

Constitutional Corner – Fundamental Principles: Constitutionalism

Constitutionalism: “adherence to or government according to constitutional principles; *also* : a constitutional system of government.”¹

The Constitution of the United States of 1787 has survived wars, economic and social upheaval, deaths of sitting Presidents and other challenges, yet it survives, nearly 228 years later,² the longest continuously operating Constitution in the world. Yet, many contend that our Constitution today, even considering it has only been amended twenty-seven times, bears little resemblance to the original; we will address that charge later.

First, consider this: today’s Americans typically think of the current Constitution as our first, but it was not – far from it.

Google “What was America’s first Constitution?” and you’ll encounter a variety of responses: The Articles of Confederation (1776), Fundamental Orders of Connecticut (1638), the Mayflower Compact (1620). None of these answers would be correct. In fact, the question is unanswerable until you first define the word “constitution.”

Black’s Law Dictionary, 4th Edition says a constitution is: “*The organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers.*” (emphasis added)

The settlers who landed at Jamestown, Virginia, in 1607 brought with them America’s first written Constitution. The Virginia Charter of 1606 not only described how the colonists were to be governed (by a council of 13 in Jamestown, operating in conjunction with a duplicate 13-man council in England) it also set out the rights that the colonists would enjoy (“all [the] liberties, franchises and immunities ... as if they had been abiding ... within ... England”). Although simple when compared to its 1787 descendent, it was for all intents and purposes, a Constitution.

Yet the Virginia Charter only pertained to Virginia; later colonial charters had similar limited authority. What was the first Constitution in America that applied to all the colonies? Many will answer: the Articles of Confederation; but that answer rests on an assumption. Before we go further, let’s return to Black’s definition. Notice that a constitution need not be written. Britain, to this day, does not have a written Constitution in the standard sense of that term.

¹ <http://www.merriam-webster.com/dictionary/Constitutionalism>

² Counting from its ratification in 1788

Britain's constitution is, however, written, it is simply not contained in a single document as you might expect. "Acts of Parliament, court judgments and conventions" make up the British Constitution.³

Did America ever have an unwritten Constitution? I contend they did, and I support my case with the words of Thomas Jefferson in the Declaration of Independence. Jefferson's thirteenth of twenty-seven complaints lodged against Parliament and the King states: "*He (meaning, the King) has combined with others (the Parliament) to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation.*"

Certainly there was no written Constitution covering all thirteen colonies in 1776; each governed itself in accordance with its own charter or, as we will see, their brand-new state constitutions.

Thomas Sheridan's dictionary of 1780 defines "constitution:" *The act of constituting, enacting, establishing; state of being, natural qualities; corporeal frame; temper of body, with respect to health; temper of mind; established form of government; system of laws and customs; particular law, establishment, institution.*"⁴ (emphasis added) Although Sheridan's dictionary was published after the Declaration, the definition of "constitution" had been commonly understood for some time. In other words, Jefferson wrote that the British government had subjected the colonies: "to a jurisdiction foreign to [*our system of laws and customs*]" i.e. their unwritten Constitution.

The "foreign jurisdiction" Jefferson referred to was, of course, the jurisdiction of Parliament. It was "foreign" because Parliament was not a party to the colonial charters; they were agreements between each colony and the King. Over time, the Charters were expanded to grant each colony some form of self-government through elected legislatures (Virginia's began in 1619), and the colonists had been governing themselves, in some cases, for nearly 150 years without the assistance of Parliament, thank you very much. They saw no reason to change this arrangement. The colonists believed the laws that Parliament passed pertaining to the colonies (aka, "pretended Legislation") should thus have no effect.

So if we accept, for the moment, that America had an unwritten Constitution in 1776, what did it consist of? The features of that Constitution emerge as we inventory Jefferson's twenty-seven complaints.

For example, the Constitution described thirteen Legislatures ("Representative Houses") which, the colonists felt, should be incapable of being "dissolved" on command or forced to hold its sessions at places "unusual, uncomfortable, and distant from the depository of [its] public

³ <http://www.bl.uk/magna-carta/articles/britains-unwritten-constitution>

⁴ https://books.google.com/books/about/A_General_Dictionary_of_the_English_Lang.html?id=mCY-AAAACAAJ

Records.” The Constitution described colonial judiciaries, which they felt should be independent of the Executive, certainly in respect to “the amount and payment of their salaries.” Their unwritten Constitution guaranteed “the benefits of Trial by Jury,” and that trials be held where the crime was committed instead of “beyond Seas.” Much of the design, the functions and powers, and the restrictions on government that the colonies felt were part of their “body politic,” can thus be deduced from Jefferson’s complaints.

The colonies’ unwritten constitution had been violated in numerous ways and it was preferable to demand independence than be reduced to “absolute Despotism.”

Over a period of one-hundred fifty years, the American colonies had established a rich history of constitutionalism. Royal charters, covenants of the people (ex: Mayflower Compact),⁵ expressions of their laws and their rights,⁶ all demonstrate a drive towards constitutionalism. Early Americans were familiar with the concept and understood the benefits.

As Henry Steele Commager observed: "All through the colonial era Americans went from compact to compact -- the Fundamental Laws of Connecticut of 1639, the 'Solemn Compact' at Portsmouth of 1638, and its successor the Charter of the Providence Plantations of 1647, the Pennsylvania Charter of Privileges of 1701 ..., and thereafter a score of compacts and agreements on one frontier after another."⁷

On 5 January 1776, acting on a recommendation of the Continental Congress the previous fall, New Hampshire enacted the first state constitution in America. Although the formal declaration of independence would not be signed for another seven months, this act severed the colony’s connection with England. South Carolina followed suit in April and Virginia in June. By the end of 1776, seven more states would as well. Rhode Island decided their Charter of 1663 would be adequate for independent governance and on May 4th, they unilaterally declared their independence.

With four states already independent and more State constitutions being drafted, the signing of Mr. Jefferson’s Declaration on July 4th was almost reduced to an administrative formality.

Why mention the state Constitutions? “[T]he United States Constitution assumes, in fact requires, the existence of state constitutions if it is to make any sense. They are part of the national document and are needed to complete the legal text...(For example), [i]f we want to know who can vote for members of the House of Representatives, we must look, says Article 1,

⁵ Covenant theology was well known to colonial Americans.

⁶ Such as the 1641 Body of Liberties (Massachusetts)

⁷ Henry Steele Commager, *Documents of American History* (New York: Appleton-Century-Crofts, 1963).

Section 2, at who can vote for members of the lower house in each state, and this requires reading the state constitutions.”⁸

The delegates in Philadelphia borrowed many features from the constitutions of the states; many of the Framers had even helped draft these documents. They also had the experience of the Articles of Confederation, often cited as the first Constitution of the political entity we call the “United States of America” although it was closer to a treaty than a true constitution.

The delegates of 1787 were sent to Philadelphia with instructions to “render the federal Constitution adequate to the exigencies of Government, and the preservation of the Union,” which they did. They rendered the “constitution” of the thirteen confederated states adequate to preserve their union.

In *The Origins of American Constitutionalism*, Donald Lutz concludes there are certain features that make up “the American constitutional tradition.” These are found not only in the document created by the “Grand Convention,” but also its antecedents. They include:

1. Use of a single document (as opposed to the British model).
2. Replaceable with a new form, when desired.
3. Double agreement: agreement among the people (as in a covenant), and agreement between the people and their government (as in a charter).
4. A preamble that defines the goals and values of the society.
5. Defines the structure of government and assigns powers to each branch (horizontal federalism).
6. Assigns powers that can be separate/distinct or shared/concurrent.
7. Shares power with the states (vertical federalism).
8. Defines a limited national government of defined and enumerated powers (at least that was the intent).
9. Establishes a system of checks and balances on power.
10. Establishes Constitutional supremacy.
11. Reserves unenumerated powers to the states or people.
12. Protects pluralism.
13. Balance of power vs. judicial supremacy.

Constitutionalism in America Today

If we are to keep constitutionalism alive in America, we must protect, and in some cases, restore its inherent features. You can quickly see from the list above that some of these features, particularly “defined and enumerated powers,” have been routinely ignored and

⁸ Donald S. Lutz, *The Origins of American Constitutionalism*, 1988, Louisiana State University Press., p.96.

others, such as “vertical federalism,” have been permanently altered (in this case by the 17th Amendment).

While Americans might pride themselves in having the briefest and longest operating written Constitution, the document in operation today is a far cry from its ratified version. I will support this accusation over the next few essays. We need look no further than former-Congressman Peter Stark’s famous statement that “The Federal Government, yes, can do most anything in this country” and compare it with the numerous founding period statements that we were given a government of limited and enumerated powers. Both statements can’t be right, or can they?

Many remedies have been proposed to restore American constitutionalism to its original form and we will survey some of these in an upcoming essay.

As you will see, constitutionalism is alive in America, but it is definitely not well. It is imperiled by the forces of Progressivism who would like to replace its traditional features with ones of their own, features that would turn the Constitution into the ultimate “wants and needs” provider, where each inhabitant (not just each citizen), cradle to grave, wants for nothing. “Running with scissors” would no longer be allowed; neither, however, would independent thought or speech.

If we are to survive as a nation, as a people, we must return to original constitutionalism while there is still time. The route to our present state has been slow and tortuous and no remedy promises overnight repair; still the journey must be commenced, and soon. Join us next week as we discuss that journey.

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