




The Philosophers' Government


Session V: Feb. 21, 2013


The Constitution of the United States
of America, Pt. II; *The Federalist Papers*


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- Principles beneath the Constitution's design for government.

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- Principles beneath the Constitution's design for government.
 - Republicanism.
 - “The republican principle” is mentioned several times in *The Federalist Papers*, with several senses.
 - No. 39 offers the most complete account of the phrase's meaning.
 - The first element of republicanism is the Principle of Popular Sovereignty, considered as comprising the principle of majority rule.
 - The idea of the rule of law is also an essential element.
 - Representationalism: The moderation of popular sovereignty by having the people speak through representatives, presumably persons distinguished in the qualities requisite for statesmanship.
 - On this point, the influence of Aristotle may be seen.
 - Government officials are all chosen by the people, directly or through their representatives, and hold their offices more or less temporarily.
 - Realism: The acceptance of people as we find them in experience, not through reliance on some theoretical ideal.
 - Hence, fallibilism, the recognition that people have vices as well as virtues.
 - Civic responsibility: Citizens have duties to the body politic.

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- Principles beneath the Constitution's design for government.
 - Republicanism (cont.)
 - Civic duties (cont.)
 - To participate in the common defense, whether that be repelling an invader or assisting in recovery from natural disaster.
 - To participate in the conduct of political affairs in an informed, rational and mutually respectful fashion.
 - Independence of the judiciary.
 - The Amendments to the Constitution.
 - The 14th Amendment: a preliminary consideration.
 - § 1: The first sentence sets aside the Supreme Court's ruling in the *Dred Scott* case, making the freed slaves and their progeny citizens.
 - It has the unintended consequence of making many other persons citizens, including the children of illegal immigrants born within U.S. borders, as well as those of persons here under the terms of visas.
 - Hence, it has recently been suggested that this proposition is obsolete and should be stricken by amendment.

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- The Amendments to the Constitution (cont.).
 - The 14th Amendment: preliminary consideration (cont.).
 - The second sentence extends the restrictions upon the States listed in Art. I, § 10.
 - The purpose was to assure the freed slaves the basic rights of citizens.
 - The sentence includes three “clauses”: the “privileges and immunities” clause, “the due process” clause; the “equal protection” clause.
 - The first of these clauses has been of little effect.
 - The other two, given the implementation power of § 5, have been the vehicles for an immense increase of federal power at the expense of that of the states.
 - The application of these clauses, together with the commerce clause of Art. I, § 8, has turned the federal system constructed by the Founders on its head.
 - The Bill of Rights.
 - Hamilton makes a compelling case *against* including a Bill of Rights in the Constitution in *Federalist* 84.
 - Even so, there was significant criticism of the document for its lack of that feature, e.g., by Patrick Henry.
 - Madison felt forced to declare his support for such a body of amendments in order to win election to the House from Virginia.

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- Amendments (cont.).
 - The Bill of Rights cont.).
 - Congress submitted 12 amendments to the states for ratification: 10 were ratified and went into effect in 1791.
 - The provisions of the Bill of Rights were then construed simply as limitations on the power of the Federal government, hence, rather as extensions Art. I, § 9, not as natural rights acknowledged by the government, as many today would have it.
 - See *Barron v. Baltimore*, 1833, with regard to the takings clause of the Fifth Amendment.
 - Many of the rights of the B.O.R. are now applicable to the states through the 14th Amendment, which is why we consider it here.
 - This is known as the incorporation doctrine.
 - The First Amendment consists of three main clauses, each of which has two sub-clauses.
 - The religion clause prohibits the “establishment” of a national religion, such as Britain and most of the other European countries had.
 - Several of the states did have established religions in this sense at the time.
 - The sub-clause is now usually interpreted through the lens of Jefferson’s “wall of separation” metaphor, greatly extending its effects.





- Amendments (cont.).


- The Bill of Rights cont.).

- Amendment I, (cont.).

- Much less attention had been given to the free exercise sub-clause until recent years.
 - It is at issue in the Obama Administration's interpretation of one of the provisions of the Obamacare legislation which places it in conflict with the Catholic church, especially.
- No case was brought under the freedom of speech and the press clause until the Sedition Acts of the WW I era.
 - Many cases have been brought since the mid-1960's.
 - One of the important cases from this latter period was *Cohen v. California*, which grew out of events of April 26, 1968.
 - Paul Robert Cohen was seen in a courthouse wearing a jacket bearing the inscription "F**k the Draft" across its back.
 - Women and children were present.
 - He was charged with disturbing the peace under California law, and convicted.
 - The case made its way to the U.S. Supreme Court, which struck down Cohen's conviction, surely a ringing blow for liberty.
 - The reach of the freedom of assembly clause was extended by the Supreme Court in *N.A.A.C.P. v. Alabama*, 1958.

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- *N.A.A.C.P. v. Alabama* (cont.)
 - Alabama, in an attempt to discourage the N.A.A.C.P. from operating in that state, sought an injunction prohibiting it from acting within the state on grounds that it had failed to register as a foreign corporation before commencing operation in Alabama.
 - (The N.A.A.C.P. was a New York corporation.)
 - In the course of the injunction proceeding Alabama demanded the organization's membership list, which it refused to supply.
 - The Court ruled that Alabama's demand infringed the freedom of assembly clause.
 - The Second Amendment.
 - Gun control legislation first came into vogue in the South, both before and after the Civil War.
 - Before emancipation, slaves were generally explicitly forbidden by state laws to possess weapons, to learn to read and write, and to be off their owner's premises without a written pass.
 - After emancipation the first prohibition was maintained, officially or unofficially.
 - Gun control legislation or ordinances were adopted in some jurisdictions late in the 19th Century out of concern for threats from immigrants and "anarchists."

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- The Second Amendment (cont.).
 - The National Firearms Act of 1934 outlawed the possession of sawed off shotguns.
 - In upholding this act in *United States v. Miller*, 1939, the Supreme Court took note of the apparent introductory conditional clause in the language of the Amendment, establishing a reading which made the right a collective one, applicable to what became the National Guard.
 - This interpretation was set aside by *District of Columbia v. Heller*, 2008, which restored the right as an individual one.
 - In fact, the Amendment was probably a response to the British confiscation of the arms of Boston's citizens, under false pretenses, an important cause of the outbreak of hostilities in that city.
 - The Fourth Amendment.
 - This one has been much in the news because of actions to combat Islamic terrorism.
 - Less notice has been given to the many instances of searches and seizures undertaken by mistake, e.g., when the police misread an address on a warrant.
 - The Fifth Amendment.
 - The self-incrimination, double-jeopardy, and takings clauses are the most familiar of these provisions.
 - Note that the double jeopardy prohibition does not forbid a civil action alleging damages from the offense adjudicated in a criminal proceeding, whether resulting in conviction, or not, as, e.g., in the O.J. Simpson cases.

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- **The Fifth Amendment (cont.).**
 - The due process clause, whose language reappears in the 14th Amendment, apparently also permits punitive “damages” in civil cases and “forfeitures” of property in certain kinds of criminal cases.
 - **The Sixth Amendment.**
 - The right to counsel was the subject of one of the Warren Court’s most prominent decisions, *Gideon v. Wainwright*, 1963.
 - Whereas the Court had previously ruled that the states must provide counsel to indigent defendants in capital cases, and in other felony actions where lack of counsel would clearly create unfairness (*Betts v. Brady*, 1942) it now ruled that they must provide it in all felony cases on grounds that it was “an obvious truth” that such counsel was necessary.
 - See “Gideon’s Trumpet,” a made for television movie starring Henry Fonda late in his career.
 - **Amendments 9 and 10.**
 - These answer to Hamilton’s point in *Federalist 84* that the enumeration of rights would imply that citizens had none other than those listed.
 - Attempts have been made to find particular rights in these, e.g., the right of privacy in the Ninth by Justice Goldberg (*Griswold v. Connecticut*, 1965).



- The Civil War Amendments.

- Amendment XIII (1865).

- The present Amendment is the second proposed under this designation: the first was introduced in Congress in an attempt to stave off the war. It would have made slavery a permanent institution.
- The scope of the language has been the subject of some controversy, even given the obvious intent.

- Amendment XIV (1868).

- This Amendment was meant to constitutionalize major provisions of the Civil Rights Act of 1866, which had twice been vetoed by President Johnson.
 - The intent was to insure that some future Congress would not invalidate the legislation.
 - The states of the former Confederacy were required to ratify the Amendment in order to regain their Congressional seats.
- While it is now settled law that the Amendment makes the relevant provisions of the Bill of Rights applicable to the states it has been argued that the records of the Congressional debates and the ratification debates show that this was explicitly not intended.

- **Amendment XIV (cont.).**
 - Many of the major rulings of the Supreme Court in the post-WWII era centered on the due process or equal protection clauses of this Amendment.
 - *Brown v. Board of Education of Topeka, et al.*, 1954, is an example.
 - Similarly, many of the major pieces of legislation of the period are premised on one or another of these clauses.
 - The Civil Rights Act of 1964 is an example.
 - Most of the business of the Supreme Court now consists in adjudicating claims of violation of one of these two clauses.
- **Amendment XV (1870).**
 - The force of this Amendment was successfully evaded by at least the Southern and border states until the modern era, with the cooperation of the Federal courts.

- ***The Federalist Papers.***

- **No. I (Hamilton).**

- His purpose is to frame the ratification debate in New York by placing the issue on a properly high plane.
- “It has been frequently remarked...deserve to be considered as the general misfortune of mankind.”