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Your Friend, the Constitution



Studies show that a majority of Americans know very little about the Constitution, the very document that is the foundation of our government and laws. That doesn't stop them from having an opinion, of course. We're Americans; we think we know everything.

This is especially true of many conservatives these days, who proudly hold positions contrary to all facts. (Climate change is a hoax! Evolution is a lie! Trickle-down economics works! Being gay is a choice! Obama was born in Kenya!) You'll never win a debate with these people because they're operating on a completely different plane of thought as the rest of us.¹

However, there really are some reasonable conservatives out there who will respond to actual logic and facts. They may not be in charge of the current Republican party, and they may be few and far between these days, but when you do encounter one, this book may help you.

For that matter, this book may also help you debate well-meaning liberals who don't understand things like Freedom of Speech. There seems to be an impressive number of them, especially on college campuses.

And it's really not that complicated to get the basics of the Constitution right.

This book is meant to help. It's definitely not a textbook; I'm not going to go into great detail about the hundreds of years of case law, and hopefully I'm going to keep it interesting (something my Constitutional Law professors often had trouble accomplishing). It's short—almost as short as the Constitution itself—because it's meant to be introductory. Even if you just read this short book, though, you'll know more about the Constitution than 99% of your fellow Americans, including certain Presidents I could name.

But we have to start with some basic premises. You can't discuss the Constitution without knowing what it is and how it got here.

The Goddamn Articles of Confederation

You can drive from Boston down to Raleigh in a day, or, if you wish, take a plane from Boston in the morning and be in Los Angeles by afternoon.

1. I'm using the word "thought" ironically here

So imagine what life must have been like in 1776, when traveling from Boston to Philadelphia took weeks—slightly less if you took a ship. Most people never left the area in which they were born.

Each state was like a different country, which isn't too surprising when you compare the US to Europe. Look how close and small all those countries in Europe are. At least we all (mostly) spoke the same language.

So when we declared our independence from Britain, we saw ourselves more as a collection of different states than as a country. Hell, we even called ourselves “The United States of America” instead of just plain old “America” or something less interesting (Benjamin Franklin's suggestion of “Duckburg” never caught on).²

And this has led to countless problems since.

The Articles of Confederation created a confederacy, which was the root of the problem.³ The states were more powerful than the federal government. The feds couldn't even tax and had to ask the states to give them money for things like, I dunno, the military. There was a Congress but no President. There was no judicial branch to handle disputes between the states or between citizens from two different states.

States started ignoring the federal government even with the Articles. They'd print their own money⁴ and make their own treaties with foreign governments. And the Articles didn't give the feds any power to do anything about it.

It didn't take long for people to see that this wasn't working. So a meeting in Philadelphia was held in May of 1787. Each state sent representatives. They quickly realized that the Articles needed a lot more than a few tweaks.

2. Franklin had a great sense of humor. He wrote an article about farting, and had a top ten list of why you should make love to older women, with the number one reason being “They are so grateful.” He suggested using the turkey for the US symbol instead of an eagle (He was kidding, even though some trivia questions don't realize that). He never suggested “Duckburg” though.

3. The Confederate States of America clearly learned nothing when they declared war against us.

4. Technically, they issued “bills of credit” which were pretty much the same thing, but I'm not going to write a treatise here about early monetary policies.

The delegates decided to throw the Articles into the trash and write a Constitution. They wisely didn't tell anyone they were doing this so as not to be called back by their respective states. They knew that they had to write a completely new document to solve their problems.

It solved some of them.

But before we discuss what they actually passed, let's make three things clear:

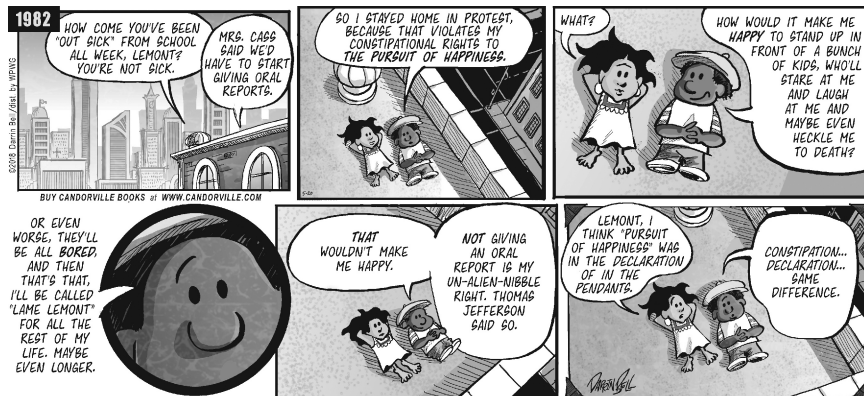
The Constitution is not the Declaration of Independence

I'm always amazed at how many people confuse the two. The Declaration was written by Thomas Jefferson and signed in 1776, with John Hancock's signature prominent.

This is the document that says, basically, "Hey King George! Screw you!" It starts off with "When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation." (Or, to be more concise, "Here's why we're leaving, asshole.")

The Declaration also has the famous sentence "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

Neither of those sentences can be found in the Constitution.



The Constitution came eleven years later, after the war was won, and after people realized how awful the Articles of Confederation were. It was mostly written by James Madison.⁵ Alexander Hamilton played a huge role in this as well, especially thanks to the Federalist Papers he wrote (along with Madison and John Jay, who later became the first Supreme Court Chief Justice).⁶ These treatises not only helped to convince the states to pass the Constitution, but the ones from Hamilton were also amazingly poetic and even danceable, because he was not giving up his shot. Thomas Jefferson's writings were influential but he was prohibited from attending the discussions on the Constitution, mostly because he was in France at the time.

The second thing we need to make clear is this:

Who cares what the Founding Fathers thought?

The Founding Fathers who wrote the Constitution were a bunch of politicians, not too different from the politicians we have today (except that they were all rich white men. Okay, maybe it is similar to today after all). Some were tremendously intelligent people who deserve all the accolades they receive. Others have been lost to history. William Blount? Alexander Baldwin? Pierce Butler? Some were mediocre men, who fought against giving people any power, who argued to keep slavery, who forced the great men into compromises in order to gain their votes.

You know—*politics*.

And that's why it is so frustrating when the Constitutional Fundamentalists say that we should obey the "will of the Founders" when interpreting the Constitution.

5. Madison later went on to be known as "Shortest Man Ever to be President," a record still unbroken to this day.

6. Warning: Many conservatives cite the opinions in the Federalist papers as if they were legal precedents which must be followed. They're not. They're just opinions. Sure, they're great for historical reasons and can give some insight into what some of the Founders thought, but they are not definite answers to constitutional questions. They're *opinions*. And not all of these opinions were adopted by others. I suggest that whenever someone cites the Federalist papers to you to support some crazy idea they have, you respond by citing this book, because this book has just as much legal authority as the Federalist papers.

Well, *which* Founders? This wasn't adopted unanimously, you know. To argue that we should never have a position about the Constitution based on who won is like saying we should never question Obamacare because hey, it got passed by some politicians so it's gospel and cannot be challenged.

I call these people Constitutional Fundamentalists because they view the document like it's a religious holy book, handed down by the Founding Gods, and we should obey what the Founders said. (And, just like religious fundamentalists, these people know exactly what their "holy book" means and it *matches their own personal views perfectly!* Isn't that amazing!)

The worst of these Constitutional Fundamentalists in recent history was former Supreme Court Justice Antonin Scalia. Justice Scalia chided his fellow Justices all the time for getting it "wrong" when they refused to acknowledge he had super powers to read the minds of the Founding Fathers and know exactly, for instance, what their views were on internet regulations. Scalia also believed the devil is in the details. Literally. "In the Gospels, the Devil is doing all sorts of things," he said once. "He's making pigs run off cliffs, he's possessing people and whatnot. And that doesn't happen very much anymore. It's because he's smart. He just got wilier." Scalia's version of Devil, who is apparently a lobbyist and



probably a Democrat too, is the only explanation he had on how it was possible people could disagree with him. If you held an opposite position, it's not that you were wrong, but you were also *evil*. Fortunately, Scalia no longer does this, primarily because he is dead, but his ideas are still shared by many conservatives.

The Founders created a foundation for a building—the Constitution provides the very minimalist blueprint. “Freedom of Speech” it says, but it doesn't go into any detail. Does it include libel and slander? Television and internet? Can you incite a riot and claim this freedom as a defense? Can you reveal military secrets and not get punished? *The Constitution doesn't say.*

That means it has to be interpreted, just like it had to be within a few years of its passage, when Founding Fathers argued its meaning before members of the Supreme Court (who were also Founding Fathers) *and they didn't all agree!*

So with all respect to the great men who founded this nation, 230-some years later: who cares what they thought? These were guys who believed you could cure diseases through bloodletting. They thought humans could be property, women should be close to property, and killing natives for their land was perfectly fine.

This would be like trying to add air conditioning and heating to your home but being told “No, the original blueprints from 200 years ago don't mention that, so you can't do it.” We should not have our society limited, Amish-like, to a time that no longer exists.

Many religious fundamentalists already understand this. They already ignore the parts of the Bible they want to ignore, recognizing that something that was written so long ago should not guide modern thinking.

Somehow, Constitutional Fundamentalists have yet to reach that stage.

All law is politics

The third thing to understand is that politics didn't stop once the Constitution was passed. Our legal system, which is based on that document, makes a lot more sense when you realize that it's all politics.

There are those who insist that the law is absolute; that there is only one interpretation of it; and that only crazy radical liberals engage in “judicial activism.” But the bottom line is that the law is whatever judges say it is.

Every judge has their own opinion as to what the “original intent” of the law was. If everyone agreed on what the “original intent” was, we wouldn’t need judges.

And the meanings of words change over time. “Cruel and unusual punishment” does not mean the same thing in the 21st Century as it did in the 18th. The 14th amendment gives rights to “people” but at the time it was written, women, racial minorities, and gays were not completely included as “people” and were given only the bare minimum rights in limited circumstances. Meanings change. Society changes.

Conservative judges interpret the Constitution just as much as liberal judges do—the difference is that liberal judges tend to be more honest about it. Or maybe the conservative ones are just deluded, like Scalia was, that they have some great “insight” into the Founders’ desires. It was the conservative justices who reinterpreted the 2nd amendment to turn gun ownership into a personal right after 200 years. It was the conservative judges who decided that corporations were “people” and money was “speech.” And a different Court could turn around and say “nope” and change it back, using the exact same words in the Constitution.

Politics.

I know some people want the law to be like a science, where you can do an experiment or research and know the answer, but it isn’t. It’s



politics. It's written by politicians. It's judged by people who are elected (and are therefore politicians) or who have been appointed by politicians. The judges don't all agree, just like politicians don't all agree.

And most of them (if they aren't deluded) will admit that the Constitution is not a religious document written by gods; it's a political document written by a bunch of politicians.

Why compromise is not a bad word

In order to get a majority to support the Constitution, compromises had to be made.⁷

This is how the world works. Compromising and negotiating are how mature adults handle problems. They work together to solve their problems. I'm not talking about compromising your ethics. But politics? Law? My marriage? Life in general? I've learned, as I've aged and become wiser, that I'd rather work with the other side and get 50% of what I want than be stubborn and get 0%.

There are gray areas in the world. Not everything is black and white.

For instance: anti-abortionists. They believe, without an ounce of evidence, that life begins from the moment the man says, "Your place or mine?" There is no room to compromise in their world. Most rational people agree that abortion should be prohibited after a certain point where the child is viable, and are willing to discuss where that point should be, based on current medical science. We're even willing to change that position as science advances. But not the anti-abortionists. It's all or nothing. If you compromise, the devil wins and you go to Hell.

Radical libertarians⁸ are the worst in this regard. They hate all government (except of course the government they like; they are uncompromising hypocrites). If you say, "You know, people shouldn't discriminate," they argue that it is their right to discriminate and if you don't let them kick gays out of their business then you are violating their

7. Yes, we'll soon get to what those compromises are. Be patient. Or just skip ahead to the next section, but if you do, you'll miss a great joke.

8. I have to say "radical libertarians" because some libertarians are quite reasonable. I disagree completely with their view of the world, but they aren't necessarily against compromising and they don't whine and bitch when they lose. They understand how democracy works.

freedom! (They of course, could care less about the freedom of anyone else.)

There are lots of things our government does that I disagree with, so I try to elect people who will pass laws that I agree with. Sometimes I lose and a bunch of laws are passed I don't like. I don't claim then that those laws are "forced" against me and that my rights are being violated.

And that's the reason why many of us just can't debate some libertarians, because they have this double standard: If they like the law personally, it's fine but if they don't like it, they are being forced to obey it and that's just evil! There is no room for compromise in their world. There are no gray areas.

I don't think laws I don't like are evil. They were passed through our democratic process and I can try to get that changed. I don't always get my way.

If these libertarians said, "Well, we lost, but we'll try to win next time," then we can discuss the merits of libertarian philosophy. But instead we often get, "You people who won are taking away my freedom to not obey the laws I don't feel like obeying!"

Well, suck it up. We all have laws we don't like that we have to obey. That's what being in a democratic society is all about. This doesn't mean we have to accept them blindly; it doesn't mean we can't engage in protests and civil disobedience; it doesn't mean we can't work to get those terrible laws changed. But to claim that the laws are illegal and a violation simply because you don't like them? That's where you lose me.

The main problem with libertarian philosophy is that they see programs where we ask everyone to pitch in a little to help everyone a lot as "theft" and then complain that they are "forced at gunpoint" to pay taxes to support this stuff. Give me a break. Every society in the history of this planet has asked its members to support it in some way. Even the most basic society made you pick berries for the good of the tribe.

We can disagree on how much we should do—that's a legitimate debate. We can discuss how to make taxation fairer. But when libertarians say *any* program is a violation of their rights and all taxation is theft, then instead of looking principled, they just look, well, selfish.

Pick some berries, guys.

Seriously, how do you deal with these people? Well, you can't. You can lead someone to compromise, but you can't make them think.

Mind you, this way of thinking isn't limited to conservatives and libertarians. There are liberals who can be just as obnoxious and uncompromising. There are liberal politicians who realize they can't get 100% of what they want so they compromise, and then their liberal voters scream at them and yell that they are not worthy of their support because they are not "pure" enough or something. This is especially true in red districts where the candidate has to be a moderate in order to win. And then these "pure liberals" run third-party candidates against these politicians and split the vote which results in a conservative getting elected. Yeah, that's helpful.

Both sides have people who do not understand the art of compromise; who would rather fight an unwinnable fight in order to keep their "purity."

And you know what I've found? So many of these people are unhappy with life. They lack empathy for anyone else's view. They'd rather fight the fight and lose than compromise and at least get *something*. They're angry all the time because they are constantly fighting battles they can't win because of their inability to compromise.

Don't be like that.

But back to the Constitution.⁹

Examples of Constitutional compromises

As I said previously, the Constitution is a product of politics, which means it is full of compromises.

The most obvious example may be "The Virginia Compromise." (Look, it even has "compromise" in its name.) The smaller states wanted each state to have an equal vote so that they wouldn't be ignored. The larger states wanted it to be based on population which would obviously benefit them. In the end, we got both—a Senate where each state gets the same representation no matter how small, and a House where the states with more people get more representation.

Then there's the example of the first ten amendments themselves (the "Bill of Rights"). Many states refused to ratify the Constitution without these protections, and it's a good thing they demanded them.

Let's not forget the terrible idea of the Electoral College as well as how Senators are chosen. Some founders wanted everyone to vote for all

9. Okay, I didn't really have a great joke there. I just wanted you to read that section.

political positions, but many were afraid of the unwashed masses who could conceivably elect a complete idiot who had absolutely no governmental experience, was completely incompetent and corrupt, and maybe whose greatest claim to fame was hosting a reality television show or something. So they compromised and allowed for the House to be elected democratically but for the Senate to be chosen by the state legislatures¹⁰ and for the President to be chosen by a system more confusing and prone to arguments and unhappy results than the 4th edition Dungeons & Dragons handbook.¹¹ We need an entire chapter to vent our spleens on this, so more later.

The clearest example of compromise in the Constitution had to do with slavery. Most of the northern states had already abolished it and wanted the entire country to do the same, but the southern states refused. The south was worried that as soon as this Constitution was passed, the northern states would have enough votes to outlaw slavery completely. Without some provisions to prevent this, the south refused to agree to the Constitution. Rather than split the country within the first dozen years of its existence, a series of compromises were worked out. (Sadly, postponing this only led to the bloodiest war in American history seventy years later.)



10. This was changed to direct elections of Senators with the 17th Amendment, which passed in 1913. Amazingly, some conservatives still argue today that we shouldn't have done this.

11. But enough about the US Constitution! What about the US Strength, Intelligence, Wisdom, Dexterity, and Charisma?

First, there's Article I section 9 which specifically prohibited Congress from passing any law outlawing the importing of slaves before 1808 (twenty years from the Constitution's signing). Why 1808? Was there something magical about that year? No, that was just the number that compromise produced. And as soon as 1808 came about, Congress did exactly what the south was worried about and banished the importation of any more slaves.

Second, there's the ridiculous $\frac{3}{5}$ th clause. The south demanded that when determining how many representatives they would get in the House, that slaves should be counted as "people" even when they were property in every other respect under the law. The north rightly pointed out how stupid this was (plus they didn't want the south getting more members in the House of Representatives), but the south insisted on counting the slaves and there was another compromise made. We ended up with a provision that held that $\frac{3}{5}$ th of every slave would count. No mention as to which $\frac{3}{5}$ th of the slave counted, but it certainly didn't include the head since the views of the slaves mattered not.

Third, there's the 2nd Amendment, which (among other things) allowed the southern states to keep their state "militias" which were basically armed gangs whose only job it was to intimidate slaves and capture ones who escaped. (More on this later.)

And, honestly, the best example of a compromise is the entire Constitution itself, which is short and doesn't go into a lot of detail. More detail means more debate, more disagreement, more arguments, and that would mean it might not pass. It's easy to get people to agree with "freedom of speech." It's much harder to get them to agree to "freedom to advocate Nazi beliefs."

Which leads to one more point we need to make:

Your opinion is not the law



Too often, when I discuss the Constitution with people, they will say things like “The 2nd Amendment prohibits all gun control!” Well, no, that’s not true. Or “The 10th Amendment means the government can’t regulate (fill in the blank) because that is what only the states can do.” Well, no, courts have ruled many times counter to that.

Remember: the law is whatever judges say it is. You may read a part of the Constitution which clearly means something to you but unless the judges agree with you, your position is merely an opinion.

For instance, in my *opinion*, the Constitution protects the rights of gays, lesbians and the transgendered because they are “people” under the 14th Amendment.

The *fact* is that it doesn’t—*yet*. Not until the Courts say it does.