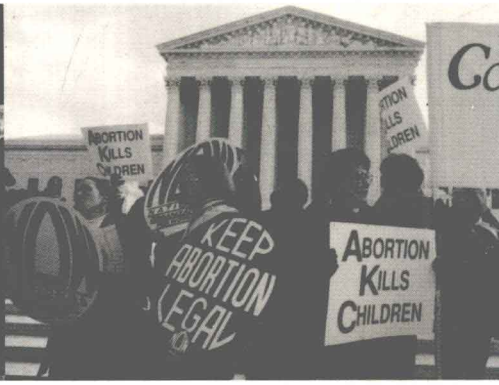
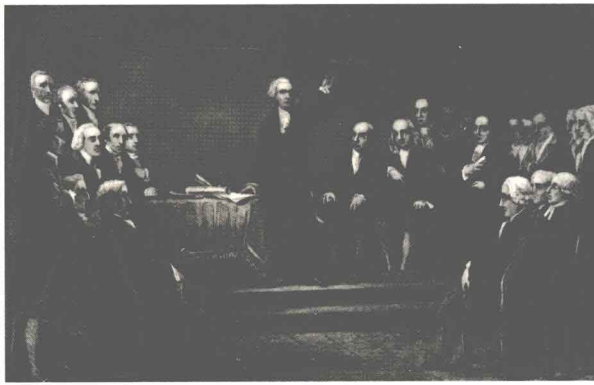


THE ENDURING DEBATE



Classic
and Contemporary
Readings
In American Politics

SECOND EDITION

Edited by

David T. Canon, Anne Khademian, and Kenneth R. Mayer

THE
ENDURING DEBATE

**CLASSIC AND CONTEMPORARY READINGS
IN AMERICAN POLITICS**

Second Edition

David T. Canon
Anne Khademian
Kenneth R. Mayer



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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 that 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 represent 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