

ESSAYS
ON
THE CONSTITUTION
OF THE
UNITED STATES



edited by
M. Judd Harmon

**ESSAYS on the
CONSTITUTION
of the
UNITED STATES**

HENRY J. ABRAHAM	WALTER F. MURPHY
DAVID FELLMAN	C. HERMAN PRITCHETT
LOUIS HENKIN	MARTIN SHAPIRO
ALPHEUS T. MASON	HERBERT J. STORING

edited by
M. JUDD HARMON

National University Publications
KENNIKAT PRESS // 1978
Port Washington, N. Y. // London

Copyright © 1978 by Kennikat Press Corp. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher.

Manufactured in the United States of America

Published by
Kennikat Press Corp.
Port Washington, N.Y./London

Library of Congress Cataloging in Publication Data
Main entry under title:

Essays on the Constitution of the United States.

(Multi-disciplinary studies in the law) (National
University Publications)

Bibliography: p.

Includes index.

1. United States—Constitutional law—Addresses,
essays, lectures. I. Harmon, Mont, Judd.

KF4550.A2E8

342'.73

78-6445

ISBN 0-8046-9210-6

*This volume is dedicated to Emma Eccles Jones,
whose generosity was a major factor in making possible
the Bicentennial Lecture Series upon which these essays
were based.*

CONTENTS

1.	INTRODUCTION	3
	M. JUDD HARMON	
1.	AMERICA'S POLITICAL HERITAGE: Revolution and Free Government—A Bicentennial Tribute	11
	ALPHEUS T. MASON	
2.	THE CONSTITUTION AND THE BILL OF RIGHTS	32
	HERBERT J. STORING	
3.	THE NATIONALIZATION OF AMERICAN CIVIL LIBERTIES	49
	DAVID FELLMAN	
4.	THE SUPREME COURT IN THE EVOLVING POLITICAL PROCESS	61
	HENRY J. ABRAHAM	
5.	THE CONSTITUTION AND ECONOMIC RIGHTS	74
	MARTIN SHAPIRO	
6.	JUDICIAL SUPREMACY FROM MARSHALL TO BURGER	99
	C. HERMAN PRITCHETT	
7.	THE CONSTITUTION AND FOREIGN AFFAIRS	113
	LOUIS HENKIN	
8.	THE ART OF CONSTITUTIONAL INTERPRETATION: A Preliminary Showing	130
	WALTER F. MURPHY	
	NOTES	160
	TABLE OF CASES	195

**ESSAYS on the CONSTITUTION
of the UNITED STATES**

ABOUT THE CONTRIBUTORS

Henry J. Abraham has been an active participant and leader in a great variety of academic and civil affairs and is a member of some twenty-five professional societies and associations. He has written nine books and dozens of scholarly articles. He is presently Henry L. and Grace Doherty Memorial Foundation Professor in Government and Foreign Affairs at the University of Virginia.

David Fellman, Vilas Professor of Political Science at the University of Wisconsin, is a teacher, scholar, author and civil servant. He has written numerous books and articles and has written the annual review of the Supreme Court for the *American Political Science Review*.

M. Judd Harmon is Professor of Political Science at Utah State University in Logan, Utah, and received his Ph.D. from the University of Wisconsin in 1953. He is the author of books and articles in the field of political science.

Louis Henkin was an officer of the United States Department of State for ten years before entering academic life. He is currently Hamilton Fish Professor of International Law and Diplomacy and Professor of Constitutional Law at Columbia University. His publications include an extensive list of articles in professional journals and books and monographs.

Alpheus T. Mason, Emeritus McCormick Professor of Jurisprudence at Princeton University, is widely recognized as the country's leading judicial biographer. He retired from the faculty of Princeton in 1968 after forty-three years of service. In addition to many scholarly articles Dr. Mason has written twenty books.

Walter F. Murphy is McCormick Professor of Jurisprudence at Princeton. He was a member of the New Jersey Advisory Committee to the U.S. Civil Rights Commission and the Board of Trustees of the Law and Society Association, among other public service organizations. He has written a large number of articles for professional journals of law and political science as well as several books.

C. Herman Pritchett has long been recognized as one of the leading authorities on the Constitution of the United States. He is a past president of the American Political Science Association and was a member of the American Bar Association Commission on Electoral College Reform in 1966. He has written many articles and is the author or co-author of numerous books. He was formerly Chairman of the Department of Political Science at the University of Chicago and is presently at the University of California, Santa Barbara.

Martin Shapiro has achieved an enviable reputation as a constitutional lawyer. He has written many articles on the courts and judicial process. He is the author and editor or co-editor of numerous books. He is currently a member of the faculty of the School of Law at the University of California at Berkeley.

Herbert J. Storing has been a member of the Political Science Department at the University of Chicago since 1956. His principal scholarly interests are in the areas of the American founding, constitutional law, black American political thought, and public administration theory. He has written many articles and edited and co-authored several books on these subjects.

M. JUDD HARMON

INTRODUCTION

The celebration of America's Bicentennial was, above all, a salute to our forebears, who won our independence as a nation and established the institutions that still govern the nation. Those institutions and the principles underlying them have, of course, altered. But the alterations are less striking than their continuity and durability. It is an historical fact of some consequence that we are, after two hundred years, still pointing with pride to the origins of our system. That system has, on occasion, been threatened, sometimes seriously, but it has survived and flourished, and it has done so on the basis of the consent of its citizens. Few other political societies can make such a claim.

Stability, standing alone, is no virtue. It is, however, one requirement for the good life, as Aristotle said. And there is no doubt that the great majority of Americans believe that, compared to most other peoples of the world, they live a good life. While maintaining a strong and probably healthy skepticism concerning those who are responsible for operating it, they also believe in the governmental system which helped produce it. Only a short time ago the traumas of Vietnam and Watergate created widespread doubts in the minds of Americans concerning their system, but this pessimism had largely vanished by the time the Bicentennial year began.

When we speak of the "system" and its "principles," we are referring mainly to those outlined in the Constitution of the United States, adopted thirteen years after the nation had declared its independence. Thus, it was fitting that a celebration of the Bicentennial should have included a consideration of our fundamental document of government. Americans have been debating its meaning, purpose, and value ever since the Philadelphia Convention of 1787. But it was particularly appropriate to do so on such

an occasion as the Bicentennial because it gives an historical perspective to analysis that is often absent at other times. It is one thing to engage in a debate over the wisdom of a particular constitutional decision and quite another to consider the value of the Constitution over the long haul. Thus, although there may be public dissatisfaction with a specific issue of constitutional interpretation, it appears presently that most Americans are not only satisfied with the working of their Constitution but they are also enthusiastic and proud about its long-term success.

If this were true only with regard to the masses of average citizens, whose knowledge of the history and even the content of the Constitution is sketchy to say the least, it might be dismissed as a matter of little importance, a transitory phenomenon engendered by the holiday spirit of the Bicentennial. This, however, does not appear to be the case. Among the "experts," the scholars, the legal practitioners, and others who are both knowledgeable and directly interested, there seems to be a greater respect for the Constitution and confidence in its capacity to resolve problems than has existed for many years, perhaps greater than has ever existed.

It would be difficult to prove such an assertion, and I make no attempt to do so here. What follows is primarily a personal assessment based upon observations extending over a period of some thirty years. I do not pretend that those observations have led to unassailable conclusions, but my professional contemporaries will know what I am talking about.

I must admit that I had given little thought to this matter until it became my responsibility to provide an introduction to the eight essays which comprise this volume. These essays are based upon a series of lectures on the Constitution of the United States given during the Bicentennial year.* The authors, eight of the country's most distinguished constitutional scholars, were invited to speak and write on any aspect of the Constitution in which they had greatest interest. Surprisingly, there was no need to alter subject matter to prevent duplication; the authors selected topics that were quite diverse. Such diversity, however, made the task of writing an introduction much more difficult than would have been the case had the essays focused on one specific problem.

It was only after several readings and approaching despair over the possibility of finding something to tie them together that I saw a glimmer of light. It was faint at first, but the more I concentrated on it the brighter it became. It was a simple fact, so simple that I did not initially conceive its significance, although considering that Alpheus T. Mason had pointed clearly to it in his introductory essay I am appalled at my obtuseness. The common thread is that not one of these eminent constitutional authorities

*The Milton R. Merrill Bicentennial Lectures, Utah State University, 1975-76.

found fault with or criticized the fundamental principles of the document about which they were writing. To be sure, there was ample criticism, but it was directed toward persons—judges, public officials, and others—who had “misinterpreted” the Constitution or misused it. For the Constitution itself, for its basic principles and qualities, there was, implicitly if not always explicitly, a respect as sincere if not as flamboyant as that expressed during the Bicentennial celebration. It is most obvious in Mason’s essay, but it is there in all of them.

The fact is worthy of consideration, for it represents a significant shift in academic opinion. I cannot conceive that a comparable collection of essays published, say, twenty-five or thirty years ago would not have included some which raised serious questions concerning federalism, separation of powers, checks and balances, legislative supremacy, judicial review, and other constitutional principles.

I do not suggest that there were no supporters of the Constitution in Academe at that time. I suspect that Professor Mason was saying then what he is saying now and that many agreed with him. But my generation, as students, were marching to different drummers—J. Allen Smith, Charles A. Beard, Vernon Louis Parrington, and their disciples, whose views were scarcely calculated to instill among their followers confidence in and admiration for the Constitution and the men who framed it.

According to this critical school, the Constitution was the handiwork of Americans who profoundly distrusted the democratic spirit which had carried us through the Revolution and the establishment of the Articles of Confederation. The Constitution, they argued, was designed to halt the developing movement toward equality and majority rule—euphemisms, they believed, for mob rule—and make the country safe for economic privilege disguised in the robes of “liberty.” To be sure, the strategy did not enjoy unqualified success. The democratic trend was too powerful to block, but it was severely curbed through the judicious use of various devices, such as federalism and judicial review, which the Constitution provided. Thus, worthwhile progress could be made only by overcoming the obstacles placed in its path by the Constitution. To this end the Constitution was amended and interpreted, political parties were organized to overcome the handicaps of separation of powers, presidents were popularly elected (or nearly so) and wrested power from congressional representatives of special interests, and so forth. Only by neutralizing its enemy, the Constitution, could the American ideal be achieved.

These arguments did not fall on deaf ears. To a generation of students who bore the scars of depression and war they had a powerful appeal. We were aware that other views existed, those of E. S. Corwin and Charles Warren, for example, but these were less appealing. The hardships resulting

from the Great Depression demonstrated the need for a greater measure of economic and social equality. That Fascism and Nazism were the enemies of democracy proved that democracy, based upon majority rule and equality, was the only morally acceptable governmental system. The New Deal, which sought both a greater degree of economic equality and the defeat of Nazism-Fascism, received the support of the vast majority of political scientists, students and teachers alike.

Typically, the critics of the Constitution praised the British system of government for its responsiveness to the popular will, a responsiveness untrammelled by such undemocratic restraints as federalism and judicial review. And although there were few who seriously suggested that the United States should move to a unitary and parliamentary system, there were many who were convinced that it was unfortunate such a move was impractical, for only by doing so could the United States make swift progress toward its egalitarian destiny.

I suggest that these critical views are not nearly so widespread today as they were twenty-five years ago—or twenty, fifteen, or ten years ago—and that the present trend is toward a new and greatly increased respect both for the Constitution and for the wisdom and foresight of the men of the Philadelphia Convention. Those who have engaged in this reappraisal do not all agree upon the reasons for their conclusions, and surely there is room for additional scholarly effort here. But that their conclusions are harmonious seems significant.

In a provocative essay published on the eve of the Bicentennial, Martin Diamond¹ harshly attacked the school of Smith, Beard, and Parrington, which argued that the Constitution was a betrayal of the Declaration of Independence and the Revolution, in the name of liberty but in the spirit of privilege. In fact, Professor Diamond wrote, the Declaration took its stand for *liberty*, for it was liberty, not democracy, in which eighteenth-century Americans were interested. And it was the *Constitution* which established democracy, a form of government appropriate to the achievement and defense of liberty. Those who have seen the Constitution as anti-democratic make the mistake of equating democracy with equality, which they regard as a “political good” superior to liberty. The framers of the Constitution were too much under the influence of Montesquieu to permit the establishment of *any* form of government in which power went unchecked, for unrestrained governmental power would violate the principle of liberty. Thus, the framers believed that devices which impose limits upon the powers of the majority were necessary if democracy were to succeed. In modern times, however, Professor Diamond continues, ideas of equality have become inflated. The older idea of “equal political liberty” has given way to an ideology which demands equality in all respects. This,

of course, was neither the objective of the revolutionaries who produced the Declaration nor that of the framers of the Constitution.

On the other hand, in his introductory essay Professor Mason asserts that it was not democracy that the framers of the Constitution intended but "free government," a system which recognizes that human nature contains elements of both good and evil and provides devices designed to encourage the good and restrain the evil. For Mason the revolutionary quality of the Declaration was twofold: first, an assertion of equality, not in each and every respect, but in the possession of rights to life, liberty, and the pursuit of happiness; second, the assumption that government rests upon consent rather than fear. "Free government" does not make majority rule impossible; indeed, it has countenanced a "series of limited revolutions." But it assumes that tyranny can be imposed by a majority as well as by a minority and guards against both by providing institutional restraints that impede precipitous action.

It is, I believe, an increased awareness of and appreciation for this last point, among those who formerly were most critical of the Constitution, that accounts for the shift in opinion to which I have previously alluded. That the Constitution has imposed restraints upon the movement toward equality is obvious. But just as obviously that movement has continued. It is hard to imagine that even the wildest-eyed of the eighteenth-century radicals would have advocated all the policies, designed to advance the cause of equality, which have become the law of the land. Even Jefferson spoke of the desirability of government by a "natural aristocracy." If it had been the essential purpose of the Constitution to block the path to the achievement of equality, one can only conclude that it has failed. This is not to say, of course, that we have established complete political, economic, social, and racial equality in the United States of America. But that major progress in that direction has been made cannot be doubted.

Coupled with this awareness that the Constitution has permitted, if not facilitated, steady progress toward equality is, I believe, a growing and uneasy suspicion that perhaps too much progress in this direction has already been made. On this point I detect a distinct air of apprehension among liberals. Many of those who were enthusiastic supporters of the New Deal, for example, now openly express doubt about the wisdom of extending the welfare state and voice concern over the decline of the spirit of "enterprise." No less a New Dealer than William O. Douglas felt it necessary a decade ago to remind us that "the purpose of the Constitution and the Bill of Rights, unlike more recent models promoting a welfare state, was to take government off the backs of people."²

The widespread defections from the ranks of the Democrats in the presidential election of 1972 has generally been attributed to the belief

among the defectors that George McGovern, the Democratic candidate, was an altogether too fervid proponent of the expansion of social and economic equality. And while there were many reasons for the nomination victory of Jimmy Carter in 1976, it is certainly the fact that he was widely regarded as much more moderate on this issue than McGovern had been four years previously. In the Republican Party the strongly conservative platform adopted in 1976 and the near-victory of Ronald Reagan provided further evidence of anxiety over this matter, an anxiety generally expressed in terms of fear of "creeping" or "galloping" socialism. That the deeply conservative Gerald Ford could be seriously regarded by many as a leftist, or, at best, soft on "socialism," bears eloquent witness to the strong feelings within the vocal and influential right wing of the Republican Party. But, although the majority of American voters reject the extreme position of the Republican (and Democratic) right, it is apparent that they are paying more attention to the issues upon which that faction has been harping for many years. That the right favors the status quo ante and moderates the status quo, or at least slower progress beyond it, does not alter the fact that both are apprehensive that equality is being extended at the cost of diminishing liberty.

The dean of American television editorialists, Eric Sevareid, recently commented that the fundamental philosophic disagreement in American politics is between those who believe that the poor support society and those who believe that society supports the poor. It would appear that the ranks of the latter faction are growing. This, of course, is simply another way of saying that a great many Americans believe that we have gone far enough, or too far, in using government to achieve social and economic equality.

Corollaries of the extension of the principle of equality from the political to the economic and social spheres have been the expansion of governmental powers, especially those of the national government, and an impressive increase in the size of government and in the cost of operating it. The transformation of the United States from a simple rural, agricultural society to a complex urban, industrial society and the growth of the nation's population would themselves have accounted for a large part of these developments. But it is also the fact that a society committed to equality is bound to require more government and more powerful government than one whose primary concern is liberty. This is not to suggest that a government committed to liberty is necessarily small and impotent. Liberty may be threatened not only by government but also by individuals, organizations, and foreign enemies. One of the justifications of government is that it provides protection, and it must be large and powerful enough to do so. However, a government whose essential function is the protection

of the individual will not compare in size and power with one which additionally provides the vast array of services associated with the welfare state and administers the legislation designed to achieve a greater degree of social equality.

Just as many liberals of the older school now worry that the principle of equality has been overextended, so too do they express misgivings over the expansion of governmental size and power. It is a view which has had significant political consequences, for it provides one basis for the current phenomenon of "anti-Washingtonism" which formed a part of Carter's strategy to gain the Democratic nomination for the presidency and very nearly enabled Ronald Reagan to capture the Republican nomination from an incumbent Republican president.

A successful society demands that a decent balance of the often conflicting principles of liberty and equality be maintained. Quite aside from the fact that a simple humanitarianism requires attention to the plight of the less fortunate, it is also true, as Aristotle wrote long ago, that a polity in which differences in the holding of wealth are too great is inherently unstable, and that in such a situation the property and privileges of the wealthy themselves are threatened. On the other hand, equality achieved by governmental intervention necessitates limitations upon the liberties of the individual. Under "free government" there is bound to be constant struggle between the advocates of these two principles, and indeed that has been the case throughout the history of the American republic. That neither side has achieved permanent dominance is a victory for the principles of free government—for the Constitution.

The conventional wisdom among liberals of the New Deal school was, as stated above, that the Constitution was an enemy to be overcome because it had been used by executive, legislative, and judicial officers (especially the latter) to defeat majority demands for equality. There was little or no concern that the achievement of equality would create a larger and more powerful government which might threaten the liberties of the people. The new attitude of respect for the Constitution among those who were until recently its critics can be explained by not only the realization that the Constitution has countenanced a substantial expansion of equality but also that it may be useful in curbing further progress in the same direction.

For whichever direction public policy takes, toward liberty or equality, the Constitution assures that it cannot move too rapidly. It requires that "sober second thought" which is often annoying and frustrating but which, the record demonstrates, has proved its value. The Constitution could, of course, be altered to remove the obstacles to immediate achieve-

ment of its purposes. If a sufficiently large majority wished to do so, it could even require the calling of another constitutional convention wherein a new document, more amenable to the majority will, could be forged. That such a demand has not been made is, on the face of the matter, somewhat of an anomaly. It is likely, however, that most Americans, or at any rate most of those who think about the issue, understand that there are no permanent majorities and that they may, on any given occasion, be as supportive of a minority as they are of the majority position. In short, the majority itself accepts the principle that majorities, as well as minorities, cannot always be trusted—precisely the view of the authors of the Constitution. It does not seem unreasonable to suggest that one explanation for the present esteem accorded the Constitution is an awareness that the purposes it was intended to serve are wise and in the general interest.

Criticism of the Constitution will, of course, continue. Support for and opposition to the document, its interpretations, and applications have always been based, in large part, upon the personal feelings engendered by the consequences of those interpretations and applications. Supporters of the New Deal thought that civil liberties were inadequately protected by the Constitution whereas economic liberties were overly protected. Their opponents later railed against a constitutional interpretation which accorded civil liberties a preferred position. That the Constitution can be so construed as to permit the busing of public school students to achieve racial balance gratifies some and infuriates others. Countless similar examples could be cited. We have long since learned that tranquility is not an inevitable consequence of constitutionality.

A reasonable degree of stability has, however, been a consequence of the system of governmental institutions outlined by the Constitution. That complex array of checks and counterchecks discourages precipitate action and encourages deliberation. In the short run speed often seems desirable and deliberation's delay vexatious. In the long run, however, it is essential to liberty under the law that men think before they act in the name of an entire people. If the Bicentennial did no more than remind us of this connection between reasoned deliberation and intelligent, principled choice, its celebration was worthwhile.

AMERICA'S POLITICAL HERITAGE
Revolution and Free Government—
A Bicentennial Tribute

In 1974, two years before the Bicentennial of America's birth as a nation, free government experienced a crisis comparable only to the Civil War. Thoughtful Americans gravely wondered whether there would be anything to celebrate in 1976. Confronted with unprecedented betrayals, the institutions of free government—press, Congress, and courts—responded. Without loss of a drop of blood, America ousted from the highest office in the land a rebellious conspirator to obstruct justice.¹ To rid themselves of Britain's tyrannical rule, the colonies resorted to revolution. Thanks to the Founding Fathers' constitutional handiwork, that was not necessary on the eve of America's Bicentennial.

No happenstance, this timely tribute to the resilience of eighteenth-century institutions was the result of careful planning. James Madison, "Father of the Constitution," boasted that the American people "accomplished a revolution which has no parallel in the annals of human history. They reared the fabrics of government which have no models on the face of the globe. They formed the design of a great Confederacy which it is incumbent on their successors to improve and perpetuate."²

Madison's unqualified acclaim seems parochial, self-serving, even more so when one takes into account the fact that these exalted pronouncements were published in a newspaper article circulated during the heated campaign to win support for the proposed Constitution. Ratification was uncertain; America's constitutional future was clouded in doubt. Circumstances put a high premium on hyperbole. How do Madison's lofty claims measure up in the light of nearly two centuries of history?

Reprinted from *Political Science Quarterly* 91 (summer 1976): 193-217 by permission.

REVOLUTION WITHOUT PARALLEL

Nowadays few words are bandied about more freely than “revolution.” For most it evokes images of violence, disruption, and anarchy. Yet the right of revolution, historically and logically, has high claim as the focus of America’s Bicentennial. How can Americans denigrate contemporary models and celebrate 1776? In his classic formulation Jefferson made revolution seem glorious, noble, Heaven-sent.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights. That among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any Form of government becomes destructive of those ends, it is the Right of the People to alter or to abolish it, and institute a new Government, laying its foundations on such principles and organizing its powers in such form, as to them seem most likely to effect their safety and happiness.³

The Declaration of Independence is our national birth certificate. Our first state constitutions, some of them prefaced with the Declaration, denounced the doctrine of nonresistance against arbitrary power and oppression as “absurd, slavish, and destructive of the good of mankind.”⁴ Lincoln called the people’s “right to rise up, and shake off the existing government, and form a new one that suits them better—a most sacred right—a right, which we hope and believe, is to liberate the world.”⁵ In 1953 Arthur Schlesinger, Sr., listing America’s ten contributions to civilization, accorded top rank to the right of revolution.⁶ At no time in our history could we reasonably or gracefully turn our backs on it. Nor can we do so in 1976.

“If there be a principle,” James Madison commented in 1793, “that ought not to be queried within the United States, it is that every Nation has a right to abolish an old government and establish a new one. . . . It is the only lawful tenure by which the United States hold their existence as a Nation.”⁷ “It is in vain,” Madison wrote in *Federalist* no. 41, “to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain, because it plants in the constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions.” Although not always in agreement with his *Federalist* collaborator, Alexander Hamilton called revolution “an original right of self-defense, paramount to all positive government.”⁸