

The Case for the Constitution

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I. Introduction

At the Philadelphia Convention in the fateful summer of 1787, delegates met to discuss an entirely new national system of government. Their aim was not, as citizens and state legislatures believed, to amend the Article of Confederation; their vision was much more radical than that.³ The delegates intended to upend the Articles completely. What emerged from the muggy heat of Philadelphia in 1787 profoundly shapes our lives today. The United States Constitution is worthy of study and contemplation for at least three reasons: (1) it was a radical political innovation that has substantially shaped world history; (2) the document formed a system of government “of the people, by the people, [and] for the people”;⁴ and (3) by design, the people have a continued role in the life of the document.

II. The Radically Innovative Constitution

The United States Constitution was radically innovative. Thomas Paine famously quipped that early Americans had in their power the ability to “begin the world over again” — and they did just that.⁵ Among the earliest of decisions the delegates made was to write the Constitution down. This may seem like a small thing to modern observers, but its implications are monumental. Prominent constitutional scholar Michael Stokes Paulsen, writing with his son Luke, aptly summarized the importance of this innovation: “The written-ness of the Constitution matters enormously. America’s Constitution is a specific written document, not a collection of traditions or practices. . . In America, the fundamental rules of the game are written down, and intended to be binding.”⁶ Unlike any national constitution that preceded it, the rights granted to

³ Richard Beemon, *Plain Honest Men: The Making of the American Constitution* (New York: Random House, 2009), 20.

⁴ Abraham Lincoln, “Gettysburg Address,” 19 November 1863, accessed here: <https://www.loc.gov/item/rbpe.24404500/>.

⁵ Thomas Paine, “Common Sense,” 14 February 1776, accessed here: <https://oll.libertyfund.org/page/1776-paine-common-sense-pamphlet>.

⁶ Michael Stokes Paulsen and Luke Paulsen, “The Constitution: An Introduction,” (New York: Basic Books, 2015): 25.

the people and the restrictions imposed upon the government existed on parchment, not just in the ether.⁷ This meant that average Americans could know and understand their constitutional rights. Today, over 190 countries around the world have written constitutions.⁸

Equally as important as the “written-ness” of the Constitution was what was written. The Founders relied on contemporary political philosophy to create a new form of government.⁹ Among the most important innovations of this government are popular sovereignty, federalism, the separation of powers, civil rights and liberties, and the rule of law.¹⁰

In the Declaration of Independence, Americans had acknowledged that governments derive “their just powers from the consent of the governed.”¹¹ Accordingly, the Constitution acknowledges the paramount role of the people in governance. It is important to note that this took place “in a time when sovereign power was universally assumed to come from the divine right of kings or from military power.”¹² The people’s voice is heard through elected representatives.

⁷ The Massachusetts Constitution, which was written largely by John Adams, preceded the federal constitution by a few years. Separately, the small island of Corsica, which was independent only for a few years, established a written constitution in the 1750s. The Corsican Constitution even attempted to enact Enlightenment ideas. The world did not learn of Corsica’s Constitution until relatively recently, so it is not generally understood to have influenced world history in the way the U.S. Constitution did. Furthermore, Corsica was never widely internationally recognized as a nation because of the brief duration of its independence. This is why I argue that the U.S. Constitution, not the Corsican Constitution, was a radically innovative political instrument that profoundly influenced world history. For more on the Corsican Constitution, visit <https://www.jstor.org/stable/564654?seq=12>.

⁸ Crystal Jones, “Israel Is One of Only 5 Countries Without a Written Constitution. What Can It Learn from One of the Oldest—the UK?”, *themedialine*, 21 May 2023, <https://themedialine.org/by-region/israel-is-one-of-only-5-countries-without-a-written-constitution-what-can-it-learn-from-one-of-the-oldest-the-uk/>

⁹ In *The Spirit of Laws*, Montesquieu, a French political philosopher, argued that power should be used to check power, an argument relayed by James Madison in Federalist 51. An effective way of doing this, wrote Montesquieu, was to divide power between the executive, legislative, and judicial branches, and to allow each of the branches to check the power of the others. The entire text of *The Spirit of the Laws* can be found here: <https://oll.libertyfund.org/title/montesquieu-complete-works-vol-1-the-spirit-of-laws>. See especially Chapter VI: “Of the Constitution of England.”

¹⁰ Dallin H. Oaks, “Defending Our Divinely Inspired Constitution,” The Church of Jesus Christ of Latter-day Saints, 4 April 2021, https://www.google.com/search?q=when+was+general+conference+lds+april+2021&rlz=1C5CHFA_enUS898US898&oq=when+was+general+conference+lds+april+2021&aqs=chrome.69i57j33i160l2.6510j0j7&sourceid=chrome&ie=UTF-8

¹¹ Declaration of Independence, 1776, U.S. National Archives, <https://www.archives.gov/founding-docs/declaration>.

¹² Dallin H. Oaks, “Defending Our Divinely Inspired Constitution,” The Church of Jesus Christ of Latter-day Saints, 4 April 2021,

Through the principle of federalism, the Constitution divides power between the federal government and state governments. This innovative balance allows for both national unity and individual state autonomy, thus empowering states to serve as the “laboratories of democracy,” testing innovative policies that may end up benefiting the nation as a whole.¹³ Additionally, localized governments are better suited to understand the needs and preferences of their respective populations. It is easier, for example, for elected Utahns to understand their neighbors and implement policy solutions for them than for D.C. administrators to craft effective policies for people with whom they have never interacted.

In addition to balancing power between national and state governments, the Founders ensured federal power would itself be balanced. James Madison recognized the great difficulty of forming a non-tyrannical government: “you must first enable the government to control the governed; and in the next place oblige it to control itself.”¹⁴ Importantly, the Constitution separated powers between three distinct branches of government, each possessing the ability to check the powers of the others, thereby ensuring the government could “control itself.” By including provisions ensuring the executive, legislative, and judicial branches possessed overlapping power, the Founders ensured that no one branch would dominate American political life.

The Constitution is a story of compromise. Today, “the Bill of Rights stands as the most important element of the Constitution, the touchstone. . . of our shared inalienable rights and

https://www.google.com/search?q=when+was+general+conference+lds+april+2021&rlz=1C5CHFA_enUS898US898&oq=when+was+general+conference+lds+april+2021&aqs=chrome.69i57j33i160l2.6510j0j7&sourceid=chrome&ie=UTF-8

¹³ Justice Louis Brandeis in *New State Ice Co. v. Liebman* (1932). Brandeis wrote, “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” Accessed here: <https://supreme.justia.com/cases/federal/us/285/262/>.

¹⁴ James Madison, Federalist Papers No. 51, 1788, accessed here: <https://billofrightsinstitute.org/primary-sources/federalist-no-51>.

liberties.”¹⁵ But it was not always that way. Many Federalists vehemently opposed including a bill of rights in the Constitution. James Madison, one of the staunchest Federalists, however, came to understand the political necessity of the Bill of Rights. It would not only ensure Americans’ rights against their government, but also win the loyalty of the Antifederalists. Madison’s ingenious unification of “practical considerations and noble aspirations” continues to protect citizens from tyranny today.¹⁶

Finally, the Framers ensured that all people, regardless of status or wealth, are subject to the same rules. John Adams famously wrote that our republic is “a government of laws and not of men.”¹⁷

Each of these innovations were incredibly important in the 18th Century and remain so today. Popular sovereignty, federalism, the separation of powers, civil rights and liberties, and the rule of law work together to create a free and prosperous society—but they are fragile. Without continual safeguarding by the citizenry, our Constitution can crumble. Our forebears gave us a republic, but we must keep it.¹⁸

III. The People’s Document

Among the most significant provisions of the newfangled Constitution was the process whereby it would take effect. It stipulated that the people of the United States, by electing individuals to represent them in special conventions, would choose whether the Constitution

¹⁵ Carol Berkin, *The Bill of Rights: The Fight to Secure America’s Liberties* (New York: Simon and Schuster, 2015): 1.

¹⁶ Carol Berkin, *The Bill of Rights: The Fight to Secure America’s Liberties* (New York: Simon and Schuster, 2015): 3.

¹⁷ John Adams, *Thoughts of Government*, April 1776, National Archives, accessed here: <https://founders.archives.gov/documents/Adams/06-04-02-0026-0004>.

¹⁸ On the last day of the Constitutional Convention, a lady asked Benjamin Franklin whether the United States would have a monarchical government or a republican one. Franklin responded, “A republic, if you can keep it.” This episode is recorded in the diary of James McHenry. For commentary on McHenry and his diary, visit <https://blogs.loc.gov/manuscripts/2022/01/a-republic-if-you-can-keep-it-elizabeth-willing-powel-benjamin-franklin-and-the-james-mchenry-journal/#:~:text=On%20the%20page%20where%20McHenry,here%20alluded%20to%20was%20Mrs.>

would take force. Only when nine of the thirteen American colonies approved of the document would it be enacted. This provision further emphasized the undergirding theory of the document: that the people, not a monarch or any individual state, would be sovereign. Akhil Amar, one of the world's foremost scholars on the American Constitution, argues that the people of the United States, more than James Madison or any other Founding Father, wrote the Constitution: "The delegates had come from across the continent, and their proposed plan truly did reflect America more than it did any one person's vision."¹⁹ Near the time of the Constitution's ratification James Wilson observed, "This Constitution, proposed by [the Philadelphia draftsmen]. . . is laid before the citizens of the United States. . . By their fiat, it will become of value and authority; without it, it will never receive the character of authenticity and power."²⁰

Because of the importance of the citizens' fiat, supporters of the Constitution, commonly called Federalists, took to newspapers to defend the document.²¹ The Federalists understood a crucial fact: for the Constitution to be ratified—and even more importantly, survive—the public would need to be persuaded by its provisions. The people would need to come to see the document as their own. Ultimately, they did, and "by their fiat," it became authoritative.

The importance of the role of the people in the drafting and ratification of the Constitution cannot be overstated. Law professor Paul Carrington noted that "constitutions work to provide political stability if they reflect the inculturated notions of those they govern, *but not otherwise*."²² The words of the United States Constitution, powerful as they may be, are not universally applicable. This is evidenced by the Liberian Constitution of 1847. The American

¹⁹ Akhil Amar, "The Words That Made Us: America's Constitutional Conversation, 1760-1840," (New York: Basic Books, 2021): 195-196.

²⁰ Akhil Amar, "America's Constitution: A Biography." (New York: Random House Trade, 2005): 7.

²¹ See "Federalist Papers: Primary Documents in American History," *Library of Congress*, accessed here: <https://guides.loc.gov/federalist-papers/full-text>.

²² Paul Carrington, "Writing Other Peoples' Constitutions," *North Carolina Journal of International Law* 33, no. 167 (2007): 169. [Emphasis added] Accessed here: https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/ncjint33&id=183&men_tab=srchresults

Colonization Society enlisted an American scholar named Simon Greenleaf to produce Liberia's first constitution.²³ Predictably, the scholar produced a document that greatly resembled the American Constitution.²⁴ The words of Liberia's Constitution quickly proved meaningless as the elite and powerful routinely ignored constitutional guarantees when they deemed them inconvenient.²⁵ In short, Greenleaf produced an American constitution for a Liberian people. For that reason, it was destined to fail.²⁶

Many constitutions pledge attractive rights to individuals, but those rights mean little if they are not binding. Justice Antonin Scalia remarked, "Every banana republic in the world has a bill of rights."²⁷ Constitutional scholar Justin Collings noted that even North Korea's Constitution grants its people "the right to rest and leisure."²⁸ Both Scalia and Collings argued that structural guarantees differentiate the United States from "banana republics." But the text of Liberia's Constitution did indeed promise structural guarantees.²⁹ I would add to Scalia and Collings's insights that the people must be involved in the drafting of their governing documents to ensure they reflect their values. If the people are granted a role in the creation of their

²³ "J.J. Roberts to Simon Greenleaf, 6 April 1852," *Harvard Law School*, accessed on 8 September 2023, <https://exhibits.law.harvard.edu/jj-roberts-simon-greenleaf>

²⁴ "J.J. Roberts to Simon Greenleaf, 6 April 1852," *Harvard Law School*, accessed on 8 September 2023, <https://exhibits.law.harvard.edu/jj-roberts-simon-greenleaf>

²⁵ Paul Carrington, "Writing Other Peoples' Constitutions," *North Carolina Journal of International Law* 33, no. 167 (2007): 175–77. Accessed here:

https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/ncjint33&id=183&men_tab=srchresults

²⁶ The rule of the ethnic ruling class, the Americo-Liberians, came to an end in 1980 through a violent coup. The new leader, Samuel Doe, suspended the Liberian Constitution. Eventually, the new leadership brought forth a new constitution. See the following webpage for more information: <https://www.ictj.org/sites/default/files/ICTJ-Liberia-Brief-History-2006-English.pdf>.

²⁷ Antonin Scalia, "Opening Statement on American Exceptionalism to Senate Judiciary Committee," delivered on 5 October 2011. Accessed here:

<https://www.americanrhetoric.com/speeches/antonin Scalia american exceptionalism.htm>.

²⁸ Justin Collings, "Perspective: How the U.S. Constitution Changed the World," *Deseret News*, June 27, 2021, <https://www.deseret.com/2021/6/27/22546064/perspective-how-the-u-s-constitution-changed-the-world-democracy-george-washington-law-politics>

²⁹ The text of the Liberian Constitution of 1847 can be found here:

<http://crl.gov.lr/doc/CONSTITUTION%20OF%201847%20final.pdf>. See especially Article 14, which divides the powers of government between the executive, legislative, and judicial branches. See also all Articles under the Legislative Powers, Executive Powers, and Judicial Department sections.

constitution, they are likely to ensure its provisions are binding. If, on the other hand, the people are inequitably cut out from their governance, no such action can be taken.

Understanding the role of the people in the survival of a constitution provides essential context. The people are the lifeblood of an effective constitution. Not only do people need constitutions for vital protections, but constitutions also need them. This is a critical reason Americans should study and contemplate their Constitution.

IV. A Document for Tomorrow

The Constitution has never been perfect. For example, at its inception, the document contained abhorrent clauses designed to placate slaveholders.³⁰ While these clauses may have been necessary to the document's success, they are no less lamentable.³¹ Luckily, we are not stuck with those racist passages today. A defining characteristic of the Constitution is its changeability.

The Framers recognized that people and sentiments change. Some of the most inspiring episodes in American history took place when the people rallied together to effect meaningful change. Groups like the abolitionists and suffragists labored to bring about sweeping reforms in American society, and both groups fought for amendments to the Constitution. If one has a problem with American society, one may endeavor to fix it—for each American plays a role in the perfecting of the union. As President Barack Obama once remarked, “That is the true genius of America — that America can change. . . And what we have already achieved gives us hope for what we can and must achieve tomorrow.”³² We should recognize the achievements of our past,

³⁰ David Waldstreicher, “How the Constitution Was Indeed Pro-slavery,” *The Atlantic*, September 19, 2015, <https://www.theatlantic.com/politics/archive/2015/09/how-the-constitution-was-indeed-pro-slavery/406288/>

³¹ Some constitutional scholars have argued that Northern delegates at the Constitutional Convention could have convinced the Southerners to adopt a plan of gradual emancipation. Some states in the North had employed gradual emancipation provisions as early as 1777 (the Vermont Constitution of 1777 can be accessed here: <https://sos.vermont.gov/vsara/learn/constitution/1777-constitution/>).

³² “Transcript of Barack Obama’s Victory Speech,” *National Public Radio*, 5 November 2008, accessed here: <https://www.npr.org/2008/11/05/96624326/transcript-of-barack-obamas-victory-speech>.

especially those embodied in our Constitution, but we should also keep an eye to what we can accomplish in the future—always striving to create a more perfect union.

Bibliography

- Adams, John. *Thoughts of Government*. April 1776. *National Archives*. Accessed at <https://founders.archives.gov/documents/Adams/06-04-02-0026-0004>.
- Amar, Akhil. "America's Constitution: A Biography." New York: Random House Trade, 2005.
- Amar, Akhil. "The Words That Made Us: America's Constitutional Conversation, 1760-1840." New York: Basic Books, 2021.
- Beeman, Richard. *Plain Honest Men: The Making of the American Constitution*. New York: Random House, 2009.
- Carrington, Dorothy. "The Corsican Constitution of Pasquale Paoli (1755-1769)." *The English Historical Review* 88, no. 348 (1973): 481–503. <http://www.jstor.org/stable/564654>.
- Carrington, Paul D. "Writing Other Peoples' Constitutions," *North Carolina Journal of International Law* 33, no. 167 (2007). <https://scholarship.law.unc.edu/ncilj/vol33/iss2/1/>
- Collings Justin. "Perspective: How the U.S. Constitution Changed the World." *Deseret News*. June 27, 2021. <https://www.deseret.com/2021/6/27/22546064/perspective-how-the-u-s-constitution-changed-the-world-democracy-george-washington-law-politics>
- Dennis, Peter. "A Brief History of Liberia." *The International Center for Transitional Justice*. May 2006. Accessed on September 29, 2021. <https://www.ictj.org/sites/default/files/ICTJ-Liberia-Brief-History-2006-English.pdf>.
- "J.J. Roberts to Simon Greenleaf, 6 April 1852." *Harvard Law School*. Accessed on September 8, 2023. <https://exhibits.law.harvard.edu/jj-roberts-simon-greenleaf>.
- Jones, Crystal. "Israel Is One of Only 5 Countries Without a Written Constitution. What Can It Learn from One of the Oldest—the UK?" *themedialine*, 21 May 2023. <https://themedialine.org/by-region/israel-is-one-of-only-5-countries-without-a-written-constitution-what-can-it-learn-from-one-of-the-oldest-the-uk/>.
- Levy, Josh. "A Republic, If You Can Keep It: Elizabeth Willing Powel, Benjamin Franklin, and the James McHenry Journal." *Library of Congress Blog*. 6 January 2022. <https://blogs.loc.gov/manuscripts/2022/01/a-republic-if-you-can-keep-it-elizabeth-willing-powel-benjamin-franklin-and-the-james-mchenry-journal/#:~:text=On%20the%20page%20where%20McHenry,here%20alluded%20to%20was%20Mrs.>
- Liberian Constitution of 1847. Accessed here: <http://crc.gov.lr/doc/CONSTITUTION%20OF%201847%20final.pdf>.
- Lincoln, Abraham. "Gettysburg Address," 19 November 1863. Accessed at <https://www.loc.gov/item/rbpe.24404500/>.

Madison, James. Federalist Papers No. 51, 1788. Accessed at <https://billofrightsinstitute.org/primary-sources/federalist-no-51>.

New State Ice Co. v. Liebman (1932).

Montesquieu. *The Spirit of the Laws*. Accessed here: <https://oll.libertyfund.org/title/montesquieu-complete-works-vol-1-the-spirit-of-laws>. See especially Chapter VI: "Of the Constitution of England."

Paine, Thomas. "Common Sense," 14 February 1776. Accessed at <https://oll.libertyfund.org/page/1776-paine-common-sense-pamphlet>.

Scalia, Antonin. "Opening Statement on American Exceptionalism to Senate Judiciary Committee." Delivered on 5 October 2011. Accessed here: <https://www.americanrhetoric.com/speeches/antoninscaliaamericanexceptionalism.htm>.

The Vermont Constitution of 1777. Accessed here: <https://sos.vermont.gov/vsara/learn/constitution/1777-constitution/>.

"Transcript of Barack Obama's Victory Speech." National Public Radio, 5 November 2008. Accessed at <https://www.npr.org/2008/11/05/96624326/transcript-of-barack-obamas-victory-speech>.

Waldstreicher, David. "How the Constitution Was Indeed Pro-slavery." *The Atlantic*. 19 September 2015. <https://www.theatlantic.com/politics/archive/2015/09/how-the-constitution-was-indeed-pro-slavery/406288/>.