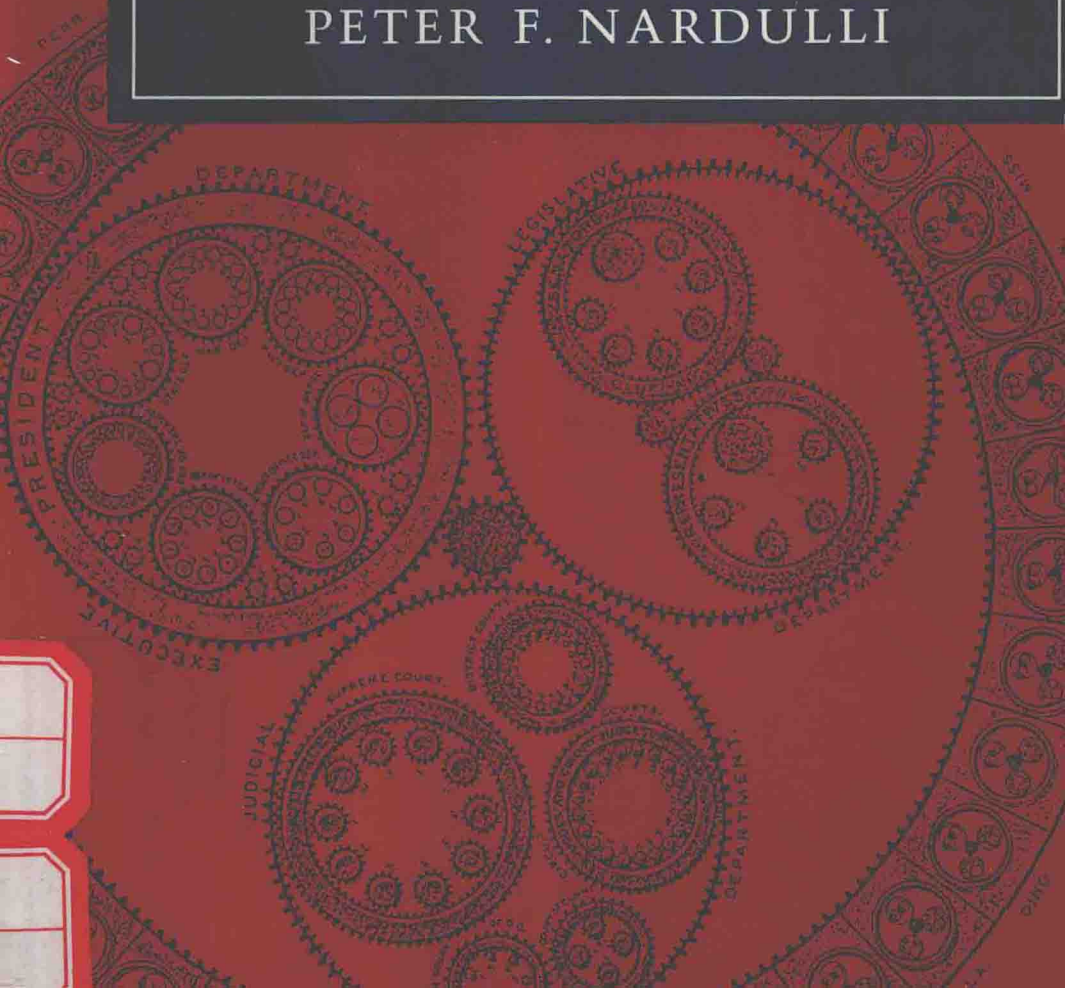


# The Constitution and American Political Development

AN INSTITUTIONAL PERSPECTIVE

EDITED BY  
PETER F. NARDULLI



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## Preface

This book is a collection of original essays on the role of the U.S. Constitution in the development of American political institutions. It represents a marriage between neo-institutionalism and the renewed interest in the U.S. Constitution spurred by the bicentennial. A fundamental issue that needs to be addressed within the new institutionalism is the role of the Constitution in American politics. The Constitution embodies the structural design for American political institutions. To understand these institutions fully, one must begin with their constitutional roots and examine the Constitution's impact on their development.

By viewing the Constitution as an independent force in American politics and integrating it with the renewed interest in institutionalism, this book differs significantly from much of the scholarship on the Constitution that proliferated in the bicentennial period. Much of this literature has an historical-legalistic hue. There is a marked tendency to view the Constitution as an organic whole upon which external forces act. As such these works follow the traditional paradigm in constitutional studies. This body of literature has long been concerned with the evolution of the Constitution (or parts thereof) and the impact of social, economic, and political factors on its development. Was a constitutional provision interpreted in a particular case in a manner consistent with the text of the Constitution? With the intent of the framers? Does a line of precedent constitute a constitutional doctrine or change in a doctrine? What are the factors that led to the establishment and evolution of that doctrine?

No one could deny the importance of these traditional concerns. The smooth functioning of the American political system depends on the continued evolution of constitutional doctrine; the legitimacy of that system depends on the nature of the evolutionary process. But scholars' preoccupation with constitutional development has led them to ignore its role in structuring American political development. This is unfortunate because fundamental issues exist in

this field of inquiry. Despite the relative constancy of its constitutional framework, no political scholar would claim the American political system has remained unchanged over the course of its history. Does this mean that the American political system is unbounded, that the Constitution has exerted no significant force on political development? If the Constitution can be said to have exerted some independent developmental force, has it channeled institutional development in a manner consistent with the broad aims of the framers? If so, how? Have unrecognized subtleties of its complex structure led to unintended and unforeseen developments? How have historical developments interacted with constitutional factors to mold political development?

The immensity of these questions makes it impossible to answer them definitively; their importance requires that we begin. To do this a conference was sponsored by the University of Illinois in December, 1987, to which recognized American politics scholars, not constitutional experts, were invited. We were most concerned with the impact of constitutional factors on the development of national political institutions (Congress, the presidency, the bureaucracy, and the Supreme Court), political institutions in the penumbra of the Constitution (political parties and interest groups), and federalism. Scholars in each of these areas were asked to address the issues raised here using whatever perspective and methodology they thought most appropriate. The result was a set of original essays that blended historical and comparative approaches with explicitly political perspectives into an analysis of their respective domains.

This volume contains highly refined versions of the papers presented at this conference. As a whole they represent a unique perspective on constitutionalism in American politics and its impact on American political development. They should stimulate new thinking on the role and importance of the Constitution in American politics and reintegrate it into mainstream political research.

## Acknowledgments

A number of individuals made important contributions to the conference from which this volume emerged and to the volume itself. William Prokasy, former dean of the College of Liberal Arts and Sciences at the University of Illinois, supported the conference and the publication of this volume. Roger Kanet, former head of the Department of Political Science, played a crucial role in appointing a committee to organize the conference and in both prodding and supporting the committee in its efforts to complete its tasks. The planning committee consisted of Ira Carmen, Peter Nardulli, and Frederick Wirt. While Nardulli and Wirt assumed the primary organizational responsibilities for the conference, they were greatly assisted by Susan Hanson, Merrily Shaw, and Janie Carroll of the Department of Political Science. Others helpful in planning and organizing the conference included Winton Solberg, Robert Sutton, and William Widenor of the Department of History, Gerhard Casper of the University of Chicago, and John Hope Franklin of Duke University.

A variety of other individuals contributed to the execution of the conference. Walter Murphy of Princeton University presented a thought-provoking keynote address to initiate the conference; Robert Weissberg, Frederick Wirt, and Samuel Gove served as panel chairs; Winton Solberg, Rein Staal, Wallace Farnham, Dianne Pinderhughes, and Carol Mock served as paper discussants. The paper givers dutifully integrated the comments from these discussants, one another, and various anonymous reviewers into the essays presented in this volume.

Shirley Burnette and Lorena McClain performed admirably, as usual, in the preparation of various drafts of the manuscript. The efforts of Larry Malley, now at Duke University Press, and Richard Wentworth of the University of Illinois Press in seeing this project to completion should also be acknowledged, as well as the admirable efforts of Jane Mohraz, who edited the manuscript and shepherded it through the publication process.

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PART

★ I ★

Introduction



## CHAPTER

# ★ 1 ★

## The Constitution and American Politics: A Developmental Perspective

PETER F. NARDULLI

An important but much neglected concern in the study of the Constitution is its effect on the development of the American political system. A fundamental tenet of American constitutionalism is that its founding document both empowers and limits government. It defines the social contract, provides public activity with its unique flavor and character, and controls the latent potential for abuse. The Constitution is so fundamental to the structure of the American political system that its developmental significance seems axiomatic. Indeed, constitutional scholars' more traditional concern with the forces that affect constitutional evolution and interpretation can be viewed as a testament to the ascribed importance of the Constitution for American political development.

Viewed differently, however, constitutional evolution can be seen as undermining the developmental significance of the Constitution. How can an instrument that is continually unfolding be an independent force in the development of other political institutions? To the extent that both the Constitution and its institutional creations are continually unfolding, would not it be more appropriate to attribute political change to the more fundamental forces shaping constitutional evolution? Questions such as these have made it fashionable over the past several decades to discount the political significance of such institutional factors as the Constitution. Political scientists often view the field of public law as being outside the ambit of American politics; the Constitution is usually relegated to the "black box" of the political system. That black box too frequently becomes a black hole, as scholars fixate on the actors and forces that swirl around it before being sucked into its vortex.

As political scholars become more aware of the institutional context of politics, the costs of relegating the Constitution to this black hole become more obvious. This is especially true with respect to its developmental consequences. Political institutions must adapt to changing social and economic conditions. Yet change is difficult even within the simplest of political settings; powerful groups with a vested interest in the political status quo have existed throughout history. Political change is even more difficult to achieve in a constitutional government, especially when constitutionalism is a fundamental political value. The government's founding document defines the relationship between the citizens and the government and limits the sphere and structure of governmental activities. Once a government is constitutionally defined, modifications in formal institutions and structures are constrained—regardless of the level of societal consensus for political change. While a failure to adapt could be destabilizing, unconstrained changes would undermine the system's legitimacy and could erode the moral force of the Constitution.

In a political system such as that in the United States, the relationship between the Constitution and political development is thus important and complex. The following essays address some of the issues in this relationship and provide important insights into the Constitution's various roles in American political development. They employ historical and comparative approaches to examine the impact of the Constitution. This essay simply addresses some preliminary issues involved in assessing the Constitution's roles in the developmental process. It begins with an analysis of the factors clouding the formative roles of the Constitution. Next, it undertakes a reassessment of the Constitution's developmental roles and extends that reassessment to some broad developmental questions. Finally, a conceptual overview of constitutional influences on institutional development is provided, with illustrations drawn from the essays in this volume.

### **Ambiguity in the Developmental Role of the Constitution**

To question the impact of the Constitution on American political development appears heretical, particularly considering the situation that existed in Europe at the time the U.S. Constitution was adopted. In many eighteenth-century European nations, governmental insti-

tutions and procedures had evolved, fitfully at times, out of the needs and structure of feudal society. They seem to have existed for as long as most could recall, and therein lay the source of their legitimacy. In contrast, the U.S. government resulted from a conscious effort by an assembly of distinguished statesmen to create a workable political system that met the needs of American society, as Madison noted in *Federalist No. 38*. The U.S. Constitution was the product of that effort. Since political legitimacy depends on conformity with constitutional principles and provisions, that document's role in American political development would seem self-evident. Reinforcing this perspective is the fact that the federal judiciary has exercised—for the better part of two centuries—the power to invalidate activities and developments it deems unconstitutional.

Despite the seminal role of the Constitution in the creation of the American governmental system, an examination of the current political landscape gives rise to considerable skepticism concerning its developmental impact. Such an examination reveals few parallels between the government of the late eighteenth century and the late twentieth century, except those of a very superficial nature. How can such historical differences exist in the face of a largely unchanged constitutional framework, if that framework constrains institutional change? Two explanations are plausible here, both of which undermine the developmental significance of the Constitution. The first concerns constitutional ambiguity and the evolutionary process by which those ambiguities are resolved. The second involves the implications of what some would contend was a very limited political presence of the Constitution during the formative years of the Republic.

### *Constitutional Ambiguity and Evolution*

A certain level of ambiguity in a document such as a constitution is unavoidable and to some extent desirable. The ambiguity of key provisions of the U.S. Constitution has permitted it to breathe with history and undoubtedly accounts for its longevity, but it is the same ambiguity that obscures the Constitution's role in American political development. Exacerbating the impact of unavoidable textual ambiguity were the behavior and views of political leaders in the formative years of the Republic. Instead of creating a tradition of strict constructionism, they created precedents for taking license with the constitutional text. Constitutionalism yielded to

pragmatism as Thomas Jefferson, John Marshall, James Monroe, and Andrew Jackson tried to deal with such issues as the Louisiana Purchase, judicial review, federally supported internal improvements, and the controversy over a national bank. In addition, James Madison's constitutional judgments on the relationship between the nation and the states underwent several changes in the four decades following the Convention.

The ambiguity that has obscured the Constitution's role in American political development also can be seen in the changing metaphors that have been used to characterize the Constitution and its relation to society (Kammen, 1986:16-22). These metaphorical changes reveal how constitutional malleability has enabled perceptions of it to evolve, thus allowing it to accommodate new demands on government. This malleability, of course, further contributes to questions concerning the independence of its developmental role.

The earliest of these metaphors, routinely invoked around the time of the Convention by such luminaries as Benjamin Franklin and John Marshall and later by Daniel Webster, was that of an "instrument" of government. Thomas Jefferson, in his inaugural address, invoked the image of the Constitution as the sheet anchor of the ship of state, a device that could be used to stabilize the ship and rein it in during stormy times. The sheet anchor analogy did not become common until after the Civil War, partly in rebuttal to Thomas Babington Macaulay's 1857 diatribe that the American Constitution was "all sail and no anchor." Like the instrumental conception, it stressed the restrictive facets of the constitutional text. A Newtonian conception of the Constitution based on David Hume's view of the world as a great machine replaced the anchor metaphor within a quarter of a century. Michael Kammen quotes an 1888 address by James Russell Lowell that captures this notion with vivid imagery: "After our Constitution got fairly into working order it really seemed as if we had invented a machine that would go of itself, and this begot a faith in our luck which even the civil war itself but momentarily disturbed. Circumstances continued favorable, and our prosperity went on increasing. I admire the splendid complacency of my countrymen, and find something exhilarating and inspiring in it. We are a nation which has *struck il* [*sic*], but we are also a nation that is sure the well will never run dry" (1986:18). The next constitutional metaphor emerged in the early twentieth century. It was an organic conception with Darwinian overtones that emerged in the writings of such juristic giants as Oliver Wendell Holmes, Benjamin Cardozo, and Felix Frankfurter and such po-

litical leaders as Theodore Roosevelt and Woodrow Wilson. It viewed the Constitution as an integrated organic whole that slowly grew to meet the needs of an ever-changing nation.

The implications of the Newtonian and Darwinian metaphors for understanding the Constitution's role in American political development are significant. If the Constitution were "a machine that would go of itself," constitutional ambiguity and interpretation would be less of a problem. The Newtonian conception suggests an internal logic that clarifies ambiguities and determines the course of constitutional development. These principles of operation dictate how the machine of government should work. They can be used by jurists and other political leaders to determine the constitutionally appropriate response to issues as they arise. The constitutional path of political development can be made clear and its independent effect can be determined.

An organic, Darwinian view, however, suggests a different process of constitutional evolution that contributes to the ambiguity of the Constitution's developmental role. Justice Holmes in *Missouri v. Holland* nicely illustrates these difficulties:

When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago [1920:421].

If constitutional issues are examined in light of our entire experience, then purely mechanical principles do not dictate constitutional evolution. Rather, the possibility exists that political, economic, and social considerations play an important part in such matters. This possibility, of course, obscures the role of purely constitutional factors in the formation and operation of the political process; it suggests that, in at least some instances, environmental forces may overwhelm constitutional constraints and dictates.

What makes these possibilities troubling is that few today view the Constitution as "a machine that would go of itself." If mechanical principles of operation and interpretation exist for the Constitution, the most learned jurists and legal scholars have yet to

discover them. Moreover, few who have traced the evolution of constitutional doctrines would deny the relevance of social, political, and economic influences. Thus, instead of the Constitution's being driven by its own internal logic and principles, the pulls and pressures of external forces have played a part in doctrinal growth.

### *Early Constitutional Presence*

What reinforces the importance of arguments based on ambiguity and the nature of evolutionary process is historical evidence suggesting that the political presence of the Constitution on the American scene was slow in developing. The political institutions it created had to struggle with preexisting centers of public authority—state political systems—that were loathe to cede power to their fledgling competitor, or at least no more than was incumbent after a strict reading of the document. Upon ratification, the Constitution did not immediately enjoy the type of moral authority it has today. Its theories, concepts, and institutions could not be turned to as binding authority in the resolution of disputes and political crises.

The slow emergence of a strong constitutional presence left a political vacuum that permitted greater play for extraconstitutional forces, enhancing their role in shaping our notions of American constitutional government. The absence of a strong constitutional presence in the early years of the Republic can be seen in the smoldering controversy over the nature of the Union, in the reach of national lawmaking authority, and in the low regard with which the federal judiciary was held.<sup>1</sup>

The slow emergence of a constitutional presence on the national political landscape is reflected not only in the early resistance to its institutions but also in the slow acceptance of the Constitution as a national symbol. Kammen's (1986) cultural history underscores the ambivalence surrounding the Constitution during the early years of the Republic. But, although there was some initial opposition to the Constitution, as well as some uncertainty and apprehension, it was soon viewed as a document that was well suited to American needs. As the Constitution became associated with political stability and economic prosperity in the post-Civil War era, it came to be viewed as "a masterpiece, applicable to every country" (Kammen, 1986:22). The "cult of the Constitution" probably reached its early apex at the time of the centennial and, since then, has enjoyed immense stature as the symbolic representation of



American democracy and politics. It is difficult however, to discount the impact of external influences on American government during this century-long gestation period, which contributes to the problematic nature of the Constitution's developmental role.

### **The Constitution and American Politics: A Reconceptualization**

Taken at face value, the implications emerging from constitutional ambiguity, evolution, and presence are profound. They suggest that the governmental framework embodied in the Constitution exerted little independent influence on the structure and evolution of American politics. According to this view, the Constitution's ambiguity and adaptability make it little more than an integrated set of conduits through which more fundamental forces exert their influence on American politics, encountering little resistance along the way. Before embracing this view, however, we should be aware that it rests on a certain conceptualization of politics and the Constitution. Neither conceptualization is beyond criticism, and alternatives exist. An assessment of these critiques and alternatives can shed new light on the Constitution in American political development.

#### *Politics, Political Values, and Neo-institutionalism*

The conception of politics underlying the analysis presented above stresses the importance of individual actors and the role of social and economic factors as they are manifested in the activities of groups outside the government. That analysis thus falls prey to an emerging set of criticisms aimed at prevailing approaches to political research. The essence of these critiques is that politics cannot be reduced to a set of interactions among competing groups that pressure governmental actors. Equally important are political ideals and moral values, as well as the force of governmental institutions. These institutions embody value commitments, and their structures and mechanisms represent vested interests of important political actors. Political institutions can therefore mold external influences and constrain individual actors.

Samuel P. Huntington has written eloquently and persuasively on the importance of ideals and values in American politics: "To see American politics purely as a reflection of social structure is