

The U. S. Constitution: Pull the Curtain
One of a series of two articles on the U.S. Constitution
by Greg Coleridge and Virginia Rasmussen
By What Authority

a publication of the Program on Corporations, Law & Democracy [POCLAD], Winter 2007

“Government is instituted to protect property of every sort... This being the end of government, that alone is a just government which impartially secures to every man whatever is his own.”
—James Madison (1751 - 1836)

We have a big problem in this country. It goes deeper than the vast array of serious issues many of us work tirelessly to remedy. At root it's not a political, economic, social or even ecological problem. It is a problem of belief – namely a belief that since our break with the King, *We the People* have had the power, *or once had the power*, to shape our own lives and that of our communities and country.

Many cling to a faith in these late 18th Century ideals and doctrines, taking pride in a more than 200-year celebration of them. The result of this unexamined faith is an avoidance of the mutual learning and work required to explore the good and the bad of our founding story. It has prevented making real the best of Revolutionary Era possibilities.

The daily babel of information, opinion, assertion and distortion, deepens people's confusion. Lawrence Goodwyn, in his book, *The Populist Moment*, holds that “we are culturally confused and cannot even imagine our confusion. ...we are culturally organized by our society... not to understand the prerequisites of democracy itself.” This leaves us a naive and apolitical people, uncurious about the world, unaware of or indifferent to how the United States affects other lands and peoples.

In this article we will take the measure of the Constitution's intentions and briefly explore the story behind its authors and their times. We plan a follow-up article in a future *By What Authority*, hoping to draw from our readers those issues and questions they would like to see at the center of a second Constitutional Convention and the drafting of a new Constitution.

The Dangers of Make-Believe

We need to be clear-eyed about who the Founding Fathers were, what they intended, and what “the other” Founding Brothers and Sisters believed, the ones who lost the day. Being losers, their thinking quickly disappeared from our history books, their sense of the possible lost to us. This loss feeds today's confusion and starves our public imagination.

The nation's founding beliefs have held us captive for generations. They have been effectively used to rally the crowds gathered before 4th of July podiums; to claim a unique democratic heritage that survives to the present day; to justify our judging the democratic legitimacy of every other nation and our intervention, even invasion of other countries on behalf of a democracy and “freedom” we profess to understand and to practice.

There are, of course, positive features to be found in the original Constitution. These include:

- prohibiting the United States or any state from granting titles of nobility;
- guaranteeing to each state a “Republican Form of Government;”
- entitling the citizens of each state all the “Privileges and Immunities of Citizens in the several States;” and
- requiring no religious test as a “Qualification to any Office or public Trust under the United States.”

The U.S. Constitution represented a revolutionary shift in governance – the concept that a set of agreements can “lead the way” rather than a single person based on bloodline, military conquest, or “anointment from God.” It has been heralded as the only shield in the nonviolent struggle against trespasses on our liberties by the

USA Patriot Act, government spying on citizens in search of terrorist links, the inhumane torture of prisoners, and the suspension of the *writ of habeas corpus* for detainees in the “war on terrorism.” *Habeas corpus* grants prisoners access to the courts to determine the lawfulness of their detention.

Yet it was not *We the People* the Constitution put in charge, nor were the people’s protections or rights its *central* purpose. Governing power would not rest with the propertyless or with Native Americans, African Americans or women. That power has *never* rested with those lacking wealth or an elevated association with the corporate form. Not before Bush II or Bush I, not before Clinton, Reagan, Kennedy, FDR, TR, Honest Abe, Madison or Jefferson, not even before George Washington. Such authority was not the people’s after the Bill of Rights or the passage of the 13th, 14th, 15th, 19th or any other amendment.

We didn’t have authentic democracy before the recently signed Military Commissions Act or the Patriot Act, before COINTELPRO, the Red scare of the 1950s, or the Sedition Act of 1918 which limited freedom of speech and the criticism of government during war. The people of the USA did not govern themselves prior to the Haymarket affair of 1886 or the Alien and Sedition Acts of 1798, pushed through Congress to stop genuine self-governance in its tracks.

The Constitutional foundation of this country was fixed against self-governance from the start, despite our being taught, for as long as this nation is old, that the United States is the most democratic land on the planet and the U.S. Constitution a brilliant document in service to the people’s authority.

“If for decency, progress, order and liberty in the community and nation, we cannot rely upon the character, sentiments, allegiances, and moral habits of the people, upon what, in heaven’s name, can we rely?”

–Charles Beard (1874 - 1948), “An Economic Interpretation of the Constitution...”

When a horrific law is passed or a leader abuses power, we want to count on our one-of-a-kind, “self-correcting” system to set things right. But wishful thinking is costly. It gives proof to historian Edward Morgan’s warning that, “Government requires make-believe. Make believe that the King is divine, make believe the he can do no wrong or make believe that the voice of the people is the voice of God. Make believe that the people have a voice or make believe that the representatives of the people *are* the people. Make believe that governors are the servants of the people. Make believe that all men are equal or make believe they are not.”

It's time to get beyond make-believe. We need to see this Constitution anew, acknowledge its positive elements and find those provisions that thwart the democracy to which we aspire.

The Framers Had Options

The Federalist “Fathers” were men of their time. How could they be expected to design a government that would warm the heart of today’s true democrat? This question is often raised when the Constitution is exposed to a harsher critique.

In fact, the Founders lived amidst a fertile context of competing visions and ideas. Thus, the Federalist “winners” chose from a rich field of possibility those arguments that served their own priorities. They put their trust in the few rather than the many, in the individual rather than the community, in autonomy rather than connection. Their central theme was private rights as opposed to a larger public virtue. And above all, they sought stability and security through property and its protection, not through the capacities and possibilities of all the people.

These were not the revolutionary ideals of the *Declaration of Independence* – the self-evident truth of all men’s equality. **The Declaration exhorted the people “to alter or to abolish” any government that ceases to derive its “just powers from the consent of the governed,” or becomes destructive of the people’s “unalienable Rights,” including “Life, Liberty and the pursuit of Happiness.”**

The Anti-Federalists of 1776 had faith in legislatures and the common good, and feared the rulers more than they did the people. They stood against luxury, great wealth, undue centralization, unfettered commerce and speculation. According to historian Joyce Appleby, “The colonial pamphleteers stressed the eternal opposition between liberty and authority, the aggressive nature of power, and the balance of the one, the few and the many.” They warned that great differences in the power and wealth of a citizenry would make impossible the pursuit of the collective good.

“...government is instituted for the protection, safety, and happiness of the people, and not for the profit, honour, or private interest of any man, family, or class of men ...the origin of all power is in the people, and they have an incontestable right to check the creatures of their own creation, vested with certain powers to guard the life, liberty and property of the community...”

—Mercy Otis Warren (1728 - 1814), “Observations on the New Constitution”

Much of this sentiment was contained in early state constitutions. The Pennsylvania Constitution of Rights directed state laws to discourage concentrations of wealth, maintaining that “an enormous proportion of Property vested in a few Individuals is dangerous to the Rights, and destructive of the Common Happiness of Mankind.” Other laws of that state prohibited slavery, insisted on fair treaties with “the Indians,” barred the raising of a militia, and provided for a citizen legislature.

The *Articles of Confederation*, ratified in 1781, were broadly democratic, holding that the states were equal, each having one vote in a single-branched government similar to our House of Representatives. There was no president or judiciary and Congress settled disputes between the states. Elections were held every year and no one could serve for more than three out of every six years. The Congress president could serve only one in every three years. Congress could raise money on a regular basis only to support the post office, while declarations of war or military build-up needed approval from nine of the thirteen states.

As the nation evolved, there was a logical need to revisit these early arrangements for the new states. **But we learn, somewhat to our surprise, that there was more than one way to design a government in 1787.**

Appleby makes the case for a more democratic beginning:

- citizens could have had more of a role in making decisions;
- citizens could have defined the course of commerce beyond being mere buyers and sellers (setting production and trade policies within and among their jurisdictions);
- states could have maintained more control over economic and commercial life (determining where investments were made, what arrangements would protect workers, how to design monetary and barter systems for purchase or exchange);
- private property could have played a lesser role in both law and politics, allowing the propertyless greater rights and the commons a higher value;
- the Constitution could have been made easier to change, permitting a better fit with our cultural evolution; and
- the framers could have made governance an admired, not a disparaged enterprise; politics honorable rather than despised.

Alas, the Federalist Founders established a government of, by and for the “talented” few as determined largely by one’s holdings in property.

We the (*Propertied*) People: Undemocratic Provisions of the U.S. Constitution

A convention was called by the states in 1787 to craft modest amendments to the Articles of Confederation directed primarily toward issues of trade. There was no popular election of delegates and the Federalists in attendance used this opportunity to bypass the Articles and write a new Constitution instead. It was an

undemocratic convention (could we call it a coup d' état?) with meetings closed and the proceedings not made public for 53 years.

The men central to this project are familiar to us all. The monarchist, Alexander Hamilton, spoke for the commercial interests, wanting a government “capable of regulating, protecting and extending the commerce of the Union ...able to protect against the domestic violence and the depredations which the democratic spirit is apt to make on property...” He saw the people as “a great beast.” In attendance was George Washington, the wealthiest man in the new nation, who believed “we have probably had too good an opinion of human nature in forming our confederation. Experience has taught us that men will not adopt and carry into execution measures best calculated for their own good without the intervention of a coercive power.” John Jay was there, too. He thought “the people who own the country ought to govern it.” And then there was young James Madison who wrote: “The public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves.”

Madison’s view that the primary purpose of government was “to protect property of every sort” had plenty of popular support. For many of the Founders, the protection of liberty and the protection of property were one and the same.

The *Preamble* to the Constitution reads: “We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.” But the Constitution’s provisions were at odds with the self-governing spirit of this opening, a discrepancy not lost on the people!

The Framers urged adoption without amendments. In today’s parlance, we’d call it a “fast track” strategy. But many people refused ratification without the addition of a Ten Amendment *Bill of Rights*. The Framers agreed to these amendments because they did not disturb their plan of governance. They defined people’s rights as *protections from* the authority of government rather than their *powers to* govern or to shape their own economies. The structured imbalance between those with property and those without remained secure. The Bill of Rights, along with the rules of property and exchange necessary for justice, economic freedom and prosperity would be implemented through judicial processes, safe from the arenas of political participation.

The original Constitution contains many provisions that were meant to protect “We the *Propertied People*” rather than “We the People.” Elements that serve the fortunes of the already powerful and wealthy are buried in what many believe to be the most democratic of documents. Here are selected examples:

Limited personhood (Article 1, Section 2)

In determining how many Representatives would come from each state, the Constitution established population based on the “whole number of free persons, including those bound to service for a term of years ... and three fifths of all other persons.” The “all other persons” were slaves worth 3/5ths of whole persons for purposes of population, thus enhancing the master’s power, and 0/5ths when it came to the right to vote. The latter was true of women and people without property (i.e. indentured servants or renters). At the time of the first Presidential election in 1789 only 6 percent of the population – white, male property owners – were eligible to vote.

No direct election of Senators (Article 1, Section 3)

Both Senators from each state were originally chosen by the state legislatures of that state. The public (that is, only white, male property owners who could vote) had only an indirect role in choosing those in the federal government responsible for trying impeachments, passing international treaties, and confirming Supreme Court Justices. The Senate still consists of two members per state, regardless of population. The 2006 election brought us only one person of color and the unprecedented number of 16 women!

Commerce Clause (Article 1, Section 8)

"Congress shall have powers to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Some have nicknamed this provision "Baby NAFTA" since it established federal power over the right of states to control the terms and conditions of trade within their borders. Its antidemocratic legacy continues today, nullifying as unconstitutional legislation passed by communities to protect health and safety, local economies or the natural commons.

Holding citizens indefinitely without charge (Article 1, Section 9)

"The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." The government has the power to hold persons indefinitely without charge when it feels threatened by certain circumstances, violent or nonviolent. It happened once under President Lincoln. This clause stands with another – the placement of state militia under federal control ("...to execute the laws of the union, suppress insurrections and repel invasions..." Article 1, Section 8) in honoring Madison's fear of "rampant democracy" or Elbridge Gerry's concern about "excess democracy." (So much for upholding the *Declaration of Independence* with its right of revolution!)

Contracts Clause (Article 1, Section 10)

"No state shall pass any law impairing the obligation of contracts." Government could not interfere with private contracts. This sounds fair until one considers the many instances in our society where one party is more powerful than the other in a contractual setting: rich vs poor, employer vs employee, landlord vs tenant, creditor vs debtor. In these cases, to uphold the sacredness of contracts over principles of justice is to use the power of government to protect the rights of the privileged. This provision was used as a battering ram to overturn dozens of state laws enacted to protect the "general welfare" (as asserted in the *Preamble*), especially laws on behalf of workers' hours and conditions. This provision ensures that private law trumps public law – whatever the *Preamble* may say.

No direct election of the President (Article 2, Section 1)

A President is not chosen by receiving the greatest number of popular votes, as Al Gore can attest, but by receiving a majority of "electoral college" votes. The number of "Electors" from each state is determined by the total number of its representatives and senators (an example of how the failure to allot senators by population gives a stronger voice to the smaller states). While custom dictates that a state's electoral vote be given to the winner of the popular vote in that state, it's not legally required. In the event of an electoral vote tie, as in the 1876 disputed election, the House of Representatives decides who wins. In the case of Florida's dispute over the *Bush v Gore* count in 2000, the Supreme Court decreed the winner.

Appointment of Supreme Court ...for life (Article 2, Section 2)

The indirectly elected President appoints Justices to the U.S. Supreme Court. The originally unelected Senate confirms those appointments. Justices are unaccountable (except through impeachment) and can serve for life. The Supreme Court has become the most powerful branch with the authority to overturn legislation passed at federal or state levels. The high court has declared unconstitutional more than 1200 state and local laws, nearly half of them since 1950.

Slaves are property ...the "Return Servant's" clause (Article 4, Section 2)

"No person held in Service or labor in one state, under the laws thereof, escaping into another, shall in consequence of any regulation therein, be discharged from such service or labor, but shall be delivered up on Claim of the Party to whom such service or labor may be due." When a slave escaped the south, (s)he was not free when coming to the north or to "free states." The 1857 Supreme Court ruled against Dred Scott, stating that slaves were not legal citizens and had no standing in the courts. As property they had to be returned to their rightful owner. That's why there was an "underground railroad" that helped people flee to Canada.

A riddle:

Question: How can five people amend the United States Constitution?

Answer: Become Supreme Court Justices.

- Peter Kellman

Amending the Constitution (Article 5, Section 2)

It was made especially difficult to change these profoundly undemocratic provisions from the bottom up. Proposed amendments must be approved by 2/3rds of Congress, then ratified by the legislatures of 3/4ths of the states. Abolishing slavery or gaining women's right to vote required mass social movements waged over several decades. By contrast, when the propertied few over the last 200-plus years desired Constitutional change short of adopting a new amendment, they pursued a much easier route – convincing a simple majority of the Supreme Court Justices.

All in all, these provisions shielded property from people, the minority from the majority, the ruling few from the pressures of democracy. Several of the 26 Amendments to the original Constitution have removed some of these impediments to self-governance. But many remain and none have provided safeguards against concentrated private, that is, corporate power.

We the People have inherent power to make our own decisions. We're not genetically programmed to follow a "leader" who takes us toward destinations not of our choosing. We can think, reason and act in ways that promote our common interests and those of the natural world. Unfortunately, the U.S. Constitution was set up not to extend our power but to repress it.

Is it not time to drive real self-governance into the Constitution? To learn from the Abolitionists, the Suffragists, the Populists, and Civil Rights activists who understood the denial of people's rights and powers and demanded their inclusion in the nation's governance? Is it not time to take advantage of the 1776 Declaration's urging to "alter or abolish" a form of government that fails to derive its powers from the consent of the governed?

POCLAD joins many of you in wanting another round of constitutional thinking that links directly to *people's* vision and commitments, *our* powers and rights in a democracy. How would we design the structures and processes of government and law to serve public authority, the earth and all its creatures and features?

We welcome your reactions and suggestions (by March 1, 2007) on this timely undertaking. We'll share them in the second article of our constitutional explorations.

"It would be better to trust the many than the few, who are infected with the plague of self-interest and selfishness."

–Tom Paine (1737 - 1809), "The Rights of Man"

References

- Joyce Appleby, "The American Heritage: The Heirs and the Disinherited," *The Journal of American History*, pp. 798-813, 1992.
- Charles A. Beard, *An Economic Interpretation of the Constitution of the United States*, New York: The Free Press, 1913, revised 1986.
- Robert A. Dahl, *How Democratic Is the American Constitution?*, New Haven: Yale University Press, 2001.
- Jerry Fresia, *Toward an American Revolution: Exposing the Constitution and Other Illusions*, Boston: South End Press, 1988.
- Peter Kellman, *Building Unions, Past Present and Future*, New York: The Apex Press, 2001.
- Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy*, Chicago: University of Chicago Press, 1990.
- Herbert J. Storing, *What the Anti-Federalists Were For*, Chicago: University of Chicago Press, 1981.
- Mercy Otis Warren, "Observations On the New Constitution by a Columbian Patriot," 1788. Massachusetts Historical Society, Mercy Warren Papers.