

UNIT I

THE HISTORY OF THE U.S. CONSTITUTION

TEXT 1

THE NEED FOR A NEW CONSTITUTION

PRE-READING QUESTION:

1. Was the U.S. Constitution the first one in history?
2. Were there other early Constitutions?

1. For most of modern history the word constitution has meant the entire legal framework of a nation. For example, the English “constitution” includes the Magna Charta of 1215, which was the first written set of restrictions on kingly power, the Petition of Right of 1628, the English Bill of Rights of 1689, the Reform Bills of 1832 and 1867, many statutes, judicial decisions, and royal pronouncements, as well as common law and established government customs and usages. Thus, the English constitution is both much less than and much more than a written constitution such as the American one. In fact, a *written* constitution – setting forth a plan of government, establishing its institutions, and proclaiming the rights of citizens – is a relatively new development.

2. Although claims have been made for the Mayflower Compact of 1620, the 1630 Charter of the Massachusetts Bay Colony, and the 1639 Fundamental Orders of Connecticut, many scholars agree that the first written constitution of

government was England's 1653 Instrument of Government. The Instrument, which set out a new, republican form of government, and its 1657 successor, the Humble Petition and Advice, were swept away by the Restoration of Charles II in 1660 and had almost no influence on either English or American constitutional development, but they did presage many later reforms in England.

3. The English colonists in North America regarded themselves as Englishmen possessing all the rights of Englishmen, even though they lived thousands of miles away from the mother country. Each colony had some form of written instrument of government by the eighteenth century, usually a royal charter. Originally, there were three types of colonies: joint-stock *companies*, organized as economic ventures under a charter granted by the Crown conferring certain privileges, as with trade (for example, Virginia and Massachusetts Bay); compacts, agreements reached by and among the colonists themselves (Plymouth; Providence, R.I.; Fundamental Orders of Connecticut); and *proprietary colonies*, in which the Crown granted the land composing the colony to one or more landholders known as proprietors. By the mid-eighteenth century, most of the colonies were *royal colonies*, in which the former joint-stock company or compact form had been replaced by direct royal authority residing in the governor. In Maryland, Pennsylvania, and Delaware, the proprietors (not the Crown) appointed the governors; in Connecticut and Rhode Island, the surviving charter colonies, the colonists themselves chose their governors. Each colony also had a two-house, or bicameral, legislature; the lower house was elected by those colonists who could meet qualifications based on the amount of real or personal property they had, while the upper house was selected by the lower house. The upper house, or council, had both legislative and executive

powers and duties, in that it also advised the governor on a daily basis. The royal charters that most colonies possessed became the focus of disputes between the colonists and their governments, with the colonials challenging what they saw as arbitrary and unconstitutional exercises of power.

4. The initial stages of the American Revolution were moves and counter-moves in an intricate but fierce struggle to determine the limits of Parliamentary authority. Parliament retained supreme legislative power over the colonies, while at the same time other key agencies, such as the Privy Council, the Secretary of State, the Treasury, the Admiralty, and the Board of Trade, also had responsibility for colonial affairs, with the result that for most of the seventeenth and eighteenth centuries British administration of the colonies was entangled in bureaucratic infighting and prey to incompetence and mismanagement.

5. In May of 1776, anticipating its action two months later in the Declaration of Independence, the Second Continental Congress passed a resolution calling upon the colonies to prepare new, written constitutions in case it became necessary for them to separate from England. A few colonies merely modified their old charters, deleting all references to the king and England, but within the next few years most prepared entirely new, republican constitutions. These reflected the Americans' concern with arbitrary power, particularly arbitrary executive power. Pennsylvania's constitution of 1776 even did away, with a separate executive, establishing instead a Supreme Executive Council chosen by and under the thumb of its one-house legislature. Other states provided for a weak governor and a powerful two-house legislature. Still others, notably New York in 1777 and Massachusetts in 1780, created an independent governor, who was armed with veto power over legislation (although New York's constitution granted only a qualified veto

power to a council of revision composed of the governor and several state judges), and a system of checks and balances among the legislative, executive, and judicial branches of government. Massachusetts's most significant contribution to American constitutional thought was a stipulation mandating ratification of its constitution by the people in special conventions called for that purpose. Previous state constitutions merely went into effect after being adopted by their legislatures. The Massachusetts idea recognized the distinction between constitutions and mere statutes. Its constitution — chiefly the work of John Adams — and the New York one — largely that of John Jay — were important models and sources for the subsequent framing of the U.S. Constitution.

NOTES TO THE TEXT

John Jay (1745–1829) — a Founding Father of the United States who served the new nation in both law and diplomacy. He established important judicial precedents as the first Chief Justice of the United States (1789–1795) and negotiated the Jay Treaty of 1794, which settled major grievances with Great Britain and promoted commercial prosperity.

John Adams (1735–1826) — a leader of the American Revolution, the second U.S. President (1797–1801) defeated for another term by Thomas Jefferson (1743–1826). Adams — America's first Vice President. During his presidency, Washington became the American capital.

Mayflower — the ship in which the Pilgrim Fathers sailed from Southampton to the New World in 1620.

LANGUAGE PRACTICE AND COMPREHENSION CHECK

ACTIVE VOCABULARY

to presage, humble, to entangle (in), prey (to), venture, proprietary, stipulation, arbitrary, intricate

TASK I. *a) Match the words to their definitions:*

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|---------------------|------------------------------------------------------------------------------|
| 1) to presage | a) be seized by, caught by, harmed or affected in a bad way by |
| 2) to entangle (in) | b) foretell, be a sign of |
| 3) prey (to) | c) put or get into difficulties, in unfavorable circumstances |
| 4) venture | d) having many complexly interrelating parts or elements |
| 5) humble | e) not restrained or limited in the exercise of power |
| 6) intricate | f) a material condition or requirement in an agreement; provision |
| 7) arbitrary | g) owned or controlled by, held as property |
| 8) proprietary | h) an undertaking involving chance, risk, or danger |
| 9) stipulation | i) reflecting, expressing, or offered in a spirit of deference or submission |

b) Use the above words to complete the following sentences:

1. An artificially strong euro may ... strong problems for the country.
2. The refugees fell ... to criminal gangs.
3. The Court articulated several ... that had to be met to sustain a political gerrymandering claim.
4. A tax incentive violates the commerce clause when it has the effect of providing lower tax rates to in-state businesses than those imposed on out-of- state
5. The law ... the interests of church and state by seeking “the symbolic and financial support of government to achieve a religious purpose.”

6. Holmes was both proud and ... about his war service.

7. The ruling in *Board of Regents v. Roth* ... subsequent cases that did expand the rights of terminated employees.

8. Federal funding for private universities may come with congressional ... protecting student rights.

9. The courts have upheld the constitutionality of the death penalty but looking more closely at how it is applied, held that an ... or discriminatory application would be unconstitutional.

10. The Court ruled that it was not a violation of the *due process* clause of the Fourteenth Amendment for the state legislature to regulate the price of a necessary good such as milk, as long as the regulation was not ... or unreasonable.

11. The policy would ... the nation in conflicts that could easily lead to war.

12. There are few ... regarding qualifications for becoming a senator, as is the case for representatives.

13. Initially, the father had extensive powers over the family, including the power of life and death; until Justinian's time, the father alone in his *familia* had ... capacity.

14. *Hylton v. United States* case is important historically, as it ... *Marbury v. Madison*.

15. True ... rights are 'binding on the world' in the lawyer's traditional phrase.

c) *Translate the following sentences:*

On the other hand, the highly-debated establishment by Congress of a process by which independent special prosecutors could be established to investigate and prosecute cases of alleged corruption in the Executive Branch was sustained by the Court in a opinion that may **presage** a judicial approach in separation of powers cases more accepting of some blending of functions at the federal level.

For the Court, Justice Douglas observed that the interests of a State for purposes of invoking the original jurisdiction of the Court were not to be confined to those which are **proprietary** but rather “embrace the so called ‘quasi-sovereign’ interests which are independent of and behind the titles of its citizens, in all the earth and air within its domain.”

However, the States did in a number of instances engage in commercial activities that would be regulated by federal legislation if the enterprise were privately owned; the Court easily sustained application of federal law to these state **proprietary** activities.

Chief Justice Taft uttered some cautionary words to guide trial judges in the utilization of their contempt powers. “The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid **arbitrary** or oppressive conclusions.”

That the Fourth Amendment was intended to protect against **arbitrary** arrests as well as against unreasonable searches was early assumed by Chief Justice Marshall and is now established law.

Marshall sold real estate and entered other business **ventures** to afford his public service and, in order to provide for his family, often turned political office down.

In every stage of these Oppressions We have Petitioned for Redress in the most **humble** terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people (*Declaration on Independence, 1776*).

The royal charters that most colonies possessed became the focus of disputes between the colonists and their governments, with the colonials challenging what they saw as **arbitrary** and unconstitutional exercises of power.

TASK II. *Use the following binominals to describe the way colonies were governed:*

Customs and usages

Real and personal

Legislative and executive

Powers and duties

Arbitrary and unconstitutional

Moves and countermoves

Incompetence and mismanagement

TASK III. *a) Compare the meanings of phrasal verbs:*

- **set forth** – to state, to explain in a clear, organized way = to expound (a plan, a system, principles, ideas, purposes, objectives, etc.) – formal use;
- **set out** – to give all the details of something or to explain something clearly, especially in writing;
- **set down** – to record as a law or regulation, to state in an official document how something must be done; lay down;
- **set up** – to make arrangements, preparations, provisions so that something can happen, exist and operate.

b) Use set down, had set up, set out, set forth, set down, set up, set out, sets forth in the following sentences:

1. The newspaper correctly reported that the government ... an investigation.

2. The first thing to do in the new constitution was to ... effective central government.

3. The UN Resolution ... the plan of settlement between the conflicting nations.

4. Your contract will ... all the terms of your employment.

5. There are laws which attempt to ... standards whereby the animal is properly protected.

6. It was proposed that passengers' rights be ... in a separate charter.

7. Should legislators adopt the principles ... in *Roth v. United States* when many of the justices now rejected that standard? If not, what could they substitute for it?

8. The Court observed: "The contract ... in the pleadings was made for the purpose of instituting this suit."

c) Compare the meanings of phrasal verbs:

- **call upon** – to officially ask someone to do something – formal use;
- **call for** – demand that it should be done (action), be held, convened, conducted (conference, meeting, elections, investigation).

d) Use call for or call upon in the following sentences:

1. The Security Council Resolution ... an immediate cease-fire.
2. The Prime Minister may ... a new election before the end of the term of office.

3. The Constitutional Convention was ... to make and propose to the states a new constitution.

4. The army is in a state of readiness in case it should ... to resolve the ethnic conflict.

5. The weaknesses in the system soon became apparent, and the Congress issued a ... a convention to meet in May 1787 in Philadelphia "for the sole and express purpose of revising the Articles of Confederation."

6. New York and Virginia probably would not have agreed to the Constitution without the bill of rights, and Virginia even ... a second constitutional convention for that purpose.

7. From the very nature of their judicial duties, state judges would be ... to pronounce the law applicable to the case in judgment.

8. The doctrine of prior restraint was ... by the Court as it struck down a series of loosely drawn statutes and ordinances requiring licenses to hold meetings and parades and to distribute literature, with uncontrolled discretion in the licensor whether or not to issue them.

9. The New Jersey Plan also ... the supremacy of the national government, making all state laws subordinate to the laws and directions imposed by the central government.

TASK IV. *Match the nouns to their definitions or synonyms:*

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|------------------|----------------------------------------------|
| 1) statute | a) chamber |
| 2) pronouncement | b) the authority to do smth |
| 3) government | c) power |
| 4) house | d) official appointed to govern the province |
| 5) governor | e) declaration |
| 6) authority | f) an act of legislature |
| 7) stipulation | g) authority; conduct of state affairs |
| 8) mandate | h) prerequisite, requirement |

TASK V. *Combine the verbs and the nouns and use them to describe the colonial governments:*

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|-----------------|-------------------|
| 1) to confer | a) a plan |
| 2) to set forth | b) qualifications |
| 3) to retain | c) institutions |
| 4) to advise | d) a charter |
| 5) to appoint | e) an agreement |
| 6) to grant | f) privileges |
| 7) to select | g) a governor |

- | | |
|------------------|-------------------------|
| 8) to meet | h) power |
| 9) to proclaim | i) a house |
| 10) to establish | j) a form of government |
| 11) to reach | k) rights |
| 12) to determine | l) the limits |

TASK VI. *Combine the adjectives and the nouns and use them to describe the British administration of colonies:*

- | | |
|-----------------------------------|----------------------|
| 1) kingly | a) authority |
| 2) judicial | b) infighting |
| 3) royal | c) legislature |
| 4) common | d) decisions |
| 5) economic | e) house |
| 6) a two-house or bicameral | f) exercise of power |
| 7) the lower | g) struggle |
| 8) real or personal | h) property |
| 9) arbitrary and unconstitutional | i) pronouncements |
| 10) intricate but fierce | j) ventures |
| 11) Parliamentary | k) power |
| 12) bureaucratic | l) law |

TASK VII. *a) Sum up the proper paragraph to describe the following:*

- 1) British administration of the colonies;
- 2) new republican constitutions;
- 3) the role of England's Instrument of Government;
- 4) colonial types and governments;
- 5) from the entire legal framework of a nation to a single document.