising written constitutions approved by the people or by their representatives.

The men responsible for composing and revising state constitutions in the decade following 1775 regarded constitutions as social compacts that delineated the fundamental principles upon which the newly formed polities were agreed and to which they pledged themselves. They frequently used the word "experiment" because they believed that they were making institutional innovations that were risky, for they seemed virtually unprecedented. They intended to create republican governments and assumed that to do so successfully required a fair amount of social homogeneity, a high degree of consensus regarding moral values, and a pervasive capacity for virtue, by which they meant unselfish, public-spirited behavior.

Even though they often spoke of liberty, they meant civil liberty rather than natural liberty. The latter implied unrestrained freedom - absolute liberty for the individual to do as he or she pleased. The former, by contrast, meant freedom of action so long as it was not detrimental to others and was beneficial to the common weal. When they spoke of political liberty they meant the freedom to be a participant, to vote and hold public office, responsible commitments that ought to be widely shared if republican institutions were to function successfully.

The colonists’ experiences throughout the seventeenth and eighteenth centuries had helped to prepare them for this participatory and contractual view of the nature of government. Over and over again, as the circles of settlement expanded, colonists learned to improvise the rules by which they would be governed. They had received charters and had entered into covenants or compacts that may be described as protoconstitutional, i.e., cruder and less complete versions of the constitutional documents that would be formulated in 1776 and subsequently. These colonial charters not only described the structure of government, but frequently explained what officials (often called magistrates) could or could not do.

As a result, by the 1770s American attitudes toward constitutionalism were simultaneously derivative as well as original. On the one hand, they extravagantly admired the British constitution ("unwritten" in the sense that it was not contained in a single document) and declared it to be the ultimate achievement in the entire history of governmental development. On the other hand, as Oscar and Mary Handlin have explained, Americans no longer conceived of constitutions in general as the British had for centuries.
In the New World the term, constitution, no longer referred to the actual organization of power developed through custom, prescription, and precedent. Instead it had come to mean a written frame of government setting fixed limits on the use of power. The American view was, of course, closely related to the rejection of the old conception that authority descended from the Crown to its officials. In the newer view - that authority was derived from the consent of the governed - the written constitution became the instrument by which the people entrusted power to their agents.  

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Issues, Aspirations, and Apprehensions in 1787-1788

The major problems that confronted the Constitution-makers, and the issues that separated them from their opponents, can be specified by the key words that recur so frequently in the documents that follow in this collection. The Federalists often refer to the need for much more energy, stability, and efficiency in the national government. They fear anarchy and seek a political system better suited to America's geographical expanse: “an extensive sphere” was Madison's phrase in a letter to Jefferson.

The Anti-Federalists were apprehensive about "unrestrained power" (George Mason's words), about the great risk of national "consolidation" rather than a true confederation, about the failure to include a bill of rights in the new Constitution, about the prospect of too much power in the federal judiciary, about the "tendency to aristocracy" (see the "Federal Farmer"), about insufficient separation of powers, and a government unresponsive to the needs of diverse and widely scattered people.

Because the two sides disagreed so strongly about the nature of the proposed government - was it genuinely federal or really national? - it is all too easy to lose sight of the common ground that they shared, a common ground that made it possible for many Anti-Federalists to support the Constitution fully even before George Washington's first administration came to a close in 1793. Both sides felt an absolute commitment to republicanism and the protection of personal liberty, as we have already seen. Both sides acknowledged that a science of politics was possible and ought to be pursued, but that "our own experience" (Madison’s view, though held by "Brutus" also) ought to be heeded above all. A majority on both sides accepted the inevitable role that interests would play in public affairs and recognized that public opinion would be a powerful force. The phrase "public opinion" appears eleven times explicitly in *The Federalist Papers*, and many other times implicitly or indirectly.

The desire for happiness was invoked constantly. Although admittedly a vague and elusive  

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2 The pen name of Richard Henry Lee of Virginia, a noted Anti-Federalist

3 The pen name of Robert Yates, an Anti-Federalist
concept, it clearly meant much more than the safeguarding of property (though the protection of property belonged under the rubric of happiness in the minds of many). For some it simply meant personal contentment; but increasingly there were leaders, such as George Washington, who spoke of "social happiness," which referred to harmony among diverse groups. David Humphreys's "Poem on the Happiness of America" (1786) provides an indication that this notion had national as well as individual and societal connotations.

Although both sides believed that the preservation of liberty was one of the most essential ends of government, the continued existence of chattel slavery in a freedom-loving society created considerable awkwardness for the founders. In 1775-1776, when the revolutionaries had explained the reasons for their rebellion, they frequently referred to a British plot to "enslave" Americans. The constant invocation of that notion has puzzled many students because whatever the wisdom or unwisdom of imperial policy in general, there most certainly was no conspiracy in London to enslave America.

There really should be no mystery about the colonists' usage, however, because as good Lockeans they knew full well the argument in chapter four of John Locke's Second Treatise of Government, entitled "Of Slavery" (an argument reiterated in Rousseau's Social Contract). "The liberty of man in society," Locke wrote, "is to be under no other legislative power but that established by consent in the commonwealth, nor under the dominion of any will or restraint of any law but what that legislative shall enact according to the trust put in it." The denial of full freedom quite simply meant "slavery."

Slavery and the international slave trade were discussed extensively in 1787 at the Constitutional Convention. By then, however, "slavery" was not often used as a theoretical and general synonym for unfreedom. It meant the permanent possession of one person (black) by another (white), usually for life, the slaveowner being entitled to own the children of his or her chattel as well. We must remember that the Convention met in secret session, and that the delegates agreed not to divulge information about their proceedings for fifty years. Consequently not very much was said publicly about slavery in 1787-1788 in connection with the Constitution. Not until 1840, when the U.S. government published James Madison's detailed notes on the Convention debates, did Americans learn just how much had been compromised at Philadelphia in order to placate South Carolina and Georgia. The Constitution essentially protected slavery where it existed, and remained mute about the legality of slavery in territories that might one day become additional states. Accommodation had prevailed in 1787, which meant, as it turned out, postponing for seventy-four years the moral and political crisis of the Union.

Legacies of American Constitutionalism

Although it is difficult for us fully to imagine the complexities of interest group politics, regional rivalries, and ideological differences in 1787, the instrumental achievement of that extraordinary Convention has generally been appreciated over the years. Even such a sardonic mind as H. L. Mencken's conceded as much. "The amazing thing about the Constitution," he wrote, "is that it is as good as it is - that so subtle and complete a document emerged from that long debate. Most of the Framers, obviously were second-rate men; before and after their session they accomplished nothing in the world. Yet during that session they made an almost perfect job of the work in
hand."

Their accomplishment was, indeed, remarkable. The distribution and separation of powers among three branches at the national level, and the development of federalism as a means of apportioning sovereignty between the nation and the states, have received broad recognition and the compliment of imitation by many other nations.

Equally appreciated is the fact that the U.S. Constitution is the oldest written national constitution in the world. (The Massachusetts Constitution of 1780, although amended and revised many times, is even older.) Its endurance is genuinely remarkable. We should therefore note that the framers deserve much of the credit for that endurance, not simply because they transcended their own limitations, . . . but because they contrived to restrict the ease with which the Constitution might be revised or reconsidered. There was considerable talk in 1787-1788 about holding a second convention in order to refine the product of the first. Anti-Federalists and many who were undecided wanted such a course of action. George Washington, however, regarded that idea as impractical. Hamilton, despite his dissatisfaction with many aspects of the Constitution, doubted whether a second convention could possibly be as successful as the first; and Madison feared a serious erosion of what had been accomplished in 1787.

It is easy to forget that the Philadelphia Convention vastly exceeded its authority, and that the men who met there undertook what amounted to a usurpation of legitimate authority. As [President] Franklin Delano Roosevelt pointed out on Constitution Day in 1937, contemporaries who opposed the newly drafted document "insisted that the Constitution itself was unconstitutional under the Articles of Confederation. But the ratifying conventions overruled them." The right of revolution had been explicitly invoked in 1776 and implicitly practiced in 1787. Having done their work, however, most of the delegates did not believe that it ought to be repealed or casually revised.

The complexity of changing or adding to the original document had profound implications for the subsequent history of American constitutionalism. First, it meant that in order to gain acceptance of their handiwork, the Federalists had to commit themselves, unofficially, to the formulation of a bill of rights when the first Congress met in 1789, even though many Federalists felt that such a list of protections was superfluous. They protested that a finite list of specified safeguards would imply that numerous other liberties might not be protected against encroachment by the government. The point, ultimately, is that promulgation of the U.S. Constitution required two sets of compromises rather than one: those that took place among the delegates to the Convention, and the subsequent sense that support for ratification would be rewarded by the explicit enumeration of broad civil liberties.

Next, the existence of various ambiguities in the Constitution meant that explication would subsequently be required by various authorities, such as the Supreme Court. The justices' interpretations would become part of the total "package" that we call American constitutionalism; but the justices did not always agree with one another, and the rest of the nation did not always agree with the justices. Those realities gave rise to an ongoing pattern that might be called conflict - within - consensus.
Some of those disputes and ambiguities involved very basic questions: What are the implications and limits of consent? Once we have participated in the creation of a polity and agreed to abide by its rules, then what? How are we to resolve the conflict that arises when the wishes or needs of a majority diminish the liberties or interests of a minority? This last question was the tough issue faced by the New England states in 1814, when they contemplated secession, and by South Carolina in 1828-1833 when a high tariff designed to protect northern manufacturing threatened economic distress to southern agricultural interests. And that, of course, was the thorny issue that precipitated southern secession and the greatest constitutional crisis of all in 1860-1861.

There is yet another ambiguity, or contradiction, in American constitutional thought—though it is less commonly noticed than the one described in the previous paragraph. As we have observed, the founders were not eager for a second convention, or for easy revisions or additions to their handiwork. They did provide for change, but they made the process complicated and slow. They did not believe that the fundamental law of a nation should be casually altered; and most Americans have accepted that constraint.

Nevertheless, on the state level Americans have amended, expanded, revised, and totally rewritten their constitutions with some frequency. A great deal of so-called positive law (i.e., legislative enactments) finds its way into state constitutions, with the result that many modern ones exceed one hundred pages in length. There is no clear explanation for this striking pattern of divergence between constitutionalism on the national and state levels. The curious pattern does suggest, however, that Americans have regarded the U.S. Constitution of 1787 as more nearly permanent than their state constitutions. Perhaps the pattern only tells us that achieving a national consensus for change in a large and diverse society is much more difficult than achieving a statewide consensus for change.

Whatever the explanation for this dualism in American constitutionalism, the paradox does not diminish the historical reality that writers of the federal as well as the first state constitutions all tried to establish charters clearly suited to the cultural assumptions and political realities of the American scene. Even though the founders explored the history of political thought in general and the history of republics in particular, they reached the commonsense conclusion that a constitution must be adapted to the character and customs of a people. Hence the debate in 1787-1788 over the relative merits of "consolidation" versus "confederation." Hence the concern about what sort of governmental system would work most effectively over a large geographical expanse. James Madison conveyed this sense of American exceptionalism several times in a letter to Thomas Jefferson (then U.S. minister to France) in 1788, when a bill of rights was under consideration.

On August 28, 1788, a month after New York became the eleventh state to ratify the Constitution, George Washington sent Alexander Hamilton a letter from his temporary retirement at Mount Vernon. The future president acknowledged that public affairs were proceeding more smoothly than he had expected. Consequently, he wrote, "I hope the political Machine may be put in motion, without much effort or hazard of miscarrying." As he soon discovered, to put the new constitutional machine in motion would require considerable effort. It did not miscarry because the "machine" had been so soundly designed. A concerted effort would be required, however, to keep the machine successfully in operation. That should not occasion
surprise. The founders had assumed an involved citizenry; and the governmental system they created functions best when their assumption is validated. That is the very essence of democratic constitutionalism.

Answer the following questions after reading the above article.

1. According to this reading, why is an understanding of the U.S. Constitution essential?

2. At its origin, how did American constitutionalism differ from the English model?

3. Federalists and Anti-Federalists were present at our founding. They differed greatly on many issues. What two primary ideas did they both agree?

4. Despite its flaws, what remarkable achievement was codified into our constitution? What long lasting principle did they build into our political fabric?

5. What did the Founding Fathers think about changing the work they had done? How did they build this into their final document?

6. **Bonus:** When writing to Hamilton, George Washington used a particular metaphor to describe what the constitution had created. What was the metaphor? How might we use that same metaphor today in this class?