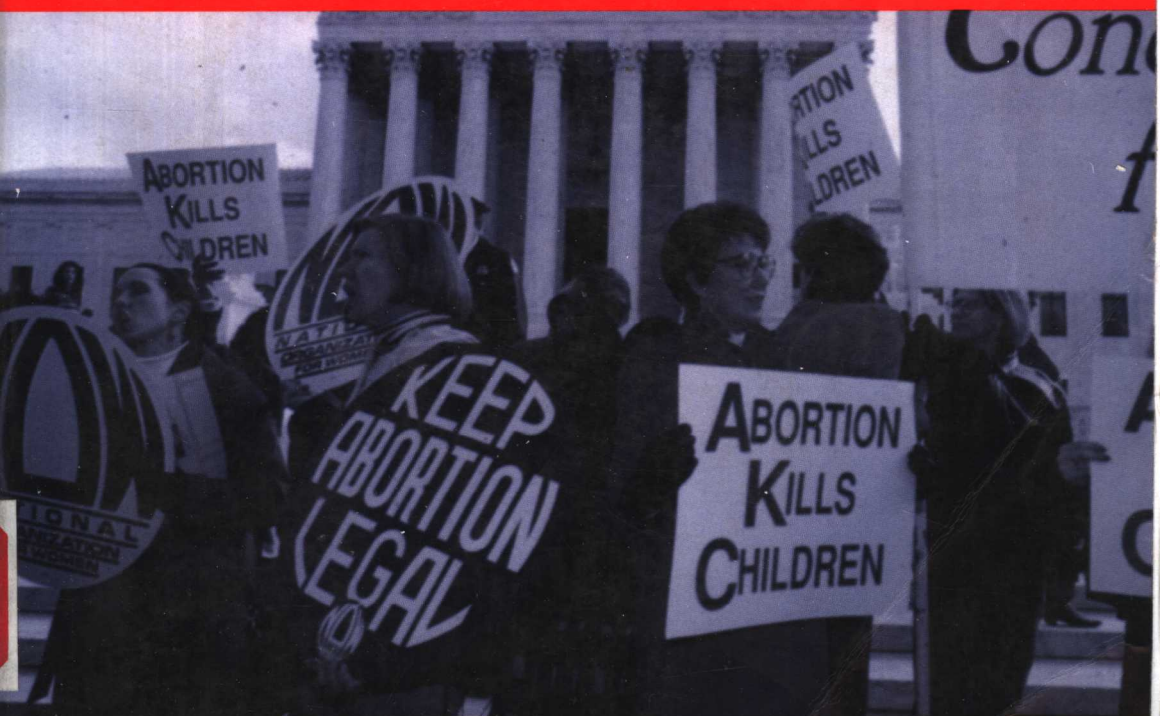




The Enduring Debate

CLASSIC AND CONTEMPORARY READINGS
IN AMERICAN POLITICS



EDITED BY DAVID T. CANON • ANNE KHADEMIAN •
KENNETH R. MAYER

THE
ENDURING DEBATE

**CLASSIC AND CONTEMPORARY READINGS
IN AMERICAN POLITICS**

David T. Canon
Anne Khademian
Kenneth R. Mayer



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Contents

PART I The Constitutional System

CHAPTER 1 Constructing the Government—The Founding and the Constitution 3

1 FROM *The Origins of the American Constitution*—MICHAEL KAMMEN 3

2 *The Federalist*, No. 15—ALEXANDER HAMILTON 12

3 "The Paranoid Style in American Politics"—RICHARD HOFSTADTER 17

THE DEBATE: AN ECONOMIC INTERPRETATION OF THE CONSTITUTION 23

4 FROM *An Economic Interpretation of the Constitution of the United States*—CHARLES A. BEARD 23

5 FROM *Charles Beard and the Constitution: A Critical Analysis of "An Economic Interpretation of the Constitution"*—ROBERT E. BROWN 28

CHAPTER 2 Federalism and Separation of Powers: Then and Now 34

6 *The Federalist*, Nos. 51 and 46—JAMES MADISON 34

7 FROM *The Price of Federalism*—PAUL PETERSON 43

8 "Guns, the Commerce Clause, and the Courts"—ROBERT KATZMANN 52

9 Rules Committee Report on the Unfunded Mandate Reform Act of 1995 55

10 "Unfunded Mandates: Balancing State and National Needs"—JAMES R. ST. GEORGE 59

THE DEBATE: DOES THE SEPARATION OF POWERS MAKE GRIDLOCK INEVITABLE? 66

vi Contents

- | | |
|---|----|
| 11 "It Ain't Broke"—CHARLES O. JONES | 66 |
| 12 FROM "[Does the System Need Fixing?] A Rationale"
—DONALD L. ROBINSON | 72 |

CHAPTER 3 The Constitutional Framework and the Individual: Civil Liberties and Civil Rights 77

- 13 "The Perpetuation of Our Political Institutions"—ABRAHAM LINCOLN 78
- 14 "Letter from Birmingham Jail, 1963"—MARTIN LUTHER KING, JR. 83
- 15 "In Defense of Prejudice"—JONATHAN RAUCH 92

- | | |
|---|-----|
| THE DEBATE: SHOULD DRUGS BE LEGALIZED? | 100 |
| 16 "The War on Drugs is Lost"—WILLIAM F. BUCKLEY | 101 |
| "The War on Drugs is Lost"—STEVEN B. DUKE | 104 |
| 17 "Legalization Madness"—JAMES A. INCIARDI AND CHRISTINE A. SAUM | 107 |

PART II Institutions

CHAPTER 4 Congress: The First Branch 119

- 18 FROM *Congress: The Electoral Connection*—DAVID R. MAYHEW 119
- 19 "Too Representative Government"—STEVEN STARK 123
- 20 "By the Numbers"—VIVECA NOVAK 138

- | | |
|---|-----|
| THE DEBATE: SHOULD THE SENATE REFORM THE
FILIBUSTER? | 147 |
| 21 "Slaying the Dinosaur: The Case for Reforming the Senate
Filibuster"—SARAH A. BINDER AND THOMAS E. MANN | 147 |
| 22 "Defending the Dinosaur: The Case for Not Fixing the
Filibuster"—BILL FRENZEL | 155 |

CHAPTER 5 The President: From Chief Clerk to Chief Executive 160

- 23 "The Power to Persuade" FROM *Presidential Power*
—RICHARD NEUSTADT 160

24 "The Search for the Perfect President—[*The Economist*] 170

25 "Presidents and Economics: One-Star Generalizations"
—HERBERT STEIN 177

| THE DEBATE: THE REACH OF PRESIDENTIAL POWER 184

26 "Perspectives on the Presidency" FROM *The Presidency in a Separated System*—CHARLES O. JONES 184

27 "The Out-of-Control Presidency"—MICHAEL LIND 190

CHAPTER 6 Bureaucracy in a Democratic System 203

28 "The Study of Administration"—WOODROW WILSON 203

29 FROM *Bureaucracy: What Government Agencies Do and Why They Do It*—JAMES Q. WILSON 212

30 "National Performance Review: An Analysis"—DONALD KETTL 221

| THE DEBATE: THE FEDERAL BUREAUCRACY: HIERARCHY VS. DECENTRALIZATION 228

31 FROM "Report Regarding the Internal Investigation of Shootings at Ruby Ridge, Idaho, During the Arrest of Randy Weaver"—DEPARTMENT OF JUSTICE 229

32 FROM "The National Performance Review"—AL GORE 233

CHAPTER 7 The Federal Judiciary 240

33 *The Federalist*, No. 78—ALEXANDER HAMILTON 240

34 "The Court in American Life" FROM *Storm Center: The Supreme Court in American Politics*—DAVID O'BRIEN 247

35 "The Color-Blind Court"—JEFFREY ROSEN 254

| THE DEBATE: INTERPRETING THE CONSTITUTION AND ORIGINAL INTENT 266

36 FROM *The Tempting of America*—ROBERT H. BORK 266

37 "Who's Right About the Constitution? Meese v. Brennan"—STUART TAYLOR, JR. 270

PART III Political Participation

CHAPTER 8 Public Opinion and the Mass Media 283

38 "Polling the Public" FROM *Public Opinion in a Democracy*

—GEORGE GALLUP 283

39 "Why Americans Hate Politics and Politicians"—MICHAEL

NELSON 291

40 "The Presidency and the Press"—CHARLES JONES 297

| THE DEBATE: THE MEDIA: HOW INFLUENTIAL ARE THEY? 303

41 "Why Americans Hate the Media"—JAMES FALLOWS 303

42 "Civic Journalism: Involving the Public" —MARGARET T.
GORDON 315

43 "When News Media Go to Grass Roots, Candidates Often
Don't Follow"—HOWARD KURTZ 317

CHAPTER 9 Elections and Voting 322

44 "The Voice of the People: An Echo" FROM *The Responsible
Electorate*—V. O. KEY 322

45 "'Give 'em Hell' These Days Is a Figure of Speech"—EILEEN
SHIELDS WEST 328

46 "What I Learned About How We Pick a President"—LAMAR
ALEXANDER 337

47 The "Motor-Voter" Debate: The National Voter Registration Act of
1993 341

| THE DEBATE: SHOULD CAMPAIGN SPENDING LIMITS BE
INSTITUTED? 348

48 Testimony of Herbert E. Alexander, Ann McBride, and
Candice J. Nelson before the Senate Rules Committee on
Campaign Finance Reform 349

49 "Take the Wealth Primary to Court"—JOHN BONIFAX 361

CHAPTER 10 Political Parties 364

50 "The Decline of Collective Responsibility in American Politics"
—MORRIS P. FIORINA 364

- 51 "The People vs. the Parties"—KEVIN PHILLIPS 375
- 52 *Harper's Magazine*, Forum: "A Revolution, or Business as Usual?" 383
- 53 Third Parties and the Presidential Race—WALTER BERNS AND GORDON S. BLACK 400

THE DEBATE: PARTY POLITICS IN AMERICA: SHOULD THE TWO-PARTY SYSTEM BE STRENGTHENED? 405

- 54 "A Report of the Committee on Political Parties: Toward a More Responsible Two-Party System"—AMERICAN POLITICAL SCIENCE ASSOCIATION 406
- 55 "Of Political Parties Great and Strong: A Dissent"—EVERETT CARLL LADD 410

CHAPTER 11 Groups and Interests 424

- 56 "Political Association in the United States" FROM *Democracy in America*—ALEXIS DE TOCQUEVILLE 424
- 57 "The Logic of Collective Action" FROM *The Rise and Decline of Nations*—MANCUR OLSON 427
- 58 "Connections Still Count"—W. JOHN MOORE 437

THE DEBATE: PACs AND POLITICS: WAS MADISON RIGHT? 447

- 59 *The Federalist*, No. 10—JAMES MADISON 448
- 60 "The Alleged Mischiefs of Faction" FROM *The Governmental Process*—DAVID B. TRUMAN 454
- 61 "The Hyperpluralism Trap"—JONATHAN RAUCH 461

PART IV Public Policy

CHAPTER 12 Politics and Policy 473

- 62 "The Science of 'Muddling Through'"—CHARLES E. LINDBLOM 473
- 63 "American Business, Public Policy, Case Studies, and Political Theory"—THEODORE J. LOWI 482
- 64 "Why Our Democracy Doesn't Work"—WILLIAM A. NISKANEN 489

| THE DEBATE: DOES THE DEFICIT MATTER? 496

65 "Should the Senate Pass a Balanced Budget Constitutional Amendment?"—LARRY E. CRAIG AND JAMES M. BUCHANAN 497

66 "The Balanced Budget Crusade"—ROBERT EISNER 504

CHAPTER 13 Government and the Economy 511

67 "Call for Federal Responsibility"—FRANKLIN D. ROOSEVELT 511

68 "Against the Proposed New Deal"—HERBERT HOOVER 515

69 "It's *Not* the Economy, Stupid"—CHARLES R. MORRIS 520

70 "If the GDP Is Up, Why Is America Down?"—CLIFFORD COBB, TED HALSTEAD, AND JONATHAN ROWE 533

| THE DEBATE: THE ROLE OF GOVERNMENT IN THE ECONOMY 543

71 "Gray Markets and Greased Pigs"—JOHN HOOD 543

72 "The Era of 'Big' Government: Why You'd Miss It If It Went"—E. J. DIONNE, JR. 546

CHAPTER 14 Government and Society 554

73 "A Program for Social Security"—FRANKLIN D. ROOSEVELT 554

74 "The Next New Deal"—NEIL HOWE AND PHILIP LONGMAN 558

75 "Remaking U.S. Social Policies for the 21st Century," FROM *Social Policy in the United States*—THEDA SKOCPOL 577

| THE DEBATE: WELFARE REFORM 583

76 "Putting Recipients to Work Will Be the Toughest Job"—JEFFREY L. KATZ 584

77 Debate on the Senate Floor on Welfare Reform
—SENATORS JOHN SHELBY (R.-ALA.) AND ORRIN HATCH (R.-UT) 591

78 "Should the House Pass H.R. 4, the Personal Responsibility Act?"—REPRESENTATIVES BILL ARCHER (R.-TEX.), MICHAEL COLLINS (R.-GA.), AND WILLIAM J. COYNE 594

CHAPTER 15 Foreign Policy and World Politics 600

79 "The Sources of Soviet Conduct"—"X"[GEORGE KENNAN] 600

80 "An Outward-Looking Economic Nationalism"—ROBERT B. REICH 607

THE DEBATE: AMERICAN FOREIGN POLICY: ISOLATIONISM OR INVOLVEMENT? 619

81 "The Intervention Dilemma"—BARRY M. BLECHMAN 620

82 "Why America Must Not Go Into Bosnia"—CHARLES KRAUTHAMMER 629

APPENDIX OF SUPREME COURT CASES

Marbury v. Madison (1803) 635*McCulloch v. Maryland* (1819) 640*Barron v. Baltimore* (1833) 645*Roe v. Wade* (1973) 647*Brown v. Board of Education* (1954) 652*United States v. Nixon* (1974) 654*Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 659*United States v. Lopez* (1995) 665

Acknowledgments 673

PART I

The Constitutional System

CHAPTER 1

Constructing the Government: The Founding and the Constitution

1

From *The Origins of the American Constitution*

MICHAEL KAMMEN

The Constitution is a remarkably simple document that has provided a framework of governance for the United States for more than two hundred years. It establishes a shared sovereignty between the states and the federal government, a separation and checking of powers between three branches of government, qualifications for citizenship and holding office, and a delineation of the rights considered so fundamental, their restriction by the government requires extensive due process and a compelling national or state concern. Yet the Constitution's simple text produces constant controversy over its interpretation, and constant efforts to bend, twist, and nudge its application to changing economic markets, technology, social trends, and family structures. The document's durability and flexibility amid conflict and social change is a tribute not only to the men who drafted the Constitution in 1787, but to the American people and their willingness to embrace the challenges of self-governance at the time of the Revolution and today.

*In the following article Michael Kammen argues that in order to begin to understand the Constitution and the continuous debate surrounding its interpretation, we must look to the history of American constitutionalism. Informed by John Locke's *Treatise of the social contract*, the British constitution, and a colonial experience deemed an affront to basic liberties and rights, Americans plunged into the writing of constitutions as a means to delegate power from the sovereign people to their elected and appointed agents. It is, as Kammen notes, quite remarkable that the American states chose to draft state constitutions in the midst of a revolutionary battle for independence, rather than establishing provisional governments. It is similarly remarkable that these state constitutions have grown significantly in length over the years and are so readily amended*

and even rewritten, in contrast to the relatively succinct and difficult-to-amend Constitution of the United States.

Kammen suggests that the Constitution's simplicity and durability lie in both the historic need for compromise between conflicted interests, and the surprising common ground that nevertheless existed over basic principles: the need to protect personal liberty, the commitment to a republican form of government, and the importance of civic virtue for preserving citizen sovereignty. This embrace of basic governing principles could explain the deeper devotion to the U.S. Constitution, in contrast to the state documents, as well might the fear that an amended or completely altered Constitution might prove less malleable and accommodating for the governance of a diverse nation.

The Nature of American Constitutionalism

"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 new-born 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 govern-

ments 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 proto-constitutional, 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.¹

* * *

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 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

* [The pen name of Richard Henry Lee of Virginia, a noted Antifederalist.]

† [The pen name of Robert Yates, an Antifederalist.]