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James McClellan: Liberty, Order, and Justice Study Guide

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JAMES McCLELLAN: LIBERTY, ORDER, AND JUSTICE

STUDY GUIDE, 2008

Steven Alan Samson

PART 1: THE CONSTITUTION'S DEEP ROOTS

Outline

1.1 The Meaning of Constitutional Government

- A. ORIGINS AND HISTORICAL BACKGROUND (2-6)
 - 1. Constitutional Convention of 1787
 - 2. Definition of Constitution
 - 3. Rule of Law
 - 4. Rooted in Generations of Experience
 - 5. Written vs. Unwritten Constitutions
 - a. British
 - b. Polish and French
 - 6. Two Distinction Constitutions
 - a. Formal written constitution
 - b. Old "unwritten" constitution of conventions, habits, ways of living together
 - 1) Political parties
 - 2) Cabinet
 - 7. Visible vs. Invisible Constitution
 - 8. A Constitution Is an Effort to Impose Order for the Achievement of Certain Ends
 - a. Preamble
 - 9. Objectives: Liberty, Order, and Justice
 - a. Republic of Korea, 1980
 - b. Portugal, 1974
 - c. Venezuela, 1972
 - d. Argentina, 1853
 - 10. "Parchment Barrier"
 - a. Virtuous citizenry is required [illustrated by Roman example of Cincinnatus]
 - 11. Ideals
 - a. Liberty: absence of coercion
 - b. Order: rights and duties
 - c. Justice: equality of opportunity and equality before the law
 - 12. Aim of a Good Constitution: "To Form a More Perfect Union"
 - 13. Constitutions: A Variety of Origins
 - a. Decrees and Proclamations
 - b. Revelation (**Moses**)
 - c. Design by Wise Men (**Solon**, who then went into self-imposed exile)
 - d. English common law: decisions of judges and popular custom
 - e. Constitutional **convention** [Massachusetts held the first, 1780, led by **John Adams**, resulting in the oldest written constitution]
 - 14. Few Last Very Long
 - 15. Much of the U.S. Constitution Is Derived from the English Constitution
 - a. Magna Charta
 - b. Principles and rules of law
 - c. Amendment
 - 16. Fundamental Laws

- B. PRIMARY CHARACTERISTICS OF A GOOD CONSTITUTION (6-8)
 - 1. Stability and Continuity (Predictability)
 - 2. Limiting and Dividing Power
 - 3. Permanent Arrangement for the Selection of Representative Public Officials
 - 4. Accountability to the People
- C. WHAT CAN AND CANNOT BE ACCOMPLISHED THROUGH CONSTITUTIONS (8-9)
 - 1. Unnecessary Detail Should Be Avoided
 - a. Focus on first principles
 - 2. Written Constitution Should Not Conflict with the Unwritten Constitution
 - a. Radical constitutions will be evaded
 - b. Constitutions are not “fungible:” Africa’s “paper constitutions”
 - 3. Neither Easy to Alter or Impossible to Amend
- D. SUCCESS OF THE AMERICAN CONSTITUTION (9)

1.2 The Lamp of Experience

- A. FEDERAL CONSTITUTION (10-13)
 - 1. Dissatisfaction with the **Articles of Confederation**
 - 2. **Federalist Papers**
 - a. **Alexander Hamilton**
 - b. **Publius**: Three Federalists: Hamilton joined by **James Madison** and **John Jay**
 - c. **Brutus**: One Anti-Federalist: probably Robert Yates
 - d. “War of pamphlets”
 - 3. Hamilton on the Basic Dilemma Americans Faced in 1787
 - a. “Last stage of national humiliation”
 - 4. New Framework Constructed
 - a. Framers respected the wisdom of their ancestors
 - 5. Balance between freedom and authority
 - 6. **Patrick Henry**: “lamp of experience”
 - a. General agreement on principles

1.3 The Constitutions of Antiquity

- A. THE FRAMERS WERE STEEPED IN CLASSICAL LEARNING (14-15)
 - 1. Study of Greek and Latin Literature
 - a. **John Quincy Adams**
 - 2. Turning Point
 - 3. Remnants of the Classical Tradition
 - a. Greek Revival in architecture
 - b. Oratory
 - 4. Jefferson: “History Informs Us What Bad Government Is”
- B. THE GREEKS (15-17)
 - 1. City-States
 - a. Civil war the rule rather than the exception
 - 2. Old Greek Constitutions
 - a. John Adams
 - b. James Monroe
 - 3. **Solon**
 - a. Greek political thought had little influence
 - 4. Plato and Aristotle
 - a. Types of government
 - 1) **Polity**
 - b. **City-states** and direct democracy
 - c. Size of the United States
- C. ROME (17-18)

1. Republic
 - a. **Cicero**
 - b. **Plutarch**
 2. **Vocabulary** of American Political Culture
 - a. Constitution
 - b. President
 - c. Federalism
 - d. Senate
 3. *Publius*: Publius Valerius Publicola
- D. THREE POLITICAL CONCEPTS FROM ROME (18-21)
1. Republic
 - a. Popular sovereignty
 - b. Radical idea in the eyes of 18C monarchists
 - c. Small size required
 - d. Protection against threat of corruption through public virtue
 2. Republican Virtue
 - a. **George Washington**
 - b. **Cincinnatus**
 - c. Society of the Cincinnati
 3. System of Checks and Balances
 - a. **Polybius** (ancient Greek historian): consuls, Senate, assembly
 - b. High old Roman virtue
 - c. Derivation from English precedent
- E. ROMAN EMPIRE AS A WARNING (21-22)
1. Federalism vs. Centralization
 2. Edward Gibbon's *Decline and Fall of the Roman Empire* (1776-83)
 3. British and Colonial Models
 4. Orestes Brownson's *The American Republic*

1.4 English Origins of America's Constitution

- A. SIMILARITIES AND DIFFERENCES (22-26)
1. Henry Maine's *Popular Government*
 2. **Differences** Between the English and American Constitutions
 - a. The English Constitution is "unwritten"
 - 1) Components: charters and statutes, common law principles, customs
 - 2) Three great political documents: **Magna Charta** (1215), **Petition of Right** (1628), **Bill of Rights** (1689)
 - 3) Law of the Land = due process of law
 - b. Question of **sovereignty**
 - 1) Parliament
 - 2) Question of constitutionality
 - 3) American Constitution
 - c. **Separation of powers**
 - 1) Parliamentary vs. presidential systems
 - 2) Cabinet members
 3. **Similarities**
 - a. Bicameral (two-chamber) legislatures
 - b. Single member electoral districts ["first past the post" elections by plurality]
 - c. Speaker
 - d. Lower houses: House of Commons and House of Representatives: larger, more frequent elections
 - e. Upper houses: House of Lords and Senate
 - f. **Bicameralism**: A device for restraining the legislature
 - g. Judiciary as an independent branch

4. British Practices and Customs
 - a. Individual liberties
 - b. Representative government
 - c. Principal American grievance: Taxation without representation

1.5 The Growth of Parliament

- A. REPRESENTATIVE GOVERNMENT (26-27)
 1. Various Forms Developed
 - a. English form was the most successful
 2. **Witanagemot** (*pitena gemōt*) or **Witans** for short: King's council, *lit.* meeting of wise men. This system operated in Anglo-Saxon England even before the 7C; it is the origin of Parliament
 3. Magna Charta
 4. **Model Parliament**, 1295
 - a. Lords Spiritual (bishops and others) and Temporal (barons)
See The English Bill of Rights (1689), pp. 80-87
 - b. House of Commons: Knights and Burgesses
 - c. Grant of monetary aid to Edward I (Longshanks)
 - d. Power of the purse passed to the House of Commons: no taxation without representation
- B. REAL REPRESENTATION BY MID-15C (27)
 1. Supremacy of the Law
 2. King Bound by **Oath**
 3. Elections: Held in County Courts (Knights) and Boroughs (Burgesses)
 4. Power of **Impeachment**
- C. TUDORS AND STUARTS: PERIOD OF STRUGGLE, c. 1485-1688 (27-28)
 1. Manipulations and threats
 2. Civil War, 1642-1649
 3. Accession of **James II**, 1685 [Duke of York: Supported by **Tories**, opposed by **Whigs**]

NOTE: Charles II did not leave a legitimate male heir to the throne, which led to a series of succession crises, including the Rye House Plot and the Monmouth Rebellion. The birth of son and heir to Charles's brother, James, the Duke of York, led to a constitutional crisis after he became King James II; Whigs and Tories joined to oust the king in the "**Glorious Revolution**"

4. William III [reign of William and Mary]
5. Elector of Hanover crowned George I

1.6 The Challenge of Parliamentary Supremacy

- A. CONSTITUTIONAL CHANGES (28)
 1. King vs. Parliament: **Charles I**
 2. Supremacy of Parliament
 3. **Oliver Cromwell**
- B. TURNING POINT: GLORIOUS REVOLUTION OF 1688-1689 (30)
 1. **Parliamentary Supremacy**
 2. Constitutional Monarchy
 3. Act of Settlement of 1701
 4. Legal fiction of the **King-in-Parliament**
 5. Lord North
- C. WHIGS AND TORIES (30-32)
 1. Originated c. 1680
 2. **John Locke** [*Treatises of Government*] vs. Sir **Robert Filmer** [*Patriarcha*] and

- 3. **Thomas Hobbes** [*Leviathan*]
- 3. Taxation of the Colonies by the Tories, 1763 [Sugar Act and Stamp Act]
- 4. **William Blackstone**
- 5. **Edmund Burke**
 - a. New York's agent in London
 - b. Opposition to the later French Revolution
 - c. *Speech on American Taxation*, 1774
 - d. *Speech on Conciliation with the American Colonies*, 1775

1.7 The Common Law Tradition

- A. WILLIAM BLACKSTONE'S *COMMENTARIES ON THE LAWS OF ENGLAND*, 1765 (32-33)
 - 1. High Sales in America
 - 2. Indictment of George III Drew Upon the *Commentaries*
 - 3. American Legal Terminology
 - 4. State Constitutions Drafted in 1776
- B. SIR **EDWARD COKE**: *REPORTS AND INSTITUTES OF THE LAWS OF ENGLAND* (33-34)
 - 1. Principle of an Independent Judiciary
 - 2. **Dr. Bonham's Case**
 - 3. **James Otis**: Writs of Assistance Case, 1761
- C. COMMON LAW (34-36)
 - 1. Body of Legal **Precedents**
 - 2. Property and Contract Law
 - 3. Sir **Matthew Hale**
 - 4. Civil Law (Roman Law): Derived from Legislative Enactment
 - a. Ecclesiastical [canon law] and administrative courts; Star Chamber
 - b. Louisiana: **Code Napoleon**
 - 5. **Henry II** [famous for the martyrdom of Thomas a Becket; married to Eleanor of Aquitaine]
 - 6. Common Law Principles Underlie Much of Our Constitution
 - 7. Federal Courts Are Not Courts of General or Common Law Jurisdiction
 - a. Impetus to abandon the common law
- D. SIR **FRANCIS BACON** (36)
 - 1. Legal Works: *Elements of the Common Law*, *Maxims of the Law*
 - 2. **Equity** (Chancery)
 - 3. Equity or Chancery Courts
 - 4. The Lord Chancellor: "Keeper of the King's Conscience"
 - a. [Sir **Thomas More**, who was beheaded in 1535 on orders of Henry VIII, also held the office]
 - b. Conflict between Bacon and Coke
- E. LAW AND EQUITY COMBINED IN MOST AMERICAN STATES (36-39)
 - 1. Judiciary Act of 1789
 - 2. Role of Equity in the Growth of Federal Power
 - a. [Gary McDowell's *Equity and the Constitution* demonstrates this thesis]
 - 3. Anti-Federalist Warning Against Arbitrary Judicial Discretion
 - 4. **Stamp Act** of 1765
 - a. Prosecutions to be tried in **vice-admiralty courts** that relied on civil law and did not use juries [maritime jurisdiction]
 - 5. Protests against the Denial of Jury Trials
 - 6. Stamp Act Threatened Two Constitutional Rights: Taxation by Consent, Trial by Jury
 - a. Erosion of colonists' faith in British rule

1.8 The Republican Tradition and the Struggle for Constitutional Liberty

- A. JOHN HAMPDEN (39-42)
 - 1. **Petition of Right**, 1628

NOTE: The Petition (backdated to 1627) was drafted by Sir Edward Coke and demanded a redress of grievances that included (§1) taxation without Parliament's consent, (§2) forced loans, (§3-4) unlawful seizure of property, (§5) imprisonment without cause, (§6) forced billeting (quartering) of troops, and (§7) the use of martial law in peacetime. Charles I soon afterward dissolved Parliament, but was confronted again in 1641 with the petition and several others, including the Grand Remonstrance, which led to a division in Parliament with the creation of a royalist party. The Magna Charta, the Petition of Right, and the **English Bill of Rights (1689), pp. 80-87** are all examples of **covenant lawsuits**. As with a writ of mandamus, these documents are designed to call a public officer to account and demand that he do his duty. Seen in light of the model of resistance to tyranny, the first two are examples of **petition**: the Magna Charta rather forcefully so. The second step, **flight**, is ironically illustrated in the last example by the flight of the king. Indeed, the language of the opening section of the English Bill of Rights should be very familiar to Americans because of its similarity to the Declaration of Independence. The difference is that, in this case, the tyrant has already fled the country and, as Eugen Rosenstock-Huussy noted, cast the Great Seal into the Thames. In the American case, the tyrant has declared his subjects to be an enemy people (the **Prohibitory Act**) and thus, as far as they are concerned, has effectively vacated his throne.

2. Potential Loophole
 - a. The Tax in Times of Emergency had previously been imposed only on port cities
3. **Ship Money Case**, 1637: Trial of **John Hampden**
4. **Executive Prerogative**: Doctrine of Royal Absolutism
 - a. Use of "emergency powers" declarations

B. ALGERNON SIDNEY (42-44)

1. **George Jeffreys**

NOTE: Jeffreys was not a Puritan but an Anglican. The Puritans were forced out of positions of authority with the accession of Charles II in the Restoration of 1660, when Jeffreys was only 12. Cromwell had died in 1658. Jeffreys is even more infamous for his role presiding over the **Bloody Assizes** (1685). He was subsequently made Lord Chancellor but imprisoned after the Glorious Revolution. He died in the Tower in April 1689.

2. Indictment of **Algernon Sidney** (Rye House Plot):

NOTE: Again, the author wrongly accuses the Puritans when, in fact, the problem was with royalists. Sidney was convicted of treason by the testimony of a single witness. The required second "witness" was his own writings. Patrick Henry, James Madison, and others helped founded Hampden-Sydney College.

3. Sidney's *Discourses Concerning Government*

NOTE: Written as a response to Filmer's *Patriarcha*, this work set forth Sidney's republican views. Sidney belonged to a political circle that included the Earl of Shaftesbury (**Anthony Ashley Cooper**) and John Locke. Anthony Ashley Cooper, a cofounder of the Province of Carolina (two rivers in South Carolina are named after him) was a remarkable political survivor. He was elected to the Short Parliament, blocked from taking a seat in the Long Parliament, turned against Charles I, served on Cromwell's Council of State, resigned in 1655, supported the Restoration, and was involved with the trial of the Regicides, for which service he was created Baron Ashley. As a member of the **Cabal** (1667-1674) [an acronym for its five members], Cooper was one of five Privy Councillors who became the governing clique, serving first as Chancellor of the Exchequer, then a year as Lord Chancellor, and ended as First Lord of Trade, after which he made was made Baron Cooper and the first Earl of Shaftesbury. A few years later

Cooper became involved with James Scott, the Duke of Monmouth (an illegitimate son of Charles II), in opposing the claim of James, the Duke of York, to succeed Charles II. Cooper became the leader of the radical Whigs before dying in exile in 1683) and John Locke. Monmouth later declared himself king in 1685, led a failed rebellion, and was afterward executed.

4. **John Locke:** *Two Treatises of Government*

NOTE: Locke wrote the bulk of this work around 1680 in response to Filmer and went into exile because of the crackdown that followed the Rye House Plot.

C. MONARCHISM (44-47)

1. Loyalists
2. **Thomas Paine:** *Common Sense* (1776)
3. Parliamentary Sovereignty
4. French Revolution and **Maximilien Robespierre: totalitarian democracy**

NOTE: Alexis de Tocqueville, Francis Lieber, Irving Babbitt, and J. L. Talmon, among many others, recognized and wrote about this phenomenon. Consider what Babbitt says in *Democracy and Leadership*, p. 112: "Sovereignty is absolute and indivisible. 'To limit it is to destroy it.' 'The sovereign people, by the very fact that it is, is always all that it should be.' It has often been pointed that **Rousseau** transfers to the people the doctrine that the king can do no wrong. But he does more than that. The king, if not responsible to what is below him, is at least responsible to what is above him – to God. But the sovereign people is responsible to no one. It is God."

5. Napoleon Bonaparte
6. Stability of Limited Constitutional Monarchies
7. America Not Suitable for a Monarchy
8. Influence of Sidney and Locke on the Popularity of Republicanism
 - a. Robert Filmer
 - b. Locke's critique
 - c. Jonathan Boucher, American Tory
 - d. Locke's *Second Treatise*
 - 1) **Natural rights**

1.9 The Influence of Continental Thinkers

A. EUROPEAN VIEWS (47)

1. European States
 - a. Most were strong monarchies
 - b. Germany and Italy were made up of principalities and did not exist as states
2. Centralization
3. No Tradition of Local Self-Government
4. **Jean Bodin:** *De Republica* (national **sovereignty** cannot be divided and is unrestrained by laws: cf. Rousseau's concept of sovereignty)
5. European Civil Law System
6. International Law Jurists: Burlamaqui, Vattel, Pufendorf, Grotius

B. FRANCE (47-49)

1. **Jean Jacques Rousseau**
2. **Baron d'Holbach** [the first publicly-professed atheist, Holbach operated one of the most important salons in Paris (1750-1780), which was frequented by the *Encyclopedists*, along with Adam Smith, David Hume, Horace Walpole, and Edward Gibbon]
3. **Charles Montesquieu:** *Spirit of the Laws*

C. SEPARATION OF POWERS DOCTRINE (49)

1. Erroneous Interpretation of the English Constitution by Montesquieu
2. Unsuitability of the Model for America
3. Anti-Federalist Complaints
4. System of Checks and Balances
5. Montesquieu's Assumption Challenged by Madison in *Federalist*, no. 10

1.10 The Education of the Founders

- A. BODY OF KNOWLEDGE (49-52)
1. Love of Books
 2. Jefferson's List of Books [In an appendix to *The Shaping of America*, John Warwick Montgomery catalogues the library of an American patriot from the same period]

1.11 The French and American Revolutions Compared [See also the posted reading by Abraham Kuyper]

- A. AMERICA (52)
1. Congress, Bill of Rights, and the American Legal System
 - a. All products of British experience and political thought
 2. Patriots Sought to Preserve Ancestral America
- B. FRANCE (52-57)
1. Bastille, 1789 [the prison housed only seven inmates; the Marquis de Sade had been removed a few days earlier]
 2. **Edmund Burke: *Reflections on the Revolution in France***
 - a. French proposed a new order for all mankind based on the Rights of Man
 3. Declaration of the Rights of Man
 - a. The rights called for a complete leveling of society [the earlier English civil war had produced two groups – the Levelers and the Diggers – who called for something similar]
 4. Eyewitness Reports by **Gouverneur Morris**
 5. Burke's Alleged Inconsistency Answered
 6. **Friedrich Gentz: *The French and American Revolutions*** (trans. John Quincy Adams)
 - a. "The American revolution had more the appearance of a foreign than a civil war"
 7. The French Revolution Was a True Civil War
 - a. **Jacobins**
 - b. Destruction of the entire social fabric
 - c. Guillotine
 - d. **Maximilien Robespierre: Committee of Public Salvation** (usually trans. Safety)
- C. SIGNIFICANCE OF THESE DISTINCTIONS (57-59)
1. Political Values and Aspirations of the Leaders
 2. Constitutional Revolt in the English Tradition
 3. Question of Individual Rights
 - a. Concrete rights of Englishmen vs. abstract rights of man
 - b. Assumed natural state of equality corrupted by institutions
 4. Philosophical Anarchy and Communal System of Collective Living
 - a. Later expression in Marxism and the Russian revolutionaries
 - b. National madness and totalitarianism
 - c. Key to understanding the history of the modern world
 5. Anglo-American Champions of the French Revolution
 - a. Thomas Paine and Dr. Richard Price
 6. France Was Left Bitter and Divided for More Than a Century
 - a. [The 1830 and 1848 revolutions, the Second Empire, the Paris Commune, the Dreyfus affair, the Vichy period during WWII, and the general strike of 1968 were later manifestations of this continuing divide]
 7. America's Remarkable Consensus

- a. Fortunate timing
- b. Deeply rooted tree of liberty

Review

characteristics of a good constitution	English and American constitutions: similarities and differences
Roman political concepts	bicameralism Witan
Model Parliament	oath impeachment
Whigs and Tories	James II Charles I
Oliver Cromwell	Glorious Revolution parliamentary supremacy
King-in-Parliament	John Locke Robert Filmer
Thomas Hobbes	William Blackstone Edmund Burke
Edward Coke	Dr. Bonham's Case James Otis
common law	precedent Henry II
Francis Bacon	equity Lord Chancellor
Stamp Act	vice-admiralty courts Petition of Right
Covenant lawsuit	English Bill of Rights John Hampden
Ship Money Case	executive prerogative George Jeffreys
Algernon Sidney	Thomas Paine Maximilien Robespierre
Jean Jacques Rousseau	Baron d'Holbach Charles Montesquieu
Gouverneur Morris	Friedrich Gentz Jacobins

APPENDIX A: RELEVANT CHAPTERS OF MAGNA CHARTA (1215)

Overview

- 1. Freedom and liberties of the Church (cf. 1st Amend.)
- 12, 14. No taxation except by consent of the general council (representatives) (cf. Art. 1, sec. 9, cl. 7)
- 24. Separation of powers
- 28. Taking of private property must be compensating (cf. the takings clause of the Fifth Amendment)
- 35. Uniform weights and measures (cf. Art. 1, sec. 8, cl. 5)
- 39. Due process (cf. 5th Amend.)
- 40. Equal protection of the laws (14th Amend.)

APPENDIX C: THE ENGLISH BILL OF RIGHTS (1689)

Overview

- 1. Grievances: suspending law without consent, prosecution of dissenting clergy, establishing an ecclesiastical court, levying money via royal (executive) prerogative (cf. Art. 1, sec. 9, cl. 7), raising a standing army and quartering soldiers in peacetime (cf. 3rd Amend.), disarming loyal subjects (cf. 2nd Amend.), interfering with free elections, usurpation of parliamentary prerogative in the Court of King's Bench, jury tampering, excessive bail and excessive fines (cf. 7th Amend.), non-judicial punishments (cf. bills of attainder, Art. 1, sec. 9, cl. 3).
- 2. Declarations: all of the above are declared illegal; Parliament is to be held frequently
- 3. Oaths are prescribed
- 4. The rights and liberties of Parliament assembled are confirmed
- 5. King James II has abdicated and been replaced by William and Mary, and Princess Anne is declared their lawful successor.
- 6. The Protestant establishment must be preserved.

PART 2: AMERICA'S FIRST CONSTITUTIONS AND DECLARATIONS OF RIGHTS

Outline

2.1 Colonial Governments

- A. VIRGINIA (92-96)
 - 1. Jamestown
 - 2. London Company
 - a. Charter
 - 3. Joint Stock Company, 1618
 - a. Incentives
 - 4. **Indentured Servants**
 - a. Self-made men
 - b. Natural aristocracy
 - c. Large landholding class
 - d. Negroes
 - e. Anthony Johnson
 - 5. Establishment of **Slavery**, 1662
 - a. Boston: first slave-trading port
 - 6. Historical Forms of Slavery
 - a. Greece and Rome
 - b. New World
 - c. Persistence of slavery
 - d. Slave-labor camps: Gulag Archipelago
 - 7. **House of Burgesses** [NOTE: The assembly in Bermuda may have been older]
- B. NEW ENGLAND (96-97)
 - 1. Plymouth (on Cape Cod), 1620
 - a. **John Eliot**: Christian Commonwealth
 - 2. Radical Separatists
 - 3. *The Mayflower* [NOTE: The settlement was Plymouth Plantation, not Massachusetts Bay]
 - a. **Mayflower Compact** resembled a church covenant
 - 4. Puritan View of the Covenant [NOTE: The Puritans, who were not Separatists, arrived at Massachusetts Bay late in the decade]
 - a. Emphasis on **local self-government**
- C. MIDDLE COLONIES (97-98)
 - 1. Religious and Ethnic Melting Pot: Catholics, Quakers, Dutch Reformed
- D. COMPARISONS (98)
 - 1. Governor and Bicameral Legislature
 - a. Governors appointed in all except the charter colonies of Rhode Island and Connecticut, where governors were elected
 - b. Upper House: members of Governor's Council were appointed, except in Massachusetts, Connecticut, and Rhode Island
 - c. Lower House: elected
 - 2. Mixed executive, Legislative, and Judicial Functions
 - a. Governor and his Council served as a Supreme Court
 - 3. Rudimentary Separation of Powers
 - 4. **Fundamental Orders of Connecticut** (1639)
 - 5. Civil Liberties
 - a. Religious and property qualifications for voting and holding office
- E. REPRESENTATION (98-103)
 - 1. **Principle of Legislative Residency**
 - a. Custom that assemblymen must reside in the districts they represent
 - 2. Rationale: Residents Would Have a Sympathetic Understanding of Local Needs and Interests (Principle of Local Self-Government)
 - a. Cultural diversity of the American states

3. **Principle of Geographical Representation**
 - a. Absolute political equality rejected; the population and geographical principles are balanced
 - b. Check on overbearing majorities
 - 1) Supreme Court rejected this constraint in **Gray v. Sanders**, 1963
 - 2) Equal-population principle affirmed in **Reynolds v. Sims**, 1964
 - c. Residency requirements
 - d. Recent origin of “one person, one vote”
4. Democratic Class Structure of Colonial Society [The influence of a hereditary Dutch aristocracy persisted for a period]
5. Freeholders
 - a. Landed gentry in Virginia dominated public affairs at first
 - b. Professionals, merchants, and military leaders gradually rose to power
6. Constitutional Convention Rejected Religious and Property Qualifications
 - a. Property qualifications left in place at the state level
7. Pressure for Universal Suffrage
 - a. Fifteenth Amendment (1870)
 - b. Subsequent amendments
8. Changes in the **Republican Principle**
 - a. Political apathy seems to have increased with the expansion of the suffrage
9. Eternal Vigilance Is the Price of Liberty
 - a. Electorate’s alarming degree of ignorance

2.2 Relations with Great Britain

- A. EFFECTIVE INDEPENDENCE (103-06)
 1. Self-Government
 2. British Empire: Commercial Rather Than Imperial in Nature
 - a. Colonies supplied raw material and markets
 - b. Burke’s “salutary neglect”
 3. Colonial Administration: Unplanned and Haphazard
 - a. Oversight divided among six agencies located in London
 - b. Few outward signs of British sovereignty
 - 1) Nine colonies had royal governors
 - 2) Judges were usually American-born and appointed by the Crown
 - 3) Revenue officers collected port duties under the **Navigation Acts**
 4. Legal Status of the Colonies
 - a. Privileges of colonial legislatures
 - b. Legislatures not granted rights and powers won by Parliament in 1688
 - c. Royal prerogatives
 - d. Triennial acts and new legislative districts disallowed
 - e. **Board of Trade**: check on colonial assemblies
 5. Victory of Assemblies in the Sphere of Finance
 - a. Power to tax and spend rested in the hands of colonial legislatures
 - b. Royal governors unsuccessful sought permanent revenue acts
 - c. New York assembly blocked all legislation until Gov. George Clinton submitted, 1740s
 6. Legislative Control of Revenues
 - a. Virginia: Treasurer/Speaker: Assembly controlled funding
 - b. Growth of colonial independence
 7. **Patrick Henry**: The Parson’s Cause

2.3 Local Government in the Colonies

- A. CONSIDERABLE INFLUENCE ON THE AMERICAN POLITICAL SYSTEM THAT DEVELOPED

1. Western Frontier
2. County System [NOTE: Originated in Charlemagne's Empire]
 - a. Virginia
 - 1) County Court composed of the **Justices of the Peace**
 - 2) County government: a preparation for the concept of **federalism**
3. New England **Township System**
4. **Alexis de Tocqueville** [Published *Democracy in America*, 1835, 1840]
 - a. Local government is a major reason for the success of American democracy
5. Melancholy Irony
 - a. Britain's political patrimony bequeathed to the colonies was a major cause of their loss

2.4 Civil Liberties in the Colonies

- A. STATES ON THE EVE OF THE AMERICAN REVOLUTION (108-11)
 1. Free Exercise of Religion
 - a. Widespread religious liberty [NOTE: Jefferson and Adams were Unitarians, not deists; Franklin is more difficult to classify]
 - b. Church establishments were merely preferred and tax-supported, not exclusive, because of the Act of Toleration of 1690
 - c. Some discrimination against Catholics, Jews, and Baptists
 - 1) Catholic masses could be celebrated publicly only in Pennsylvania
 - 2) **Quebec Act** [NOTE: The issue was not the religious freedom of Catholics; it was the denial of jury trials by the imposition of the French civil or code law system on residents of the Ohio valley]
 2. Freedom of Speech and Press. 1763
 - a. Licenses to publish and print had earlier been required
 - b. Freedom of speech protected by British statutes and common law
 3. **Stamp Act**, 1765
 - a. Tax on newspapers and legal documents
 4. Restrictions on Civil Rights During the War for Independence

2.5 The Movement Toward Independence

- A. NEW REVENUES AND RESTRICTIONS (111-15)
 1. Turning Point, 1763: End of "Hands-Off" Policy
 2. Economic Conditions in England
 - a. **Seven Years War**
 - b. American resistance against new revenues
 3. George Grenville
 - a. Sugar Act (1764) and Stamp Act (1765)
 4. **Stamp Act Congress**, 1765
 - a. Delegates sent by nine of the provinces
 - b. Bill of rights drafted
 5. Repeal of Stamp Act and Passage of **Declaratory Act**, 1766
 6. **Townshend Acts**, 1767
 - a. Direct taxation renounced in favor of indirect taxation
 - b. Objection to the **writs of assistance**
 - c. Suspension of the New York assembly over its failure to provide for the quartering of British troops
 7. Controversy over Parliament's Constitutional Powers
 - a. **John Dickinson**: *Letters of a Farmer in Pennsylvania*
 - b. Boycott by merchants and Southern planters
 - c. **Boston Massacre**, March 1770
 8. Repeal of the Townshend Duty Act

- a. Duty of tea remained
 - b. Lord North's challenge
 - c. Colonists began to question the authority of Parliament altogether
- 9. **Tea Act, 1773**
 - a. Purpose: Shore up the crumbling financial structure of the East India Company
 - b. **Boston Tea Party** [Similar protests held in New York, Philadelphia, and Charleston]
- 10. **Intolerable [Coercive] Acts, 1774**
 - a. Boston Port Act
 - b. Massachusetts Government Act
 - c. Administration of Justice Act
 - d. Quartering of Troops Act
 - e. Quebec Act
- 11. Virginia: Day of Fasting and Prayer, June 1, 1774
 - a. Assembly dissolved by Gov. John Dunmore
 - b. First provincial **committee of correspondence** [such committees had been established at the local level earlier through the efforts of Samuel Adams]
 - c. Call for a continental congress
- B. **FIRST CONTINENTAL CONGRESS, September-October 1774 (113-19)**
 - 1. Economic War
 - a. **Continental Association**
 - 2. **Declaration and Resolves**
 - a. Committee for States Rights, Grievances and Means of Redress
 - b. Conciliatory tone of loyalty to the Crown
 - 3. Rudimentary Statement of **Conflicting Theories** about the Origin and Nature of American Freedom
 - a. Affirmation of natural rights as men, prescriptive rights as Englishmen, and chartered rights as Americans
 - b. Rhetoric of the Declaration: assertion of rights based on the "immutable laws of nature"
 - 4. Disagreement over the Authority of Parliament
 - a. Principle of legislative supremacy rejected
 - b. Agreement that Parliament could regulate external commerce but could not tax the colonies
 - 5. Principle That the Constitution Is a "Higher Law"
 - a. Doctrine of judicial review is here anticipated
 - 6. Milestone in American Constitutional Development
 - a. Beginning of a long and close relationship among the Founding Fathers
- C. **SECOND CONTINENTAL CONGRESS, May 10, 1775- (119-20)**
 - 1. Selection of Commander-in-Chief
 - a. Artemus Ward
 - b. **George Washington**
 - 2. **Battle of Bunker Hill** [which was fought on Breed's Hill], June 17
- D. **DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS (120-21)**
 - 1. Disagreements
 - a. John Dickinson favored conciliation
 - b. The Lees of Virginia and the Adamses of Massachusetts opposed
 - 2. Drafting of the Declaration
 - a. Two versions: Dickinson's and Jefferson's
 - b. Final compromise
 - 3. The Colonists' Quarrel Was with Parliament

2.6 The Declaration of Independence

- A. **WHAT IT MEANS TO US (121-25)**

1. **Thomas Paine**
 2. Two Parts
 - a. Philosophical justification for secession
 - b. List of grievances
 3. Controversies
 - a. Preamble
 - b. Jefferson Davis and Abraham Lincoln found support for their respective positions
 4. Grounds for Declaring Independence Were Confused
 - a. **Natural rights**-based preamble
 - b. **British law**-based grievances
 5. Right to Trial by Jury Has No Basis in Natural Law
 6. Jefferson Was Later Asked about These Anomalies
 - a. Accusation of plagiarism
 - 1) **George Mason's** Virginia Bill of Rights
 - 2) **John Adams's** Declaration and Resolves
 - 3) **John Locke's** *Second Treatise*
 - 4) **James Otis's** pamphlets
 - 5) Jefferson's reply
 7. Modern Natural Rights Philosophy Is a Rejection of Classical Political Thought
- B. COMPARISON WITH ARISTOTLE'S NATURAL LAW PHILOSOPHY (125-28)
1. **Aristotle**
 - a. "Man is a political animal"
 - b. Groups of families and household communities create the city-state
 2. Natural Law Tradition
 - a. **Thomas Aquinas**
 3. Definition of Natural Law
 - a. **Cicero's** "true law:" right reason in agreement with Nature
 4. Constitutionalism: A Product of This Natural law Idea
 5. What Explains Variances?
 - a. Different philosophical approaches to such **cultural diversity**
 - 1) Some hold that liberty and justice are illusory (nihilism)
 - b. **Auguste Comte's** Positivism
 - c. Legal Positivists [Utilitarians such as John Austin]
 - d. Cultural relativism of such philosophers
 6. Natural Law Philosophers Reject This Theory of Knowledge
 7. The Idea of Individual "Rights" Did Not Form Part of Natural Law Philosophy
 - a. Aristotle: **Entitlements** differ from one person to another according to each person's nature
 - b. Emphasis on Natural Duties
- C. NATURAL RIGHTS THEORY (128-30)
1. Origin and Purpose of Government
 - a. Civil society is not man's natural state; it is the State of Nature
 2. Life in the State of Nature Was Not Idyllic
 - a. **Thomas Hobbes's** version: Life in the state of nature is "solitary, poor, nasty, brutish, and short."
 - b. **John Locke's** version: People's **natural rights** are not secure
 3. Solution: **Social Contract**
 - a. Man contracted out of the state of nature to create society
 - b. A second (political) contract followed, exchanging obedience for protection
 - 1) The government's failure to provide protection allows the "right" to revolution to be invoked
 4. Jefferson Failed to Recognize the Inherent Contradictions between the Natural Law and Natural Rights Doctrines
 5. How Do We Distinguish Desires from Rights?
 - a. If freedom is "natural" it is because it conforms to the nature of man in organized society

- D. "ALL MEN ARE CREATED EQUAL" (130-32)
1. Poor Choice of Words
 2. What Did the Founders Mean by "Equality?"
 3. American People Were Entitled to the Equal Rights of Englishmen
 - a. Rufus Choate
 4. The Preamble of the Declaration Is a Political Manifesto
 - a. The weakness of the colonists' philosophical argument should not detract from the strength of their political and legal case
 5. What the Rhetoric of the Declaration Inspired
 - a. View of **Stephen Douglas**
 - b. View of **Abraham Lincoln**
 - c. View of moral equality prevailed
- E. SLAVERY (132-35)
1. **Slave Trade**
 - a. Few Enlightenment thinkers called for an immediate end
 - b. John Locke was an investor in the Royal African Company
 - c. The Fundamental Constitutions of Carolina which he drafted gave freemen "absolute power and authority over his negro slaves"
 - d. Montesquieu and Burke took a more critical and more humane view
 - e. Quakers came to the view that slaveholding is a sin
 - f. Many leaders of the American Revolution and the Abolitionist Movement were members of the clergy
 2. American Revolution as a Catalyst for Anti-Slavery Sentiment
 - a. Debate with England produced a great body of literature on the meaning of freedom and the rights of Englishmen
 - b. Demand for equal rights
 - c. Abolitionist leaders condemned the Constitution as a covenant with death
 - 1) William Lloyd Garrison
 - d. Alleged contradiction between the Declaration and the Constitution was a misreading
 3. Equality before the Law
 - a. Tory suggestions of American hypocrisy
 - 1) Samuel Johnson
 - b. Public awareness of the inconsistency
 - c. British toleration of slavery
 - d. Slow growth of freedom
 - e. Growth of freedom was through a trickle-down process
 - f. Democracy was limited to the ruling class
 4. In Effect, the Constitution Has Been Amended by the Preamble to the Declaration
- F. DIFFERENT KINDS OF EQUALITY (135-36)
1. Some Forms of Equality Are Compatible with Individual Liberty
 - a. Examples: equality before the law, equality of opportunity, moral equality
 2. Political Liberty: Freedom to Participate in the Political Process
 - a. Political equality is a result
 - b. Political liberty is an important means to *individual* liberty, but there is not much support for political equality
 - c. Americans demanded the same rights as Englishmen, not the right to vote
 - d. Electorate expanded between 1800 and 1860 except where voting privileges for free Negroes was abolished
 3. Social and Economic Equality
 - a. Various inequalities
 - b. Only massive coercion could change this – at the loss of individual liberty
- G. LEGACY (136-37)
- Declaration Achieved Two Immediate Goals
1. Its Philosophical Appeal (**Natural Rights Argument**)
 - a. Claim of equal rights and the republican principle of government by consent

2. Entitlement to the Rights of Englishmen (**Constitutional Argument**)
3. Consequence: The Declaration Became a Two-Edged Sword
 - a. North: Springboard for the anti-slavery movement based on equal rights for all Americans
 - b. South: Preamble invoked to support secession
4. Rhetoric of the Preamble Supporting Principle of Equal Rights Became the Dominant Force Beginning with the Thirteenth Amendment

2.7 The Rights Proclaimed

- A. LIST OF CLAIMED RIGHTS (137-41)
 1. Common Theme: The Claim to Equal Rights
 - a. **Inherited rights**: great charters, common law, colonial charters
 - b. Nature seen as another source of rights
 - c. Emphasis placed on the inherited rights
 2. First List: **Patrick Henry's Resolves** (1765)
 - a. Response to the Stamp Act by the Virginia House of Burgesses
 - b. Violation of three rights:
 - 1) Equality of English and American subjects
 - 2) Taxation by representatives of one's own choosing
 - 3) Government by consent
 3. Declaration of Rights of 1774
 - a. Most comprehensive statement
 4. Other Rights Were Not in Dispute
 - a. Security
 - b. James Otis: Absolute rights of personal security, personal liberty, and private property
 - c. John Dickinson
 5. Disagreements over the Meaning of the English Constitution
 - a. Americans took the traditional view
 - b. London took the modern view
 - c. The real issue was sovereignty
 6. How Are American Rights to Be Protected?
 - a. James Luttrell, British MP, 1777
 - 1) Need for an American Magna Charta
 - b. The real need was for a fundamental law

2.8 The First State Constitutions, 1776-1783

- A. BIRTH OF CONSTITUTIONAL GOVERNMENT (141-42)
 1. State Constitutions and the **Articles of Confederation**
 - a. Dress rehearsals for the later Constitution by many of its future signers
 2. Adaptation of Old Colonial Forms
 3. Flaws
 4. **Rejection of All Radical and Visionary Schemes**
- B. **JOHN ADAMS** (142-44)
 1. Father of American Constitutionalism
 2. **Viscount Bolingbroke**
 - a. Repudiation of **Machiavelli's** *The Prince*
 3. Request by Richard Henry Lee
 4. Adams's Sketch of a Constitution
 5. "Thoughts on Government"
 6. Adams's Resolution
 7. Massachusetts Constitution of 1780
- C. EARLY STATE CONSTITUTIONS (144-47)

1. Most Were Written in Haste: New Hampshire and South Carolina
 2. More Permanent Constitutions: Virginia and New Jersey
 3. Rhode Island, Connecticut, and Massachusetts Kept Their Charters
 4. The Rest Were Left without a Constitution at the Time of the Declaration
 5. Abortive Massachusetts Constitution of 1778 Was the First Submitted to a Popular Vote
 6. The **Massachusetts Constitution of 1780** Was Prepared by the First **Constitutional Convention** and Ratified by the People
- D. FOUR DIFFERENT PROCEDURES (146-47)
1. Framing by Purely Legislative Bodies without Express Authority of the People: New Jersey, Virginia, South Carolina
 2. Framing by Purely Legislative Bodies with Express Authority of the People but without Submission for Approval by the People: New Hampshire, Delaware, Georgia, New York, Vermont
 3. Framing by Purely Legislative Bodies with Express Authority of the People and Formal or Informal Submission for Approval by the People: the Others
 4. Framing by a Constitutional Convention with Express Authority of the People and Formal Submission for Approval by the People: Massachusetts (1780)
- E. NEW CONTRIBUTIONS TO THE ART OF GOVERNMENT (147)
1. Electoral College: Maryland
 2. Popular Election of the Governor: New York
 3. Checks and Balances: Massachusetts
- F. MAJOR DEFECTS (147-48)
1. Worst of the Lot: **Pennsylvania**
 - a. Dominated by radicals
 - b. Benjamin Franklin
 - c. Unicameral legislature
 - d. Council of Thirteen
 - e. No governor
 - f. Prohibition of any change for seven years
 - g. Council of censors
 - h. It provoked a storm of protest
 - i. It was adopted as the model for the French Constituent Assembly, 1790, the same year that Pennsylvania abandoned it
 2. Four of These First Constitutions Lasted More Than Half a Century
 - a. North Carolina: lasted 75 years despite a weak governor
 - b. New Jersey: its design by two clergymen lasted 68 years
 - c. Maryland: lasted 65 years
 - d. Virginia: lasted 54 years
 3. Charters of Connecticut and Rhode Island Lasted Until 1818 and 1840 Respectively
 4. New York: its design by John Jay lasted 47 years
 5. The Massachusetts Constitution of 1780 Remains the Oldest Written Constitution
- G. THREE **MAJOR WEAKNESSES** IN GENERAL (149-50)
1. Failure to Provide for an Adequate System of Separation of Powers
 - a. Need for checks and balances
 - b. Power concentrated in legislatures
 - 1) Jefferson's objection to "elective despotism"
 2. Failure to Establish an Independent Executive
 3. Constitutions Were Not Established as the Supreme Law
- H. OTHER ISSUES (150-52)
1. Lack of Adequate Provisions for Amendment
 2. Virginia Declaration (or Bill) of Rights
 - a. **George Mason**
 - b. Geographical representation
 - 1) Tidewater aristocracy favored
 - c. The people were gentleman freeholders
 - 1) Fear of unrestrained democracy

2.9 The Articles of Confederation

- A. EARLY OBSTACLE TO UNION: WESTERN LAND CLAIMS (152-54)
 - 1. **Richard Henry Lee's** Resolution, June 7, 1776
 - 2. John Dickinson's Draft
 - 3. Reasons for Maryland's Refusal to Join
 - a. All Western land claims were ceded to Congress
 - b. Maryland signs, 1781
 - 4. Extent of Virginia's Claim
 - a. Role of Richard Henry Lee in surrendering Virginia's claim
 - 5. Formation of a Single Federal Union
- B. QUARREL OVER METHOD OF REPRESENTATION (154-55)
 - 1. Proportional vs. Equal Representation
 - 2. Resulting Dilemmas
 - a. Thomas Burke
- C. QUESTION OF STATE SOVEREIGNTY (155-58)
 - 1. Proponents of State Sovereignty Prevailed
 - 2. **Delegated vs. Reserved Powers**
 - 3. Congress Limited to Expressly Delegated Powers
 - a. Changes in the 1787 Constitution
 - 4. League of Friendship
 - a. Perpetual league
 - 5. International Law
 - a. **Privileges and Immunities**
 - b. **Extradition**
 - 6. **Full Faith and Credit**
 - a. "Private international law" or conflict of laws"
 - 7. Carry-Over to the Constitution of 1787
 - 8. Partial Surrender of State Sovereignty
 - a. Question: Was their **legal sovereignty** reduced?
 - b. Secession issue
 - 9. Question of State Sovereignty
 - a. Answer depends on the definition of sovereignty we adopt
 - b. **Divided sovereignty**: New concept of sovereignty introduced
- D. NATURE OF THE CENTRAL GOVERNMENT (158-60)
 - 1. Were the Articles a Constitution?
 - a. Congress given a paltry sum of powers
 - 2. Taxation and Regulation: Both Reserved to the States
 - a. Congress depended on State appropriations
 - b. State of near bankruptcy
 - 3. No Provision for an Executive or Judicial Branch
 - a. No separation of powers
 - b. Ninety-nine executive committees in Congress with overlapping jurisdiction
 - c. Absence of a unified executive
 - 4. Ad Hoc Courts: Boundary Disputes, Piracy, Felonies Committed on the High Seas
 - 5. Reliance on State Judiciaries
 - a. Nothing comparable to the **Supremacy Clause**
 - b. Provisions of the Treaty of Paris (1783) were ignored
 - c. Absence of an ability to operate directly on individuals
- E. **DIFFICULTIES** (160-61)
 - 1. Outbreaks of Mutiny
 - a. Currency devalued to finance the war effort
 - b. Borrowing
 - c. garrisons in the West could not be funded
 - 2. Serious Decline in Commercial Activity

- a. Trade barriers and import duties
 - b. Europe refused to negotiate commercial treaties
 - 3. Suffering Caused by the Helplessness of the Confederate Government
 - a. Radical factions of debtors
 - b. paper money
 - 4. **Shays' Rebellion**
- F. **SUCSESSES (161-62)**
 - 1. War and Union
 - 2. Question Whether the Articles of Confederation Might Have Succeeded
 - a. Articles and first State constitutions: No provision that allowed for amendments
 - 1) State legislatures often treated amendments as simple legislation
 - b. Under the Articles, even simple legislation required nine votes
 - c. Rhode Island blocked an amendment to permit a 5% import duty
 - d. Not a single proposed amendment succeeded
- G. **THE SITUATION HAD BECOME INTOLERABLE BY 1786 (162-64)**
 - 1. Empty Treasury
 - 2. Insecure Borders
 - 3. United States Was an Object of Ridicule in Europe
 - 4. Careerism and Parochial Concerns of Members of Congress
 - 5. Maryland Proposes a Commercial Convention
 - a. Virginia proposed extending the invitation to all the States
 - 6. **Annapolis Convention, September 1786**
 - a. Alexander Hamilton and James Madison call for a Constitutional Convention at Philadelphia the following May
 - b. Virginia responds favorably
 - c. Continental Congress remained in session during the Convention
 - 7. The Constitution Was Initiated by the States, Not the People at Large or by Congress

Review

indentured servants	slavery established, 1662	House of Burgesses
Mayflower Compact	Fundamental Orders of Connecticut	
principle of legislative residency	principle of geographical representation	
republican principle	Navigation Acts	Board of Trade
Patrick Henry	<i>Parson's Cause</i>	county system
justices of the peace	Alexis de Tocqueville	Quebec Act
Stamp Act	Seven Years War	Stamp Act Congress
Declaratory Act	Townshend Acts	writs of assistance
John Dickinson	Boston Massacre	Tea Act
Intolerable (Coercive) Acts	committees of correspondence	Continental Association
Declaration and Resolves	conflicting theories	George Washington
Battle of Bunker Hill	Declaration of Independence	Thomas Paine
natural law vs. British law	Thomas Aquinas	natural law tradition
Auguste Comte's Positivism	natural rights theory	Thomas Hobbes
John Locke	social contract	slave trade
natural rights argument	constitutional argument	inherited rights
Patrick Henry's <i>Resolves</i>	Articles of Confederation	John Adams
Massachusetts Constitution	defects of state constitutions	Pennsylvania constitution and France
western land claims	divided sovereignty	delegated powers
reserved powers	privileges and immunities	extradition
full faith and credit	difficulties with the Articles	Shays' Rebellion
Annapolis Convention		

DECLARATION OF INDEPENDENCE

Review

Laws of Nature and of Nature's God unalienable Rights
appeal to the Supreme Judge of the world Free and Independent States

VIRGINIA BILL OF RIGHTS, JUNE 12, 1776

Review

equally free and independent inherent rights power vested in the people
no hereditary office-holding free exercise of religion Christian forbearance

PART 3: THE ACHIEVEMENT OF THE PHILADELPHIA CONVENTION

Outline

3.1 The Problems of the Convention

- A. OBJECTIVES: REVISIONS TO REMEDY THE DEFECTS OF THE ARTICLES (242-43)
 - 1. Sound Finances for the General Government
 - 2. Removal of Trade Barriers
 - 3. Sound Money and Improved Credit
 - 4. Conduct of Foreign Policy
 - 5. Cooperation among the States
 - 6. Maintain Good Order
 - 7. Uniform Laws
- B. LARGER AIMS: PREAMBLE (243-44)
 - 1. Six Clauses of the **Preamble**
- C. MAJOR DIFFICULTIES TO RESOLVE (244-45)
 - 1. Divided Political Sovereignty [Not Legal Sovereignty]
 - 2. System of Separation of Powers and Checks and Balances
 - 3. Dual Legislative Branch (Bicameralism)
 - 4. Independent Executive
 - 5. Federal Judiciary
 - 6. Incorporation of Traditional Political and Legal Institutions and Rights
 - 7. Reconciliation of Order and Freedom
 - 8. Practical Instrument of Government
- D. PRACTICAL CONSIDERATIONS (245-46)
 - 1. Question of Mission
 - 2. Secrecy of Deliberations
 - 3. Subsequent Persuasion of the Public

3.2 The Delegates to the Convention

- A. EIGHTEENTH-CENTURY GENTLEMEN (246-48)
 - 1. Outward Appearance
 - 2. Their Background
 - 3. Men of Property
 - 4. Occupations
 - 5. Religion
 - 6. Club of Gentlemen
 - a. Civility of the debates
 - b. No dueling

7. Opposition to Hereditary Titles and Privileges
 - a. **Thomas Fuller** on the "True Gentleman"
 - b. Few "Degenerous Gentlemen" among them
 - c. Temperate speech

3.3 A Wide Range of Talents

- A. LEADING LIGHTS (248-52)
 1. **George Washington**
 2. **Edmund Randolph**
 3. **George Mason**
 4. **James Madison**
 5. **William Paterson**
 6. **Robert Morris**
 7. **James Wilson**
 8. **Gouverneur Morris**
 9. **John Dickinson**
 10. **Alexander Hamilton**
 11. **John Rutledge**
 12. **Charles Cotesworth Pinckney**
 13. **Elbridge Gerry**
 14. **Rufus King**
 15. **William Samuel Johnson**
 16. **Roger Sherman**
 17. **Oliver Ellsworth**
 18. **Luther Martin**
- B. THEIR INTERESTING LIVES (252-53)
 1. Hugh Williamson
 2. **Benjamin Franklin**
 3. George Wythe
 4. Absentees
 5. Unusual Wisdom

3.4 Plans and Progress at Philadelphia

- A. ASSUMPTIONS (253-55)
 1. They Came with Open Minds
 2. Republic Form
 3. Definitions
 - a. Madison on two points of difference between a democracy and a republic
 - b. Thomas Jefferson: majority rule
 - c. Thomas Cooley: representatives chosen by the people
 4. Disrepute of Democracy
 5. Agreement That the Articles Needed Strengthening
 6. Points of Disagreement

3.5 The Meaning of "Federal"

- A. FEDERALISM (255-57)
 1. "Federal" Was Once Synonymous with "Confederate"
 - a. Federation
 2. Central Government (Unitary System)
 3. Federal in the Old Sense
 - a. Articles of Confederation
 4. National Plan (Virginia)

5. Other Plans
6. Compromise

3.6 The Virginia Plan: A Supreme National Government

- A. BOLD DESIGN (257-59)
 1. **Edmund Randolph**
 2. Elements of the Proposal: Setting the Agenda
 - a. Bicameral Legislative Branch
 - 1) Voting
 - 2) Additional Powers for Congress
 - b. Executive Branch
 - 1) **Veto and Override**
 - c. Judicial Branch
 3. Resolution by **Gouverneur Morris**: Articles of Confederation Discarded
 4. States Would Have Been Relegated to Provinces
 5. Centralized Political Structure Would Have Been Difficult to Operate
 6. View of the Virginias Had Changed by 1798
 7. **William Paterson's** New Jersey Plan

3.7 Hamilton's Concept of a Unified America

- A. COMPLETE CENTRALIZATION (259-60)
 1. Plan for a Great Commercial and Industrial Power
 2. Bicameral Legislature
 3. Executive-for-Life
 4. States Reduced to Agencies of the Central Government
 5. Hamilton Soon Afterward Returned to New York
 6. He Dreaded the Power of Mobs

3.8 The New Jersey Plan: Checks Upon Central Power

- A. SMALL STATE PLAN (262-63)
 1. Virginia Set the Terms of the Debate
 2. Nine Resolutions [**Unicameral Congress** Retained]
 3. Plural Federal Executive
 - a. Supreme Court Appointed by the Executive
 - 1) Original jurisdiction over impeachment cases
 - 2) Appellate jurisdiction over international, federal, and interstate cases
 4. Influence of Smaller States Preserved
 5. Defeat

3.9 The Benefits of Compromise

- A. RECONCILING DIFFERENCES (263-69)
 1. What Was Dropped
 2. Two-Year Legislative Term
 3. Great Stumbling Block: Proportional vs. Equal Representation
 4. Committee Appointed: **Benjamin Franklin**
 5. **Great Compromise**, 5-4-1 (and the New York Delegation Left)
 6. **John Dickinson's** Role
 7. Provisions
 8. Nature of the Presidency
 9. New York Model: Hamilton's *Federalist*, no. 69
 10. **James Wilson**: Single Executive

11. Judicial Branch: Lower Courts Could Be Created by Congress
12. Supreme Court and **Chief Justice**
 - a. Judiciary Act of 1789
13. State ratifying Conventions
14. Committee of Detail: Rutledge, Randolph, Gorham, Wilson, Ellsworth
15. Committee of Style: Johnson, Hamilton, G. Morris, Madison, King

3.10 Compromise and Consensus

- A. FINAL VERSION (269-73)
 1. James Wilson's Committee on Detail
 2. Debates on Slavery and Trade
 3. **Three-Fifths Compromise**
 4. Jealousy Between Large and Small States
 5. Slavery Was a Cross-Cutting Issue
 - a. Rufus King and George Mason Were Among Those Who Opposed the Recognition of Slavery
 - b. Lower South
 - c. Gen. **Charles Cotesworth Pinckney**
 6. Compromise on the Slave Trade
 7. Non-Signers: Mason, Randolph, Gerry
 8. John Dickinson
 9. "Miracle of Philadelphia"
 10. Johann Wolfgang von Goethe

Review

defects of the Articles	preamble	gentlemen
Thomas Fuller	George Washington	Edmund Randolph
George Mason	James Madison	William Paterson
Robert Morris	James Wilson	Gouverneur Morris
John Dickinson	Alexander Hamilton	John Rutledge
Charles Cotesworth Pinckney	Elbridge Gerry	Elbridge Gerry
Rufus King	William Samuel Johnson	Roger Sherman
Oliver Ellsworth	Luther Martin	Benjamin Franklin
Democracy	republic	federal
Virginia Plan	New Jersey Plan	Great Compromise
New York model	Supreme Court	Chief Justice
Committee on Detail	Three-Fifths Compromise	

PART 4: BASIC CONSTITUTIONAL CONCEPTS

Outline

A. FEDERALISM

4.1 Introduction

- A. ORIGINS (297-99)
 1. Definition
 2. American Federal System
 - a. It is the world model for **federalism**
 - b. Two levels of authority

- c. Separate coordinate and independent spheres [cf. Abraham Kuyper's sphere sovereignty]
- d. Requirement of a written constitution
- 3. Federalism Arose out of the Circumstances of 1787
- 4. Two **Alternatives**
 - a. Feeble **confederation**
 - b. Unitary, **centralized state**
 - 1) Indignation of such French political thinkers as **Turgot and Condorcet**
- 5. Compromise
 - a. **Dual sovereignty** [NOTE: "Sovereignty" itself is unmentioned in the Constitution]

4.2 Powers Delegated to Congress

- A. ARTICLE I, SECTIONS 8-10 (299-300)
 - 1. Constitutional Provisions
 - 2. Money-Raising Power
 - 3. John Quincy Adams' *Jubilee Address* (1839):
 - a. The Constitution "had been extorted from the grinding necessity of a reluctant nation"
 - 4. Section 8 and the **Necessary and Proper Clause**

4.3 Powers Denied to Congress

- A. ARTICLE I, SECTION 9 (300-01)
 - 1. Importation of Slaves Could Not Be Forbidden before 1808 [When It Was Forbidden]
 - 2. **Habeas Corpus**: Suspended by Lincoln without Congressional Authorization
 - 3. **Bills of Attainder**: Also Referred to as **Corruption of Blood**
 - 4. **Ex Post Facto** Laws
 - a. **Calder v. Bull**: Supreme Court Did Not Apply It to Devaluing Property Rights
 - 5. Taxes, Ports, Appropriations, Titles

4.4 Powers Denied to the States

- A. ARTICLE I, SECTION 10 (301-02)
 - 1. Provisions
 - 2. Export and Import Taxes
 - 3. Armed Forces and Interstate Agreements

4.5 The Division of Powers

- A. ENDURING FEDERAL DESIGN OF GOVERNMENT (302-06)
 - 1. Beneficial and Practical Effects
 - 2. Two Coordinate Governments
 - a. General government
 - b. State governments
 - 1) **State police powers**: health, safety, and welfare
 - 3. Marked Differences among the States
 - a. Patterns of culture, economic activity, social institutions, customs, manners, speech
 - 4. Diminished Autonomy of the States
 - a. **Enumerated powers** operated directly upon citizens
 - 5. **Types of Powers**
 - a. Delegated or enumerated
 - b. Implied
 - 1) **Necessary and Proper Clause**, also known as the **Elastic Clause**

- c. **All Other Powers** provision: Congress has a voice in the affairs of the other branches
 - 1) NOTE: Such **overlapping powers** are the basis for the **checks and balances** system
- d. **Inherited powers**: investigations, subpoena witnesses, exclude members
- 6. **Classification of Powers**
 - a. Exclusive: declaration of war
 - b. Concurrent: war-making power, levying of taxes
 - c. Reserved or residual powers
 - 1) **Tenth Amendment** reaffirms
- 7. Weakening of Federalism

4.6 The Supremacy Clause

- A. SUPREMACY OF THE CONSTITUTION (306-07)
 - 1. Federal Law Prevails in Cases of Conflict
 - 2. Federalist, No. 45: States Would Command Popular Loyalty

4.7 National and State Obligations

- A. RIGHTS VS. OBLIGATIONS (307)
 - 1. Emphasis Has Been on Rights Up to This Point; A Discussion of Obligations Follows

4.8 Obligations of the National Government to the States

- A. FEDERALISM ARTICLE (ARTICLE IV) (308-309)
 - 1. Republican Form of Government
 - a. **Guarantee Clause**
 - 2. States Are Not Obligated to Establish a Written Constitution or a Bill of Rights
 - a. [But all states had bill of rights prior to the federal Bill of Rights]
 - 3. Section 3: State Sovereignty and the Creation of New States
 - a. **Doctrine of equal footing** [Utah could not be admitted until polygamy was abolished, as it was; Guthrie was designated the capital of Oklahoma before it was admitted, but it was changed afterwards]
 - 4. Section 3: Regulation of Territories, Public Lands, and United States Property [federal lands were originally restricted to the District of Columbia and military bases]

4.9 Obligations of the States to the National Government

- A. PROVISIONS (309)
 - 1. Article I, Section 4: Elections for Senators and Representatives
 - 2. Article II, Section 1: Presidential Electors

4.10 Obligations of the States to Each Other

- A. ARTICLE IV PROVISIONS (309-10)
 - 1. Section 1: **Full Faith and Credit Clause**
 - 2. Section 2: **Privileges and Immunities Clause**
 - 3. Section 2: **Extradition Clause**
 - 4. Fugitive Slave Clause Nullified by the Thirteenth Amendment

4.11 The Role of the States in the Amendment Process

- A. ARTICLE V (310-11)
 - 1. No Formal Change Without Consent of the States
 - 2. Proposed Amendment: Two Methods
 - a. Proposal by Congress
 - b. Call for a constitutional convention
 - 3. Ratification
 - 4. States Occupy a Commanding Position
 - 5. Nullification of Supreme Court Decisions
 - 6. Both a Democratic Republic and a Federal Republic

4.12 The Federalism Factor

- A. READING BETWEEN THE LINES (311-15)
 - 1. The Constitution Is Honeycombed with Protections for the States
 - 2. Article III
 - a. Section 2
 - 1) Jurisdiction of state judiciaries over disputes between citizens of the same state
 - b. An Exception: **Civil Rights Act of 1964**
 - 1) Presumption that all restaurants are engaged in interstate commerce
 - c. Circumvention of reserved powers
 - 1) Difficulty of drawing the line
 - 2) Unwritten reserved powers represent a gray area
 - 3. Article II
 - a. **Electoral College**, Section 2
 - 1) Two candidates must be named
 - 2) In case of a tie, the House votes
 - b. This system did Not survive the 1800 election
 - 1) Aaron Burr
 - c. Twelfth Amendment
 - d. Reasons for such an elaborate scheme
 - e. Why the plan failed: pledged votes
 - f. Proposals to abolish the electoral college
 - 1) Defenders of the system
 - 2) Danger of a tyranny of the majority and a plebiscitary presidency
 - 4. Silences of the Constitution

4.13 The Advantages of Federalism

- A. MOST COMMONLY MENTIONED **ADVANTAGES** OF FEDERALISM (316-19)
 - 1. Unity in Diversity (*E Pluribus Unum*)
 - a. Protection of minority rights
 - b. States' Rights
 - 2. States Can Manage Their Own Affairs
 - a. Federal structure is necessary for a modern representative democracy
 - b. It is easier to control a native son who lives in the community
 - c. Danger of **plebiscitary democracy** [citizens vote only in the narrowest sense]
 - 3. **John Stuart Mill's** Argument Against Centralized Bureaucratic Government
 - a. Federalism encourages independence and self-reliance
 - b. Decentralized government releases creative energies
 - 4. Safeguard Against an Unjust Dictator or Fanatical Party
 - a. Resistance Against Coups d'Etat
 - b. Hitler destroyed the federal structure of the Weimar Republic
 - 5. It Leaves Latitude for Reforms and Experiments
 - a. Healthy competition

- b. Bureaucracies tend to be complacent about their own policies
- B. VIEWS OF FOREIGN COMMENTATORS (319-21)
 1. **Alexis de Tocqueville**
 - a. *Democracy in America*
 2. **James Bryce**
 - a. *The American Commonwealth*
 3. Secret of American Federalism
 - a. Its direct operation on the individual
 4. Reason for Its Durability: It Promotes Political Stability
 - a. Bryce's planetary analogy
 - b. Supreme Court

4.14 The Future of Federalism

- A. ITS DIMINISHED OPERATION TODAY (321-22)
 1. The Greatest Threat Was Thought to Be Separatism Rather Than Consolidation
 - a. Trend toward increased centralization
 2. Early Federalists Recognized that National Authority Extends Only to Delegated Powers
 - a. Federalist, no. 45
 3. Federalism Was Made Explicit in the Tenth Amendment
- B. HOW AND WHY FEDERALISM HAS DECLINED (322-25)
 1. **Franklin Roosevelt** (President, 1933-1945)
 - a. Response to the **Great Depression**
 - 1) Reinterpretation of the Interstate Commerce Clause [intrastate commerce now included]
 - 2) 1937 reversals of earlier cases [Known as "the switch in time that saved nine" (Supreme Court justices) at the time of FDR's threat to "pack" the Court with additional justices]
 - b. **United States v. Darby**, 1941: Tenth Amendment Emptied of Meaning
 - c. **Garcia v. SAMTA**, 1985: No independent limits on Congress's commerce powers
 - d. Seventeenth Amendment
 2. More Recent Partial Reversal on the Commerce Clause
 - a. **United States v. Lopez**, 1995: Gun Free School Zones Act of 1990 struck down
 - b. **Printz v. United States**, 1997: Background checks on potential gun purchasers
 - 1) Antonin Scalia: State and local authorities may not be coerced into implementing federal regulatory programs
 - 2) Congress has the power to regulate individuals, not states
 3. General Welfare Clause
 - a. Federal spending
 - 1) Federal strings attached
 4. Civil Rights Legislation
 - a. Bill of Rights Originally Restricted Congress, Not the States
 - 1) States had exclusive jurisdiction over disputes between a State and one of its citizens regarding freedom of religion and rights of the accused
 - b. The Supreme Court has taken command of such cases and assigned them to the federal courts
 - c. Result: a massive transfer of power from the States to the general government
 5. Other Factors That Contribute to Big Government
 - a. Technological advances, changing public attitudes, demand for public services
- C. ARGUMENTS: PRO AND CON (325-26)
 1. Proponents of the Changes
 2. Critics of the Changes
 3. Exclusion of the People and Their Representatives from the Decision-Making Process
 4. Need for "Men of Principle"

B. THE SEPARATION OF POWERS

4.15 Introduction

- A. AUXILIARY PRECAUTIONS (327-28)
 - 1. **Federalist, No. 51**
 - 2. The **Republican Principle**
 - a. Barrier to Despotism
 - 3. Separation of Powers
 - a. Internal restraint
- B. **FOUR ELEMENTS** (328)
 - 1. Three Separate and Independent Branches [cf. Isa. 33:22: "The Lord is our Judge, the Lord is our Lawgiver, the Lord is our King; He will save us"]
 - 2. Unique Functions Appropriate to Each Branch
 - 3. Personnel Should Be Kept Distinct
 - 4. Legislature (Congress) May Not Alter the Distribution by Delegating Its Powers to the Executive or the Judicial Branch
 - a. [This would rule out regulatory agencies with quasi-legislative and/or quasi-judicial powers]
 - b. Federalist, no. 47
- C. RULE OF LAW (328)
 - 1. Need for a Force to Counteract the Temptation to Create **Special Privileges**
- D. HISTORICAL BACKGROUND (328-30)
 - 1. Separation of Powers Is an Ancient Concept
 - a. But it is unsatisfactory by itself
 - 2. The Idea of Internal Checks First Came to Maturity in 18C England
 - a. "Mixed and balanced constitution"
 - 3. Idea of a Distinct Judicial Power
 - 4. American Achievement: A **Functionally Divided System**
 - a. Separate and distinct branches
 - b. Complete separation of personnel
 - 5. Failure to Provide a Checks and balances System
 - a. State legislatures became an embarrassment
 - b. Madison in Federalist, no. 48
 - 6. Addition of a Checks and Balances System
 - a. John Adams and the Massachusetts Constitution

4.16 Checks and Balances

- A. MOST INGENIOUS AND ARTFULLY CRAFTED FEATURE OF THE CONSTITUTION (331-32)
 - 1. **Overlap of Functions**
 - a. Montesquieu
 - b. Presidential veto and recommendations
 - c. Confirmation
 - d. Judiciary
 - 2. Three Branches Chosen in Three Different Ways
 - 3. Constitutional Means of Resistance
 - a. Officials chosen by different means
 - b. Impeachment
 - 4. Safeguards Against Interference

4.17 Checks upon the Congress

4.18 Checks upon the President

4.19 Checks upon the Judiciary

4.20 The Independence of Congress

4.21 The Independence of the President

4.22 The Independence of the Judiciary

4.23 Summary and Review

4.24 Separation of Powers: A Critical Evaluation

- A. SUBSEQUENT CHANGES (337)
 - 1. Growth of the Executive Branch
 - 2. An Assertive Judiciary
 - 3. Congressional Attacks on Presidents
 - 4. Congressional Delegation of Powers to Regulatory Commissions, Administrative Bodies
- B. MISCONCEPTIONS (337)
 - 1. Assumption: Three "Equal" or "Coordinate" Branches
 - 2. Reality: "Impetuous Vortex" of the Legislative Branch
- C. POWERS OF CONGRESS ARE "LESS SUSCEPTIBLE TO PRECISE LIMITS" (337-41)
 - 1. Theoretical Power of Congress over Other Branches
 - 2. Examples of Legislative Encroachment
 - 3. Growth of Federal Power Has Been at the Expense of States
 - 4. Veneration of the Separation of Powers Doctrine
 - a. Criticism
 - 5. Separation of Powers Slows the Pace of Government
 - a. Speed is not a virtue
 - b. Debate and negotiation
 - 6. No Evidence That the Separation of Powers Weakens the Government

4.25 Separation of Powers at the Crossroads

- A. FACTORS THAT HAVE CONTRIBUTED TO THE DECLINE (341)
 - 1. Directing the Affairs of a Modern Industrial Nation
 - 2. Role of America as Defender of the Free World
- B. MASSIVE DELEGATION OF LEGISLATIVE POWERS (341-44)
 - 1. Independence Regulatory Commissions: Quasi-Legislative, Quasi-Executive, Quasi-Judicial
 - a. These operate outside the separation of powers system [cf. the courts and revenue officials who operated under the Navigation Acts in colonial times]
 - 2. Headless Fourth Branch of Government
 - a. They are hybrids created to be free from political pressure
 - b. Lobbying by special interests [with the danger of being "captured" by them]
 - c. Enormous bureaucracy
 - 3. Rejection of the Laissez Faire Approach to Economic Activity
 - 4. Effect of These Independent Commissions on the Separation of Powers System
 - a. These delegated legislative powers originally belonged to the states
 - 1) Maxim: Delegated powers may not be (re)delegated
 - 2) Constitution forbids the **initiative and referendum system** used in some States
 - 5. The Court's View of Such Delegation

- a. Congress must issue guidelines for regulators
 - b. Substantial leeway given
- C. **FAR-REACHING EFFECTS** (344-47)
- 1. Decline of Federalism
 - a. Transfer of State power to the federal bureaucracy
 - b. Labor issues originally had been left to the states
 - c. Commerce clause was claimed as a basis for regulating labor
 - d. Court reversed its stand against this in the 1930s
 - e. Congress turned to independent regulatory commissions (IRCs) to handle the heavy workload
 - f. **National Labor Relations Board** (NLRB) created in 1935
 - 2. Weakening of the Separation of Powers
 - a. Technical regulations instituted by federal employees
 - b. IRCs frustrate the executive branch
 - 1) Executive unity and uniformity of policy may suffer [the IRCs effectively continue a congressional policy of interference in the executive branch that dates back to the Reconstruction era: cf. 13-15 Amendments]
 - c. It is difficult for the courts to superintend the IRCs
 - 3. Constraints on Congress
 - a. Accountability is diminished
 - b. A strict separation of powers may no longer be possible
 - 4. The Separation of Powers Are an Integral Part of the Rule of Law
 - a. IRCs almost become governments in themselves
 - b. Danger that the rule of law may be replaced by the rule of men
 - 5. Abuses in Administrative Discretion
 - 6. Weakening of the Republican Principle

C. THE RULE OF LAW

4.26 Introduction

- A. THE ENGLISH LEGACY (347-49)
 - 1. Magna Charta
 - 2. **Henry de Bracton**
 - a. Law is superior to the king
 - 3. **Edward Coke**
 - a. Law is superior to acts of Parliament
 - b. *Dr. Bonham's Case*
 - 4. Principal Grievances of the American Colonists
 - a. **James Otis**: Higher authority—God
 - 5. Legislative Supremacy in the Early States
 - a. Absence of a supremacy clause weakened the judiciary
- B. THE PRINCIPLE OF CONSTITUTIONAL SUPREMACY (349-50)
 - 1. Article VI
 - a. **Marbury v. Madison**, 1803
 - 2. The American Constitution and Judicial Review Are Extensions of the Rule of Law
 - 3. No Person Is Superior to the Law of the land
 - 4. Rule of Law Means Equality before the Law
- C. RULE OF LAW: A DOCTRINE CONCERNING WHAT LAW OUGHT TO BE (350-51)
 - 1. The Test
 - a. Good laws restrain rather than coerce
 - 1) Liberty is not license
 - 2. Difficulties in Practice
 - 3. Supreme Court Created as a **Watchdog**
 - 4. President's Role as Guardian

- a. **Oath** of office
- b. Commander-in-chief
- 5. Rule of Law Has Prevailed
 - a. Martial law has never been declared nationwide
 - b. There have been no violent coups

4.27 The Basic Principles of the American Constitution

- A. ESSENTIAL FEATURES (351-54)
 - 1. The Only Legitimate Constitution Originates with and Is Controlled by the People
 - 2. Government Must Be Responsible to the States and the Governed
 - a. Elections
 - b. Impeachment process
 - c. Electoral College
 - 3. All Constitutional Government Is by Definition Limited Government
 - a. Its opposite is **despotism**
 - b. Parliamentary supremacy is hostile to the Constitution
 - 4. Powers of Government Must Be Defined and Distributed
 - a. Tendency toward “tyranny in the head”
 - b. danger of too little power
 - 1) Need to balance power and balance liberty and order
 - 5. A Bill of Rights Was Not Necessary in a Government of Enumerated Powers
 - a. **Thomas Cooley: *Constitutional Limitations***

Review

alternatives to federalism	powers delegated to Congress	Necessary and Proper Clause
habeas corpus	bills of attainder	ex post facto laws
state police powers	types of powers	Tenth Amendment
Supremacy Clause	Guarantee Clause	doctrine of equal footing
Full Faith and Credit Clause	Privileges and Immunities Clause	Extradition Clause
amendment process	Civil Rights Act of 1964	interstate commerce
Electoral College	Aaron Burr	advantages of federalism
John Stuart Mill	Alexis de Tocqueville	James Bryce
why federalism has declined	<i>United States v. Darby</i>	<i>Printz v. United States</i>
Federalist, no. 51	republican principle	separation of powers
four elements of the doctrine	checks upon Congress, President, and the Judiciary	congressional encroachments
effects of the growth of the executive power		their far-reaching effects
independent regulatory commissions		James Otis
Henry de Bracton	Edward Coke	Thomas Cooley
<i>Marbury v. Madison</i>	oath	

PART 5: DEFENDING THE CONSTITUTION

Outline

5.1 Introduction

- A. METHOD OF ADOPTION (382-83)
 - 1. Proposed Constitution Sent to Congress
 - 2. Copies Sent to State Legislatures
 - 3. State Constitutions Also Approved by Conventions
 - a. Articles lacked this popular foundation

- b. Significance of **Article VII**
 - c. Contrast with parliamentary procedure
- B. "REVOLUTIONARY" DOCUMENT (383-85)
 - 1. Need for Popular Approval
 - a. Congress's mandate to revise the Articles
 - b. New proposal
 - 2. Two Factions: Federalists and Anti-Federalists
 - a. The divisions later hardened into political parties: **Federalists** and **Republicans**
 - 3. Federalists (Nationalists)
 - a. Literature: Madison, Hamilton, Jay
 - 4. Anti-Federalist Literature
 - 5. Debates at the State Ratifying Conventions
 - a. James Wilson
 - b. **Jonathan Elliot**: *Debates*
 - c. **James Madison**: *Notes*

A. THE ANTI-FEDERALIST PERSUASION

- A. SUMMARY OF THE ANTI-FEDERALIST POSITION

5.2 The Constitution Establishes a Consolidated Empire

- A. CENTRAL GOVERNMENT IS TOO STRONG (385-86)
 - 1. **Patrick Henry** on the American Spirit
 - a. No checks or balances
 - b. Virginia is sufficiently large
 - 2. "Agrippa"

5.3 The Constitution Establishes an Aristocracy

- A. SIZE AND DIVERSITY OF THE CONFEDERATION (386-89)
 - 1. **Republicanism**
 - a. Representatives Given Too Much Power and Independence
 - 2. Deficiencies in the Constitution Itself
 - a. No provision for recalling elections, rotation in office not frequent enough
 - 3. Republicanism by Minority Factions and Wealthy Aristocrats
 - a. "Centinel:" permanent aristocracy
 - b. Patrick Henry
 - c. Difficulty of passing an amendment
 - 4. Right to Reform, Alter, or Abolish the Government

5.4 The Constitution Confers Too Much Power

- A. BROAD DELEGATIONS OF POWER CHALLENGED (389)
 - 1. **Elbridge Gerry**

5.5 An Imperial Congress

- A. BROAD POWERS (389-90)
 - 1. Interpretation by "**Brutus**" [prob. **Robert Yates**]
 - a. General Welfare Clause
 - b. Unlimited tax power
 - c. Necessary and Proper Clause
 - 2. Criticism of the Commerce Clause
 - 3. Constitution Impedes **Majority Rule**

- a. **Patrick Henry**
- b. Richard Henry Lee

5.6 An Elected Monarch

- A. MONARCHICAL TENDENCIES (390-91)
 - 1. Patrick Henry
 - 2. "Cato"

5.7 An Omnipotent Judiciary

- A. FEDERAL JUDICIARY WOULD SWALLOW UP THE STATE COURTS (391-92)
 - 1. "Brutus"
 - a. Article III, section 2
 - 2. Broad Discretion
 - a. **Equity jurisprudence:** Courts given broad discretion
 - 1) Goal: Natural justice
 - 3. Tendency to Subvert the Powers of the Individual States
 - 4. Appeal: Reject or Substantially Amend

B. THE FEDERALIST RESPONSE

5.8 The Most Influential Response

- A. INTRODUCTION (392-93)
 - 1. *The Federalist* Is Recognized as a Primary Source
 - 2. Authors' Difficult Task
 - 3. Vulnerability to the Charge That They Had Violated a Trust

5.9 The Constitution Limits and Distributes Power

- A. THE QUESTION WAS ONE OF POWER (393-94)
 - 1. Bone of Contention
 - 2. Constitution Disallows Concentrations of Power
 - a. Power divided between two levels: **federalism**
 - 1) National: Limited and **enumerated powers**
 - 2) State: **reserved powers**
 - b. Separation of Powers
 - c. Articles Did Not Provide for a **Proper Distribution of Power**
 - 1) "Anarchy in the parts"
- B. NEED TO EXPLAIN AND JUSTIFY THE REDISTRIBUTION OF POWER (394-98)
 - 1. **Dual Nature** of the New Union
 - 2. States Were Not Reduced to Provinces
 - a. **Residuary sovereignty**
 - 3. Political Sovereignty Rested with the People
 - 4. No Usurpation of State Power
 - a. Federalist, no. 45
 - 5. Key Role of the State Legislatures
 - 6. **Anti-Federalist** Preoccupation with **State Rights**
 - 7. Limited Scope of Federal Power

5.10 Congress Is Not an Oligarchy

- A. FOCUS ON SPECIFIC COMPLAINTS (398-99)

1. Congress Would Not Displace the State Legislatures
 - a. States would regulate federal elections
2. Objections to Specific Clauses
 - a. The tax power is not unlimited
 - b. General Welfare Clause is tied explicitly to the limited power to tax
 - c. **Federalist, no. 41:** Taxing and spending restricted to enumerated powers
3. No Limitation on the Amount That Might Be Taxed
 - a. **Federalist, no. 34:** National emergencies
 - b. Other safeguards would restrain Congress
4. Necessary and Proper, Supremacy Clauses: Nothing Is Left to Construction

5.11 The President Is Not a King

- A. FEDERALIST, NOS. 69 AND 78 (400)
 1. Differences Between the President and the **King** of Great Britain

5.12 The Judiciary Is the Least Dangerous Branch

- A. FEDERALIST, NO. 78 (400-01)
 1. Hamilton Dismissed Antifederalist Objections
 - a. Federalist, no. 78 [a Response to Brutus, no. 11]

5.13 Whether a Bill of Rights Was Necessary

- A. OPPOSITION TO A BILL OF RIGHTS (401-02)
 1. First Proposed in the Final Hours of the Convention
 - a. **George Mason** and **Elbridge Gerry**
 - b. Unanimously Rejected by the States as Unnecessary
 - b. Federalist, no. 84
 2. Declaration of Rights Seen as Superfluous
- B. **ALEXANDER HAMILTON'S OBJECTIONS** (402-03)
 1. Constitution Already Contained Specific Guarantees: **Habeas Corpus**, Prohibition of **Ex Post Facto** Laws and Titles of Nobility
 2. Such a Bill of Rights Does Not Properly Belong
 - a. They are "reservations of rights not surrendered to the prince" [Implication: a Bill of Rights turns the Constitution of Limitations into a Constitution of Powers]
 3. Thus It Might Be Dangerous
 - a. It might serve as a pretext to claim more power than has been granted
 4. Lack of a Clear Understanding of the Liberties Claimed
 5. The Constitution Itself Is a Bill of Rights
 - a. Any privileges and immunities that might be proclaimed in it are already embodied in the original document
- C. RATIFICATION STRUGGLE (403)
 1. The Issue of the Absence of a Bill of Rights Overshadowed All Others

5.14 The Clash of Values

- A. DISAGREEMENT ON FUNDAMENTAL ISSUES: THE ANTI-FEDERALIST VISION (403-04)
 1. Liberty Depends on Rule of Law
 - a. Charge: New System Rests on a Flagrant Disregard of the Forms of Legality
 - b. Madison's Rebuttal: The Changes Are Legitimate (Federalist, no. 40)
 2. Liberty Depends on Republicanism
 - a. Charge: It also depends on maintaining the primacy of the States
 - b. Preference for the simplicity of agrarian life
- B. FEDERALIST VISION (404-06)

1. Homogeneous Republics Equated with Pre-Commercial Society
 - a. The innocence of agricultural life is already lost
 - b. America is already committed to an agricultural order
 - c. Herbert Storing: the Anti-Federalists could only make half-hearted appeals to **civic virtue**, but they have never worked
 2. Madison's Solution: The **Extended Commercial Republic** in Federalist, no. 10
 - a. Danger of majority factions [Tocqueville later warned against **tyranny of the majority**]
 - b. Majority factions that represent diverse populations are more moderate than small, homogeneous factions
- C. BOTH SIDES TENDED TO EXAGGERATE THEIR CLAIMS (406)
- D. RATIFICATION PROCESS (406-09)
1. Lists of Proposed Amendments
 2. Greatest Concern: The Rights and Powers of the States
 - a. Reserved powers, direct taxes, monopolies
 3. Federalism: An Important Ingredient of the Bill of Rights
 - a. States exempted from the bill of rights [This has been gradually overturned by the Supreme Court's application of the **doctrine of incorporation** through the Fourteenth Amendment]
 - b. **Twofold purpose** of the Bill of Rights
 4. Drafting the Bill of Rights
 - a. Leadership of **James Madison**

C. THE BILL OF RIGHTS

5.15 Introduction

- A. PRECEDENTS (411-15)
1. Virginia's **Declaration of Rights**, 1776
 2. English **Bill of Rights**, 1688
 3. Guides to Interpretation
 - a. **Samuel Johnson's** dictionary, 1775
 - b. **Noah Webster's American Dictionary of the English Language**, 1828
 4. Legal Traditions
 - a. William Blackstone
 - b. **Joseph Story: Commentaries on the Constitution**, 1833
 - c. **James Kent, Commentaries on American Law**, 1826
 5. **Northwest Ordinance** of 1787
 - a. "The Magna Charta of American Freedom"
 - 1) **Daniel Webster**
 - b. Wording of the Thirteenth Amendment

5.16 The First Amendment: Religious Freedom, and Freedom to Speak, Print, Assemble, and Petition

- A. NO "WALL OF SEPARATION" (415-18)
1. **Establishment Clause**: Congress Had Originally Intended It as a Separate Amendment
 - a. Twofold purpose: No national religion, no interference with existing church-state relations in the States
 - b. Direct link to the **Free Exercise Clause**: One sect may not be preferred over another [As to what is included under this protection, Justice William O. Douglas later asserted that "a religious rite, which violates standards of Christian ethics and morality is not in the true sense, in the constitutional sense, included within 'religion', the 'free exercise' of which is guaranteed by the Bill of Rights"]
 - c. Compromise between James Madison and **Fisher Ames**

- d. Danger of a National Church
 - 1) Ames's motive
 - 2) Madison's motive
- e. **Purpose:** A device for keeping religious passions out of politics
- f. The existing establishments disappeared by 1833
- 2. Freedom of Speech, Publication, Press, and Assembly
 - a. **Prior censorship** prohibited
 - b. Civil liberty is understood as "ordered liberty" rather than license
 - c. Obscenities, libel, and calls to violence are not protected
- 3. No Absolute Rights
 - a. Justice **Oliver Wendell Holmes**: "The Bill of Rights is not a suicide pact"

5.17 The Second Amendment: The Right to Bear Arms

- A. MILITIA (419)
 - 1. An Armed Citizenry: It Prevents the Disarming of State Militias
 - a. A critical safeguard against standing armies
 - 2. **Joseph Story**
 - a. It is "the **palladium** [safeguard] of the liberties of the republic"

5.18 The Third Amendment: Quartering Troops

- A. PROTECTION OF CIVILIANS FROM MILITARY BULLYING (419-20)

5.19 The Fourth Amendment: Search and Seizure

- A. AMERICAN VERSION OF THE ENGLISH PRINCIPLE: "Every MAN'S HOUSE IS HIS CASTLE" (420)

5.20 The Fifth Amendment: Rights of Persons

- A. COMPLEX OF OLD RIGHTS AT LAW (420-21)
 - 1. **Indictment** by a Grand Jury
 - 2. Prohibition of **Double Jeopardy**
 - 3. Immunity Against **Self-Incrimination**
 - a. Legitimate presumption of guilt
 - b. Immunity for giving testimony
 - 4. **Due Process**
 - 5. **Takings Clause**
 - a. Rent control
 - b. Property rights have been less protected since 1937

5.21 The Sixth Amendment: Rights of the Accused

- A. CRIMINAL CASES (421-22)
 - 1. Enlargement of Rights
 - a. The **Miranda rule**
 - 2. Speedy Trials
 - a. Backlog of cases
 - b. "Justice delayed is justice denied" (attrib. William Gladstone)
 - [3. Protection Known as **Compulsory Witness**: Witnesses Are Obligated to Testify if Called]

5.22 The Seventh Amendment: Trial by Jury in Civil Cases

- A. CIVIL SUITS AT COMMON LAW (422)
 - 1. Large Monetary Awards

5.23 The Eighth Amendment: Bail and Cruel and Unusual Punishments

- A. CHANGING PERCEPTIONS (422-23)

5.24 The Ninth Amendment: Rights Retained by the People

- A. GENERAL PRINCIPLE OF CONSTRUCTION (423-25)
 - 1. Federalist Objection Concerning Rights That Are Omitted
 - 2. Reasoning Behind the Amendment: Hamilton's Federalist, nos. 83 and 84
 - 3. Sometimes Seen as a Source of New Rights
 - a. **Right to privacy**
 - b. Original purpose was to **limit rather than expand** the federal powers

5.25 The Tenth Amendment: Rights Retained by the States

- A. LIMITATION OF THE DELEGATED POWERS (425-26)
 - 1. The Supreme Court has largely rejected this view since 1937

5.26 Rights Versus Duties

- A. A RIGHT IS A CLAIM UPON SOMEBODY FOR SOMETHING (426-27)
 - 1. Where Force Rules Instead of Law, Society Falls into Anarchy [cf. the French Declaration of Rights]

Review

significance of Article VII	Constitution's popular base	Federalists and Anti-Federalists
Jonathan Elliot	James Madison	Patrick Henry
the American spirit	republicanism	Elbridge Gerry
Brutus	General Welfare Clause	criticism of Commerce Clause
majority rule	goal of equity jurisprudence	<i>The Federalist</i> : an authoritative source
federalism	enumerated powers	reserved powers
dual nature of the new union	Necessary and Proper Clause	Supremacy Clause
difference between President and King		George Mason
Alexander Hamilton	objections to a Bill of Rights	habeas corpus
ex post facto laws	ratification struggle	Anti-Federalist vs. Federalist visions
extended commercial republic	danger of majority factions	Bill of Rights: twofold purpose
precedents for the Bill of Rights	guides to interpretation	Samuel Johnson
Noah Webster	William Blackstone	Joseph Story
James Kent	Northwest Ordinance of 1787	Daniel Webster
Establishment Clause	Free Exercise Clause	Fisher Ames
militia	indictment by a grand jury	double jeopardy
self-incrimination	due process	Takings Clause
Miranda rule	compulsory witness	right of privacy
right as a claim upon somebody		