

## The Breakfast Club

### Constitutional Minute for 1 November 2022

#### What is a Constitution and Why Do We Have One?

Most Americans have not considered our title question; to them, “we have a Constitution because some men wrote one in 1787.” If you’re a Democrat, the answer might be “we have a Constitution because some white, cis-gendered, slave holding, misogynists wrote one in 1787.” Whatever. But Americans should understand exactly what a constitution is, what it does, and how we came to have one. If nothing else, such knowledge will yield a fuller understanding of the document.

Few Americans stop to consider just how unique our Constitution is and was in 1787. It was the first-ever written constitution of government drafted by representatives of the people. That is saying a lot considering the expanse of recorded history to that date.

Britain didn’t have one even as we were writing ours. Britain still doesn’t have a written Constitution to this day. They have a constitution all right, it is simply not written down in a single document as is ours. Britain’s Constitution consists of Magna Carta, certain Acts of Parliament, such as the Human Rights Act of 1998; the Bill of Rights of 1689; court judgments (although I frankly don’t know how they figure out which ones, so don’t ask) and what they call: “conventions” (meaning “custom”). Great Britain seems to get along alright with such an arrangement and there certainly is one big advantage: to change the Constitution requires only an act of Parliament. Or a new court judgement; sort of like how our Supreme Court operates: each new decision is treated as an “amendment” to our understanding of the U.S. Constitution (see [U.S. Constitution, Analysis and Interpretation](#)). I don’t necessarily agree with that, but that’s how we operate as a people.

Black’s Law Dictionary, 4th Edition defines “constitution” as: “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.”

Notice that Black’s acknowledges that a constitution may be “written or unwritten.” A constitution organizes the government and empowers each component it creates, including adding limitations on that power. To an extent it describes the manner in which each branch operates.

As Thomas Paine reminds us: "A constitution defines and limits the powers of the government it creates. It therefore follows, as a natural and also a logical result, that the governmental exercise of any power not authorized by the constitution is an assumed power, and therefore illegal."

Has any branch of the U.S. federal government ever exerted power not authorized by the Constitution and thereby performed an illegal act? You betchee. Hundreds if not thousands of times. And they continue to do so, almost with impunity. I say almost, because there are people, attorneys mostly, who follow closely the actions of the federal government. We call them State Attorneys General, and we rely on them to sue the federal government when it exceeds its legitimate bounds of power. The average American usually has no idea whether an action of any of the three branches of the federal government

exceeds its powers, principally because the average American has never studied the document, including the thousands of Supreme Court rulings in depth (who has the time, right?).

“Is the President’s Executive Order within the legitimate power of the President?” To answer, we must know not only the Constitution’s presidential powers, but also the powers given the President by acts of Congress. For example: Did the law passed by Congress give the President the authority to forgive student loans? It depends on what the law creating those student loans says. Until you’ve read the underlying law you cannot answer the question definitively.

One aspect of a constitution which Black’s Dictionary leaves out – and it is perhaps the most important one -- is “constitution as covenant.”

Webster’s 1828 defines “covenant” as:

“COVENANT, *noun* [L, to come; a coming together; a meeting or agreement of minds.]

1. A mutual consent or agreement of two or more persons, to do or to forbear some act or thing; a contract; stipulation. A *covenant* is created by deed in writing, sealed and executed; or it may be implied in the contract.”

One of the primary reasons the United States were the first country to establish a written Constitution is because the Christians who lived in the founding period understood the concept of covenant. Most of them came to America with church covenants already a part of their lives. If they were not already living under a covenant, they quickly established one (ex: the Mayflower Compact). As Donald Lutz and Jack Warren explain in “[A Covenanted People; The Religious Tradition and the origins of American Constitutionalism](#),” (Providence, RI, 1987): “...the peculiar characteristics of American constitutionalism – government by consent of the governed, reliance on a written constitution, and belief in a higher law – were derived from the dissenting church politics of the seventeenth century...The church covenants of seventeenth-century America provided the colonists with a model for their civil governments, which in turn helped determine the form and content of America’s eighteenth-century constitutions.” Lutz and Warren walk us through the key founding documents, many of them colonial sermons, which prove this thesis. As if we need further proof we need only turn to our Constitution’s Preamble: “We the People...ordain and establish this Constitution of the United States of America.” We could say it another way: We the people covenant together as we ordain and establish this Constitution.

Why we needed this written covenant/constitution is well known: the abject failure of the Articles of Confederation, which I cover in some detail in my seminar and which James Madison summarized in his famous “[Vices of the Political System of the United States](#).” As I tell my students: if you understand the problems created by the Articles, you will better understand the solutions provided in the Constitution.

We should revive the idea of Constitution as Covenant, it might get us through these divisive times with our republic intact.

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p.s. Don’t forget to sign up for the Virginia Constitution seminar on 10 December in Newport News.