

# The Philosophers' Government

Session IV: Feb. 14, 2013

## The Constitution of the United States of America, Pt. I

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- Summary of problems in the theory of government in Locke and *The Declaration of Independence*.
- (a) The Social Contract Theory (SCT) assumes the pre-existence of a minimally organized society with some *republican* traditions.
- (b) Under the theory people form “a compact civil society” for reasons of self-interest; i.e., it is an egoistic theory.
  - But government requires constant attention to the general good, i.e., some significant denial of self-interest.
  - Citizens who conceive of their form of government under the SCT reasonably behave as members of a Community of Interest.
    - The harmful effects of that conception are multiplied when citizens think of themselves as right-holders.
- (c) The Principle of Popular Sovereignty (PPS) assumes the existence of a “people,” or “public” with some significant degree of homogeneity of interests, traditions, and opinion.

- Problems in theory of government in Locke and *The Declaration of Independence* (cont.).
  - (d) Regimes constructed under the PPS are no more immune from tyranny than any other sort.
    - You can have the infamous tyranny of the majority while maintaining popular rule.
    - PPS regimes are vulnerable to the phenomenon of the *demagogue*, as the history of ancient Athens proves.
  - (e) The D.I.'s doctrine of natural rights is conceptually shaky, depending for its plausibility on a theory of natural law, which in turn was historically built upon the Christian conception of an omnipotent, omniscient and benevolent creator.
- The importance of these weaknesses for our present endeavor lies in the fact that the framers of the Constitution were aware of all of them save, perhaps, one.

- Historical background of the Constitution.
  - During the Revolutionary War there was no real national government.
    - The Continental Congress had little power; it could appoint officers of the Continental Army, and dispose of a few other such matters, but it could not levy taxes, or impose any other binding duties on the individual colonies.
      - Hence, such travesties as the infamous winter at Valley Forge, shoeless soldiers at Trenton leaving bloody tracks in the snow, and private largesse of a wealthy benefactor being relied upon to provide the army with minimum provisions.
  - Upon the conclusion of the war the Congress proposed to the new states formation of a national government operating under provisions set forth in The Articles of Confederation.
    - These had been drafted and circulated during the war.
    - They were adopted in 1781, forming the basis for the first national government of The United States of America.

- Historical background (cont.).
  - The Articles defined a true *confederation*, that is, an *alliance* of independent states allied for certain minimal purposes, only.
  - Thus, the power of the Articles' central government was extremely limited.
    - The citizens of the newly independent states, having seen the ill effects of a powerful central government, were suspicious of national government, generally.
  - But the Articles' government soon proved inadequate to the situation of the new states, and the country began to exhibit some of the internal conflict that had plagued Europe for many centuries, despite a generally common language and heritage.
  - Tariffs, tolls and other barriers to commerce were erected.
  - Shay's rebellion threatened to spread from Massachusetts to the other states.

- Historical background (cont.).
  - Consequently, in 1787 Congress created a committee to draft a new constitution, replacing the Articles, including provisions which would obviate the difficulties the Articles' weaknesses had exposed.
  - The committee began its work in Philadelphia in May of 1787, electing George Washington presiding officer.
  - There were 55 delegates from 12 of the states, 8 of whom had been members of the Continental Congress who signed the D.I.
  - Yet Roger Pilon, editor of your Cato edition, says, "...many of the same men who had met earlier in Philadelphia... met there again to draft a plan for governing the new nation, the Constitution..." [1]
  - His counterfactual claim represents the very modern notion that the two great documents are consistent, and the special investment of some political factions in that notion.
    - That modern notion derives from one great speech by Abraham Lincoln more than any other single factor.

- Historical background (cont.).
  - The principal architect of the Constitution is thought to have been James Madison.
    - Hence, the document is often called “the Madisonian Constitution.”
    - This appellation derives especially from the extent of compromise evident in the document’s provisions.
  - Drafting was completed Sept. 17, 1787, and the Articles Congress approved it unanimously, submitting it to the states for ratification under special terms defined by that Congress, as well as by Article VII. (See Cato, pp. 39-40.)
    - The 9 states’ ratification necessary for adoption occurred by June 21, 1788, when New Hampshire ratified.
    - But New York had not yet ratified, so Congress delayed declaring the new Constitution in force.
      - Thus began the publication in New York’s newspapers of 85 papers arguing for ratification signed by “Publius”; these are the very important *Federalist Papers*.
      - New York ratified and the new government began operating in 1789.

- Why a written constitution?
  - The modern era of constitutionalism began with the states following the Declaration of Independence.
    - Now there are hardly any nations in the world which have no written constitution.
  - But the modern movement was shaped by ancient precedent and rationale, almost entirely Greek.
  - By the Classical Era in ancient Greece there was a well-established tradition of the *nomothetes*, the person who devises the system of laws for a city-state.
    - The most famous of these men was Solon, who established a new constitution for Athens about 600 B.C.
  - Ancient constitutionalism was a product of the repudiation of despotism and the idea of *the rule of law*.
  - Kings, oligarchs and other despots made the law their subjects were to follow arbitrarily, and often to serve their own interests.
    - Thus, Thrasymachos in Bk. I of Plato's *Republic*, defines the just as the lawful and the lawful as what promotes the interests of those in power.



- Why a written constitution? (cont.)
  - The rulers were not themselves subject to the law because they made the law.
  - The rule of law arose as a response to the rampant injustice of this situation.
  - Hence, there are two common statements of the essence of the idea of the rule of law:
    - The rule of law, not of men;
    - No one is above the law.
  - To conform to the principle of the rule of law, laws made by human beings (often called *positive law*) must meet certain criteria, among them:
    - They must be knowable by all who are subject to them.
    - Thus, they must be written and published.
    - They must not be *ex post facto*, i.e., they cannot create crimes after they have been committed and then subject those who committed the acts to punishment.
    - Those who make the laws must themselves be subject to them.

- Why a written constitution? (cont.)
  - But a new problem then arose: What is the source of the law to which even kings are subject?
    - Sophocles' great play, *Antigone*, is about this problem.
  - For the concept of the rule of law to be effective there must be a source of law not subject to human will, and, preferably, endowed with wisdom superior to that of human beings.
  - Christianity offers a solution to the problem of finding a transcendental groundwork for the law, God.
    - Thus, Locke, Grotius and others of their era ground the natural law in the Creator.
  - Modern constitutions offer a second-best groundwork, a “law above the positive law.”
  - They are regarded not as expressions of the will of God, but the most fundamental expression of the will of “the people.”
    - We will see what efforts the Founders went to to establish that concept of the Constitution's origin and grounding.

- Structure of the Constitution.
  - The Constitution comprises three main parts.
    - The Preamble.
    - The Body
      - Three primary Articles.
      - Four secondary, lesser Articles.
      - Articles I-IV are divided into Sections, the Sections usually falling into paragraphs.
        - Hence, we refer to the Constitutional text by Article, Section and paragraph.
    - The Amendments, are also designated as Articles.
      - I-X, The Bill of Rights.
      - XI, XII, the pre-Civil War amendments.
      - XIII-XV, the Civil War, or Reconstruction amendments.
      - Remaining amendments are usually designated “modern.”
        - All were adopted in the Twentieth Century.

- Description of selected Articles of the Constitution.
  - The Preamble is not an Article, and has no executive force in law.
    - If the D.I. laid out the theory of the American government, which was then implemented by the Constitution, as is commonly believed, then we should find here a statement of the functions of government in accord with that of the D.I.
      - We do not: there is no mention of rights, much less natural ones, and so no statement that the purpose of the Constitution is to secure rights.
      - The Preamble's doctrinal underpinnings *do* include the Social Contract Theory and the Principle of Popular Sovereignty.
  - Article I: The Legislative Article.
    - Section 2 includes the infamous "3/5ths compromise" rendered null and void by Section 2 of Amendment XIV.
    - We now sometimes hear it said that the Constitution declared African-Americans only 3/5 of a person. This is nonsense, an example of the logical *fallacy of division*.

- Description of selected Articles of the Constitution (cont.).
  - The  $3/5$  is a portion of an aggregate number and is not distributable any more than an average is.
    - Consider: “ $3/5$  of Montana voters cast ballots for Mitt Romney in the last election. Therefore,  $3/5$  of each Montana voter cast a ballot for Mitt Romney.”
    - Consider: “The average age of MOLLI students is 68. Therefore, say, Tony Beltramo is 68.”
  - Section 2, ¶ 5, gives to the House “the sole Power of Impeachment.”
    - The power has been seldom exercised and less often have convictions followed in the Senate.
      - One impeached and convicted Federal judge, Alcee Hastings, was subsequently elected to the House, where he now remains a member.
  - Section 6 provides immunity to members of Congress for their statements in debate on the chambers’ floors; e.g., you can’t sue Max Baucus for libel for a Senate speech.

- Description of selected Articles of the Constitution (cont.).
  - Article I (cont.).
    - Section 8 specifies the powers of Congress. ¶1 resolves many of the difficulties experienced under the Articles of Confederation by giving certain powers exclusively to the Federal Congress.
      - ¶ 3 is the Commerce, or Interstate Commerce, Clause.
        - A great deal of the legislation which has defined the contemporary era in American government, beginning with the second Roosevelt Administration, is premised on the Commerce Clause.
      - ¶ 3 was at issue in the recent Supreme Court case challenging the constitutionality of Obamacare.
        - In the Obamacare case the Court ruled that the law's individual mandate provision could not be supported by the Commerce Clause, but ¶ 1's power of taxation would support it.
    - Sec. 8, ¶ 18 is known as the “necessary and proper” clause.
      - It's qualifications are often neglected by naïve readers so that it is construed as if absolute.

- Selected Articles of the Constitution (cont.).
  - Article I (cont.).
    - Section 9 is the complement of Section 8: it specifies what Congress explicitly *cannot* do.
      - ¶ 1 Prevents Congress from prohibiting the slave trade before 1808. (Notice that those traded are referred to as “persons”.)
      - ¶ 4 Forbids anything like an income tax. It is set aside by the much beloved Amendment XVI of 1913.
    - Section 10 is the complement of 9 for the states, i.e., it says what the states *cannot* do.
      - Why is there no complement of Section 8 for the states?
  - Article II, the Executive article.
    - Section 1, ¶¶ 2, 4 describe the Electoral College, one of several features of the Constitution aimed at moderating the effects of popular sovereignty.
    - There were those a few years ago who wanted to amend away Section 1, ¶ 5 so that “The Terminator” could run for President.

- Selected Articles of the Constitution (cont.).
  - Article II (cont.).
    - Section 2, ¶ 3 was recently enforced by a Federal court against President Obama, who had invoked it to make appointments when the Senate was not actually in recess.
    - Section 4 lists the grounds for impeachment of the President and Vice-President.
      - The “...other high Crimes and Misdemeanors” language was what was at issue in the Clinton impeachment.
      - Note that frequently having his foot in his mouth is not grounds for impeachment of a Vice-President.
  - Article III, the Judicial article.
    - “United States” in the opening sentence of Section 1 really means the Federal government, not the country entire.
    - The second sentence responds to abuses cited in the D.I.
    - Section 3 defines treason stringently to avoid the abuses of the concept characteristic of European monarchies.



- Selected Articles of the Constitution (cont.).
  - Article III (cont.)
    - For example, insult to the crown, or opposition to an action or policy of the crown had regularly been prosecuted as treason in England.
      - Punishment for the crime is limited out of similar experience.
    - Notice the plural pronouns in the first sentence.
  - Where in Article III is the Supreme Court given the power of judicial review?
- Article IV.
  - Section one is known as the “full faith and credit” clause.
    - The “Defense of Marriage Act” may be challenged under this clause.
  - The vague language of Section 2 reappears in Amendment XIV and is rather quickly rendered largely impotent by the Supreme Court in the Slaughter House Cases.
  - ¶ 3 of Section 2 is known as the fugitive slave clause. It is the third acknowledgement of slavery in the Constitution. A fourth occurs in Article V.

- Summary of contrasts between the D.I. and the Constitution.
  - No doctrine of natural rights in the Constitution.
    - Even the rights of The Bill of Rights were not regarded as natural rights.
      - The definitive case on the point is *Barron v. Baltimore*, 1833.
  - The purpose of government differs in the two documents, although the source of government and the basis of government power are the same.
  - The Constitution acknowledges the existence of slavery and gives it limited protection, while the moral theory of the D.I. implies that it must be forbidden.
    - This contradiction figures largely among the causes of the Civil War.
  - Finally, the epistemologies underlying the two documents differ strongly.
    - The D.I. reflects a rationalism; the Constitution an empiricism.
      - The latter point is demonstrated extensively and repeatedly by the *Federalist Papers*, e.g., No. 6.