Corwin and Peltason’s Understanding the Constitution, Seventeenth Edition

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Corwin and Peltason’s *Understanding the Constitution* has changed in a number of important ways since the First Edition was published in 1949. The changes reflect the developments in the United States that have transformed the Constitution. In 1949 the states had not yet approved the Twenty-second Amendment, which limits the president to two terms in office. The poll tax would not be constitutionally proscribed by the Twenty-fourth Amendment for another fifteen years, and it would be an additional seven years before the Twenty-sixth Amendment recognized the right to vote for eighteen-year-olds.

The Constitution has six more amendments today than it did in 1949, but its transformation goes far beyond the addition of formal amendments. In 1949 the Court had not yet declared segregation to be in violation of the Fourteenth Amendment, and Justice Felix Frankfurter’s opinion permitting states to prohibit women from obtaining a license to tend bar was still “good law.” Indeed, in the First Edition of *Understanding the Constitution* the authors dealt with the equal protection clause in exactly one page and seven lines.¹ In 1949 the Supreme Court had barely begun to invalidate the schemes that the southern states devised to avoid complying with the constitutional proscription on racial discrimination in voting, and only about 3 percent of African Americans of

voting age in the South voted. The Court had not yet entered “the political thicket” of legislative reapportionment, and state and congressional districts reflected the demographics of a rural, small-town America that no longer existed. Nor had the Court yet held that most of the provisions in the Bill of Rights restrict the states through the due process clause of the Fourteenth Amendment. As the Supreme Court’s interpretation of the Constitution has changed, the document that permitted official racial segregation and discrimination against women, allowed individuals accused of crimes to be tried without a lawyer or a jury, and did not recognize a constitutionally protected right to privacy now reflects the values of equality and human dignity.

The Seventeenth Edition includes the major developments in constitutional law through November of 2006. The new edition also contains an expanded discussion of the repercussions of the War on Terrorism on the powers of the president, Congress, and the impact it is having on civil liberties. Also, for the Seventeenth Edition we have improved Chapter 8, which covers Amendments Four through Eight by eliminating much of the technical discussion of criminal procedures. Our goal with the new edition as well all the others is to provide to undergraduate students an accessible and up-to-date introduction to constitutional law.

We hope that this edition of Understanding the Constitution will convey to readers that the endeavor to understand the Constitution is an ongoing, constantly evolving process. Jack Peltason captured the overarching purpose of the book in the Preface to the Fourteenth Edition:

It is not enough, however, to celebrate the Constitution. We should also—or at least a considerable number of us should—cerebrate about it. We need to understand that, important as it is to see the forest, the forest is made up of trees, and unless someone tends them, there will be no forest to be seen. That is one of the purposes of this volume—to go beyond generalities and discover the major constitutional issues of our times.

ACKNOWLEDGMENTS

I have been fortunate to have the support of a large number of friends, colleagues, and mentors over the years. First, I would like to thank Jack W. Peltason for inviting me to join him as coauthor of Understanding the Constitution beginning with the Fifteenth Edition. Although the Fifteenth, Sixteenth, and now the Seventeenth editions continue to build on the earlier work of Jack Peltason and the late Edward S. Corwin, the responsibility for the revisions is mine. Jack Peltason’s comment in his Preface to the Eighth Edition in 1979 applies here as well: “It is more than the usual cliché, . . . for me to acknowledge that whatever is its merit is attributable to the teacher; the error to his student.”

Second, I wish to single out just a few of my teachers and mentors who have contributed in crucial ways to my own understanding of the Constitution. Walter F. Murphy provided support and intellectual guidance at the beginning of my career when it was very much needed. As a graduate student at the
University of California, Santa Barbara, I was fortunate in having the chance to study with C. Herman Pritchett, who was a wonderful teacher and an extraordinary human being. Gordon E. Baker, another professor with whom I had the pleasure to study at UCSB, taught me about the ideas of the Progressive era, and it was from his work that I first learned about reapportionment. As an undergraduate at Western Washington State College in 1972, I took a course in constitutional law from Dick Payne, and he initiated my endeavor to understand the Constitution.

Third, I would like to express my gratitude to several scholars of my own generation whose work I have found particularly helpful in revising Understanding the Constitution. Lee Epstein and Thomas G. Walker’s two-volume Constitutional Law for a Changing America sets the standard in casebooks for clarity and accessibility to undergraduates. I frequently turned to their work for guidance in making a technical point more readily understandable. This book benefited tremendously from Epstein and Walker’s work. I also found Craig R. Ducat’s Constitutional Interpretation immensely valuable, and I have borrowed several of his tables. In addition, I owe a great deal to the political scientists who have developed the new historical institutionalism in the field of law and courts including but not limited to Rogers M. Smith, Howard Gillman, Cornell Clayton, Mark Graber, and Ronald Kahn.

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As the title of this book makes clear, our project is to understand the Constitution. But how should we approach such a seemingly daunting task? We begin by examining the historical background of the charter for American government and symbol of national values that has become the world’s oldest written constitution. Antecedents of the United States Constitution can be traced to 1215, when King John signed the Magna Carta, thereby initiating the notion of constitutional limitations on governmental authority.\(^1\) Because “the history of the American Constitution is a history of ideas,”\(^2\) our introduction to the Constitution begins by considering the political thought of the Revolutionary Era to provide some insights into the underlying themes and values of the Declaration of Independence as well as the Constitution. We then summarize the developments that led to drafting the Declaration and the fight for American independence. Next we examine the major features of the nation’s first written charter, the Articles of Confederation, and consider the conditions that led to the Constitutional


Convention in 1787. Finally, we outline the major events in the drafting of
the Constitution and the circumstances surrounding its ratification.  

THE POLITICAL IDEAS OF
THE REVOLUTIONARY ERA

Although the colonists relied heavily on British political thinkers, they were
constantly developing their own political traditions, drawing on varied philo-
sophical sources. The political thought of the English philosopher John Locke
(1632–1704) had a major influence on the ideas that emerged in the colonies
during the revolutionary period. The principle at the heart of Locke’s theory
holds that government is artificial rather than natural—that the power of
government derives from the people, not from God. Locke presented his views
of human nature and the origins of government by depicting men in a hypo-
thetical prepolitical state of nature uncontaminated by the influences of society.
In Locke’s state of nature, everyone was free and equal. But inconveniences
arising from the lack of an impartial authority to resolve disputes—each
man had to be judge in his own case—marred the state of nature, rendering
the natural rights to life, liberty, and property insecure. People therefore left
the state of nature to secure protection of those rights. In Locke’s scenario, the
process of moving from the state of nature to government involved two
contracts:

1. Individuals agreed to enter society. Locke suggested that once people
   made the decision to create a social order, they could never return to the
   state of nature.
2. They agreed to establish government and to operate by the principle of
   majority rule.

The government was not a party to the contract that established its authority;
rather, the government had a fiduciary or trustee relationship to the people.
Thus, the people retained the power to remove or alter the government if it
violated the trust—that is, if it failed to protect the natural rights of individuals.
If the people resorted to revolution to defend their rights, they abolished only
the second contract. The first, the contract of society, remained in place.

Thus, for Locke, the decision to abolish a particular government would not
entail a rebellion against the social order and a return to the state of nature.
Locke’s political theory contains the major ingredients of modern liberalism:
Government’s authority is based on a contract among individuals who possess
certain natural rights including life, liberty, and property. Indeed, in Locke’s
view, government is a necessary evil whose function was limited to protecting
the rights of individuals.

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3 The following discussion is based on Sue Davis, American Political Thought: Four Hundred
Carl L. Becker’s *The Declaration of Independence*, first published in 1922, asserted that “[m]ost Americans had absorbed Locke’s works as a kind of political gospel; and the Declaration in its form, in its phraseology, follows closely certain sentences in Locke’s second treatise on government.” Becker noted that the Declaration—indeed, the political theory and practice of the American Revolution—was thoroughly grounded in the language of natural rights. Locke’s ideas, he argued, were so commonplace in the colonies that the men who declared independence from England simply adapted those ideas to meet the emergency created by the British government’s determination to raise revenue through taxation at the expense of the colonists. The colonists were merely exercising their natural rights in framing a government to suit their needs in America initially voluntarily retaining a union with the people of Great Britain and withdrawing only when the king violated the rights of the colonists.

From such a perspective, the colonists who fought for independence were motivated primarily by a concern for their rights—particularly their property rights—which were threatened by the British government’s determination to tax the colonies. Resistance was justified because the government had failed to protect the natural rights of individuals to life, liberty, and property.

**Liberalism, Republicanism, and Ascriptivism**

The beginning of the second paragraph of the Declaration reflects the political philosophy of Locke’s liberalism with its proclamation of the self-evident truths of equality and inalienable rights and its claim that governments are instituted to secure those rights,

> deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

Although a concern with securing the natural rights of individuals is evident in the language of the Declaration of Independence, Locke’s liberalism was not the only political theory that influenced the colonists during the revolutionary period. The ideas and values of republicanism were also important to eighteenth-century Americans. Liberalism and republicanism actually overlapped in the sense that both emphasized liberty and assumed that the economic independence that came with property ownership provided an essential foundation of political freedom. Yet, the two political theories diverged in important ways. While Locke’s liberty revolved around personal autonomy, the republican conception of liberty was tied to active involvement

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5 From *The Declaration of Independence*.

in public life. Republicanism held that human beings were naturally social and able to develop fully only in association with others—only in the context of a community rather than in isolation.

Consequently, republicanism assigned the community an important role that liberalism rejected. Whereas liberalism focused on the rights of individuals—natural rights that government must protect—republicanism posited that human fulfillment could be achieved by setting aside self-interest to pursue the common good. Thus, obligations rather than rights and the common good rather than individual self-interest were the central concerns of republicanism. Republican freedom was invariably linked to the common rights of the entire community. The primary purpose of government was, accordingly, to create an environment conducive to achieving the shared goals of that community.

Another defining characteristic of republicanism was a suspicion of power. In the early sixteenth century, Florentine statesman and political philosopher Niccolo Machiavelli (1469–1527) pointed out that governments tend to become corrupt, to degenerate into tyranny, and to deprive citizens of their liberty. The only force capable of reversing that trend would be a body of virtuous citizens who, through vigorous participation in public affairs, would revitalize the political life of their community and rid it of corruption. Civic virtue—a concern with and willingness to pursue the public good in contrast to preoccupation with self-interest—was, according to republicanism, essential to the preservation of liberty. With its focus on the opposition between power and liberty, and between corruption and virtue, republicanism prescribed active participation in public life and the transcendence of self-interest for the good of the community. It also envisioned a society whose members were tied together by common interests.

In contrast, liberalism perceived society as a collection of individuals engaged in the pursuit of private interests. While republicanism embodied the notion that self-realization is possible only through active participation in public life, liberalism—with its emphasis on the individual, natural rights, and diversity of interests—placed one’s choice of activity beyond the judgment of others; it was simply a matter of private preference. Although the idea that people should strive to be virtuous citizens so that they could protect their community had a definite democratic element, republicanism had an inegalitarian dimension as well. Running through republican thought was the notion that civic virtue was attainable only by those who owned property. After all, property ownership was what gave people the economic independence that enabled them to transcend self-interest.

Scholars who have examined the political literature of the years preceding the American Revolution have found it to be dominated by the theme of power—its nature, its dangers, and the conviction that “what turned power into a malignant force was not its nature so much as the nature of man—his susceptibility to corruption and his lust for self-aggrandizement.”7 Thus, the

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idea that the protection of liberty lay in a balanced government and a constitution that effectively limited power through the distribution of functions among the different components of society was central to revolutionary thought.8

Before 1763, the colonists viewed the laws and institutions of England as the embodiment of “the most perfect combination of human powers in society which finite wisdom has yet contrived and reduced to practice for the preservation of liberty and the production of happiness.”9 During the ten years after the Stamp Act, however, the colonists began to see an active conspiracy to destroy not only their liberty but also the liberty of the entire British Empire by destroying the English Constitution and all the rights and privileges that it protected. From a republican perspective, taxation without the consent of the colonists was particularly dangerous because it increased the power of British officials and thereby threatened the liberty of the colonists. In addition, measures to constrain colonial courts by limiting the tenure of judges to the discretion of the crown, and the extension of the jurisdiction of vice-admiralty courts composed not of juries but of single judges appointed by the royal governors to enforce the new parliamentary legislation, destroyed the essential balance of powers by stripping the judiciary of its independence.

Moreover, such actions “denied Americans a crucial measure of the protection of the British constitution.”10 The decision to station British troops in Boston in the fall of 1768 further signaled the destruction of the principles of the English Constitution. Any doubt that might have remained among the colonists that they were the victims of a deliberate assault on their liberty was eliminated by the Boston Massacre in 1770 and the subsequent acquittal of the soldiers indicted for the murder of the youths who attacked them with snowballs. Although the colonists were convinced that the British government’s policies constituted a threat to their individual inalienable rights, they also condemned those policies, which they perceived as indicative of the corruption of the king’s ministers that was spreading through the British government to the colonies, as a threat to the liberty of the people throughout Europe.

The remedy for the corruption was American independence. In his famous pamphlet, Common Sense, Tom Paine exhorted Americans to declare their complete independence from England and argued that the British government was in constant conflict with the most important principle of government: frequent elections and the exchange between the people and their

8The term constitution as commonly used among the colonists at the beginning of the revolutionary period did not refer to a written document or even an unwritten design of government but, rather, an arrangement of governmental institutions, laws, and customs, and the principles and goals that animated them. Ibid., 68.


10Bailyn, 109.
representatives. He noted that, “as this frequent interchange will establish a common interest with every part of the community, they will mutually and naturally support each other, and on this... depends the strength of government, and the happiness of the governed.”

Republican ideas are also evident in the Declaration of Independence. For example, the second paragraph concluded with a condemnation of the king, who had inflicted “repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny” over the colonies. One of the Declaration’s specific charges against the king asserted that he had abolished the free system of English laws... establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies.

Thus, a republican concern with preserving balanced government against the threat of corruption and tyranny combined with a liberal mandate for government to protect the inalienable rights of individuals to justify the colonists’ break with England.

A third tradition, ascriptivism was also apparent in the political thought of the Revolutionary Era, although it has not often been acknowledged. As Rogers M. Smith wrote,

> From the revolutionary era on, many American leaders deliberately promoted the popular notion that Americans had a distinctive character, born of their freedom-loving Anglo-Saxon ancestors and heightened by the favorable conditions of the new world. This character made them the last hope to preserve human freedom once the English had become corrupt—it also set them above blacks and truly Native Americans.

The presence of ascriptivism alongside liberalism and republicanism goes a long way to explain the Declaration’s most glaring contradiction. While the Declaration proclaimed that it was “self-evident, that all men are created equal and endowed by their Creator with certain inalienable Rights, that among these are life, liberty, and the pursuit of happiness,” the institution of chattel slavery in the colonies placed such ideals far beyond the realm of possibility for nearly half a million black slaves.

In addition, the principles of liberalism and republicanism did not extend to women who had no voice in the drafting of the Declaration of Independence or in any of the decisions of the state or national governments during the Revolutionary Era. Moreover, the principles of the English common law

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12 The Declaration of Independence.
13 Ibid.
precluded the possibility of a legal or economic existence for a woman independent of that of her father or husband. Liberalism’s personal autonomy and republicanism’s civic virtue were, in short, reserved for free property-owning white males.

THE DECLARATION OF INDEPENDENCE AND THE AMERICAN REVOLUTION

The First Continental Congress convened in Philadelphia in September 1774. In October, the delegates issued a compromise resolution denying Parliament’s authority to legislate for the colonists because they were unrepresented but declaring that the colonies would submit voluntarily to regulation of trade. The Second Continental Congress assembled in May 1775 after the war began at Lexington and Concord in April. The Continental Congress became the de facto government that conducted the war, raising an army, sending and receiving diplomatic agents, and entering into treaties with foreign countries.

On May 15, 1776, the Congress adopted a resolution sponsored by John Adams, advising the various colonies to assume complete powers of government within themselves. On June 7, Richard Henry Lee, following the instructions of his Virginia constituents, moved a resolution to declare the United Colonies are, and of right ought to be, free and independent states... and that all political connection between them and the state of Britain is, and ought to be, totally dissolved.15

While Congress debated the resolution but failed to reach agreement, a frustrated John Adams wrote to a friend, “We are in the midst of a Revolution, the most complete, unexpected, and remarkable of any in the history of nations.”16 Congress did, however, appoint a committee to frame a declaration in conformity with the Virginia resolution. The members of the committee were Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert R. Livingston, with the thirty-three-year-old Jefferson designated as chair and drafter.

On July 2, Congress adopted the Virginia resolution and two days later it adopted the Declaration of Independence, for the first time using the term United States of America.17 With full recognition of the gravity of their acts, the men who signed the Declaration pledged their lives, their fortunes, and their sacred honor.

Congress directed that copies be sent to the assemblies or conventions of the various states, and to the army. When the Declaration was read at a

16 As quoted in ibid., 693.
17 Previous practice had been to refer to the United Colonies.