

# The Political Economy of the Constitution

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- It was not pre-determined that there was going to be a Constitution in 1787.
- The Constitutional Convention is 11 years after the Declaration of Independence and 4 years after the Treaty of Paris.
- Articles of Confederation of 1777 are in force from 1781-1787.
- Often, these years are ignored or treated as an inevitable interlude before the formation of the Federal Government.

Merrill Jensen

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# THE NEW NATION

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A HISTORY  
OF THE UNITED STATES  
DURING THE CONFEDERATION  
1781-1789

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A NORTHEASTERN CLASSICS EDITION

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## The Articles of Confederation

An interpretation of the  
social-constitutional history of the  
American Revolution 1774-1781

by Merrill Jensen



# The anti-federalists

- Anti-federalists defended that no new constitution was needed (perhaps just some amendments).
- Anti-federalist position is undermined by a lack of a clear alternative: anti-federalist is a label that includes a wide set of different positions. For example:
  1. Some anti-federalists want a weaker presidency than the one planned by the Constitution, others a stronger one.
  2. Some anti-federalists complain the Constitution does not impose a religious test.
  3. Others that the Constitution limits the power of juries to matters of fact, not of law interpretation.
- In comparison, federalists have a clear (and relatively unified) view of what they want to accomplish.
- Also, federalists will be much more deft in playing the political game (including bribery!).

# The Other Founders

Anti-Federalism &  
the Dissenting Tradition  
in America, 1788-1828

SAUL CORNELL



## What the ANTI-FEDERALISTS Were FOR

The political thought of the opponents  
of the Constitution



Herbert J. Storing

- Constitutional Convention is preceded by plenty of activity at the state level: the case of the Pennsylvania Constitution of 1776.
  - Some historians have argued that those state constitutions were more influential in the long-run.
  - Idea of a charter of the people and explicit ratification by a different procedure introduced.



EXPANDED EDITION

# The First American Constitutions

*Republican Ideology and the  
Making of the State Constitutions  
in the Revolutionary Era*

WILLI PAUL ADAMS

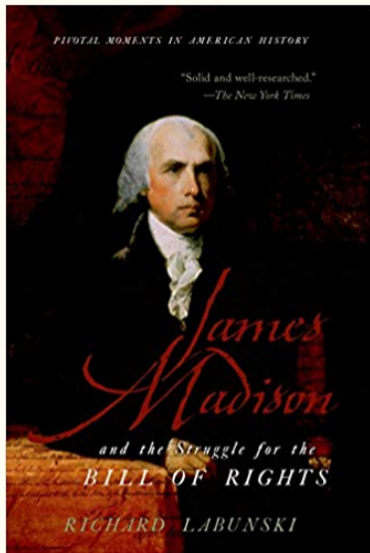
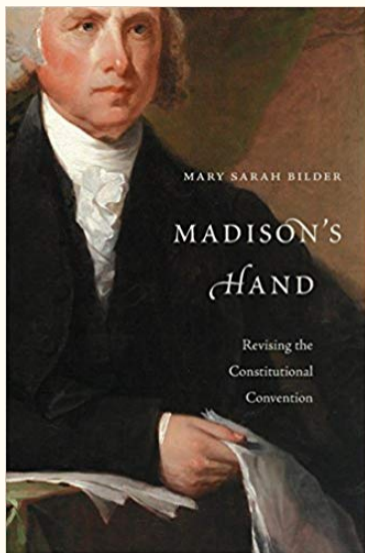
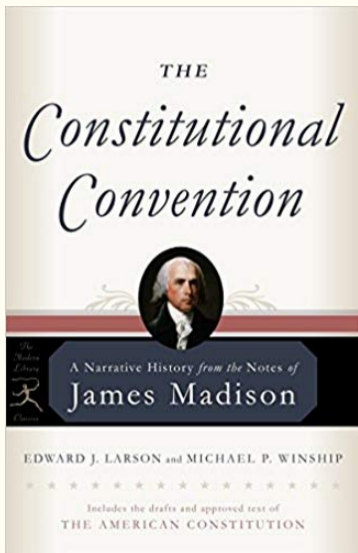
## Will of the people?

- Much of the new political-economic elite wants a new frame of government.
- But many are opposed the calling of a constitutional convention.
- Failed Annapolis Convention in 1786.
- Some states join the Philadelphia Convention unenthusiastically (New York) or late (New Hampshire only on July 23!).



# James Madison

- Central role of James Madison.
- He has spent the previous few years thinking about what republican government means and gathering historical evidence.
- He understands that a modern republic will diverge, in essential ways, from the classical understanding of ancient political philosophers (the modern notion of legislation, counterbalancing ambitions, ...).
- Read “Vices of the Political System of the U. States” (1787) at <https://founders.archives.gov/documents/Madison/01-09-02-0187>.
- Also, his *Notes of Debates in the Federal Convention of 1787* are the best historical source of the process.
- Finally, he will play a key role in Virginia’s ratification by promising a bill of rights.
- Note absence of Jefferson (Minister to France at the moment). Why is this significant?

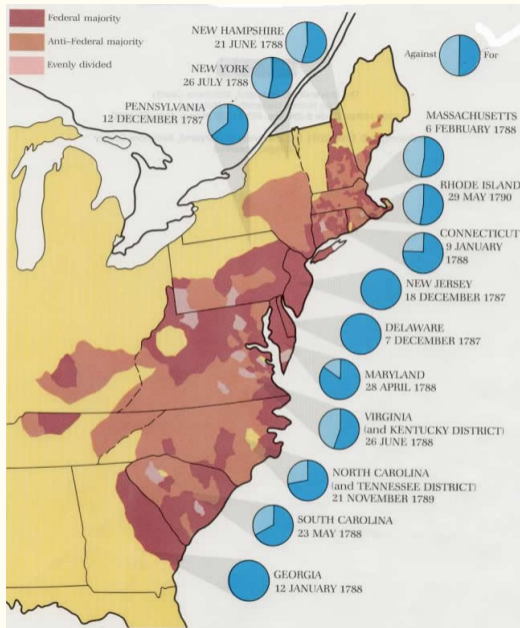


## A daunting convention

- Design issues concerning structure vs. authority (and, indirectly of *auctoritas* vs. *potestas*).
- Important tensions among delegates regarding representation: Virginia Plan vs. New Jersey Plan and the somewhat misnamed Connecticut Compromise.
- In particular, sovereignty question between states and Federal Government is blurred and left ambiguous (we are still debating about it nowadays).
- Also, the issue of slavery will be complex. The Constitution never uses the “S-word” and resorts to rather awkward linguistic gymnastics and compromises regarding voting weights (the so-called “three-fifths compromise”).
- Nobody comes out of the convention too happy: many clauses are passed with the smallest of margins and most delegates find the Constitution the “least bad” of alternatives.

## A difficult ratification, I

- The resulting Constitution is far away from the opinions of many Americans.
- Particularly salient point: absence of a bill of rights.
- Opposition replicates many of the tensions existing during the Revolution and going back to original settlements (e.g., Scot-Irish vs. English).
- Ratification was “a damned nice thing – the nearest run thing you ever saw in your life.”
- Decisive vote in Virginia (at the time included modern-day Virginia, West Virginia, and Kentucky): 89 for, 79 against.
- In fact, Rhode Island and North Carolina did not join the United States until after the Federal Government started in 1789.



"*Ratification* is a gripping and eye-opening read. Maier is a member of that rare breed of historians who write vividly and with a flair for depicting dramatic events." —*The Wall Street Journal*

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# RATIFICATION

*The People Debate  
the Constitution,  
1787–1788*

PAULINE MAIER



## A difficult ratification, II

- Madison comes to believe that the Constitution is only ratified because it does not accomplish his ambitious original goals of a centralized national government and thanks to its ambiguities.
- Need to ensure ratification is why Alexander Hamilton, James Madison, and John Jay wrote the 85 essays known as the *Federalist Papers*.
- Also bill of rights added soon after Congress starts operating. Nonetheless, Madison successfully resist amendments to limit the Federal Government's ability to tax.

*For Mr Church from his sister  
Elizabeth THE Hamilton*

FEDERALIST;

A COLLECTION

OF

ESSAYS,

WRITTEN IN FAVOUR OF THE

NEW CONSTITUTION,

AS AGREED UPON BY THE FEDERAL CONVENTION,  
SEPTEMBER 17, 1787.

IN TWO VOLUMES.

VOL. I.



NEW-YORK:

PRINTED AND SOLD BY J. AND A. McLEAN,  
No. 41, HANOVER-SQUARE.  
M,DCC,LXXXVIII.

*Mr Jefferson's copy*



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# THE ANTI- FEDERALIST



Writings by the Opponents of the Constitution

Edited by  
**HERBERT J. STORING**

Selected by Murray Dry from  
*The Complete Anti-Federalist*

- Four central questions:
  1. What is a constitution?
  2. Why did we have a Constitutional Convention in 1787?
  3. Which forces shaped the Constitution and its main features?
  4. Why has the Constitution been so resilient?
- We will not cover much of narrative history.
- As with the Revolution, you might want to refresh your memory with a good general survey of the constitutional process and read some of the original documents.



*The*  
**FRAMERS'  
COUP**

The MAKING of the  
UNITED STATES CONSTITUTION



Michael J. Klarman



# *The Debate on the Constitution*

Federalist and Antifederalist Speeches,  
Articles, and Letters During the  
Struggle over Ratification  
Part One: September 1787 to February 1788



## A preliminary warning

### Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (1922)

“The limits of my language mean the limits of my world.

*(Die Grenzen meiner Sprache bedeuten die Grenzen meiner Welt).“*

- Words are used in different ways over time: “society,” “constitution,” “economy.”
- In particular, in the English-speaking world, the meaning of many words in the late 18th century was much closer to their original meaning in Latin (or sometimes, Classical Greek).
- Thus, we should be cautious when we read arguments and documents from the time if we want to understand the cognitive frameworks of the authors of the Constitution.

# The constitution as a fundamental law

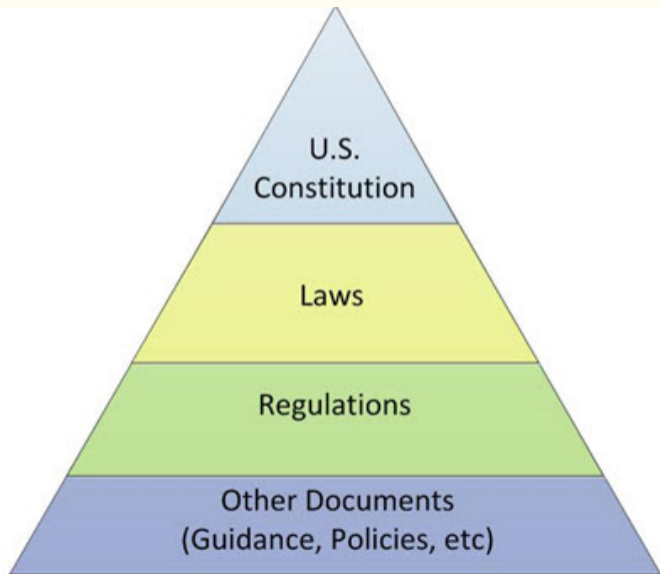
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# What is a constitution?

- Fundamental norm in a political system.
- This is better understood in German: *Grundgesetz für die Bundesrepublik Deutschland* (although, also in German, *Verfassung*).
- Similarly, in Israel, you have the 14 Basic Laws of Israel.
- Supremacy includes a temporal component. The rule is universal that a prior statute is repealed by a subsequent statute (*Leges posteriores priores contrarias abrogant*).



## Kelsen's pyramid of norms



## Unwritten and uncoded constitutions

- Historically, constitutions were the product of evolution over time, not of conscious and temporally concentrated design (this was the understanding, for example, of Montesquieu and David Hume).
- Thus, constitutions were rarely written (although, some times, some principles of government were written down, as in *Magna Carta* or *Sachsenspiegel*) and never codified.
- Even today, constitutions are not codified and partly unwritten in the U.K. and several Commonwealth realms (Canada and New Zealand).
- When constitutions were “written,” it was a description of the political system by observers, not an authoritative document.
- Example: 158 constitutions of Greek cities compiled by Aristotle’s students.

# Choosing the German king (1300)



# Aristotle's Athenaiion Politeia (Papyrus 131)

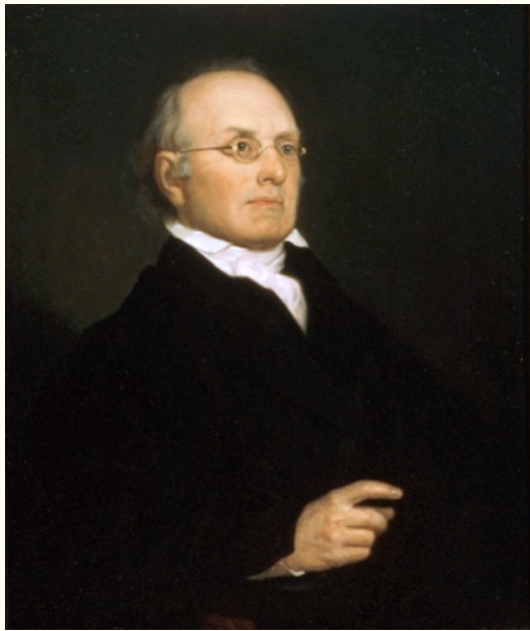


# Unwritten and uncoded constitution in the U.S., I

- You can argue that legal doctrine, international treaties, and constitutional case law are as much part of a constitution as the formal, codified constitution.
- Legal doctrine: huge historical influence of law professors such as Joseph Story and his *Commentaries on the Constitution of the United States*.
- Think about the influence that originalism has had over the last four decades on case law.

## Paul Samuelson

“Let those who will write the nation’s laws if I can write its textbooks.”





A DEBT  
*Against the*  
LIVING

An Introduction to Originalism



ILAN WURMAN

STEPHEN  
BREYER

.....

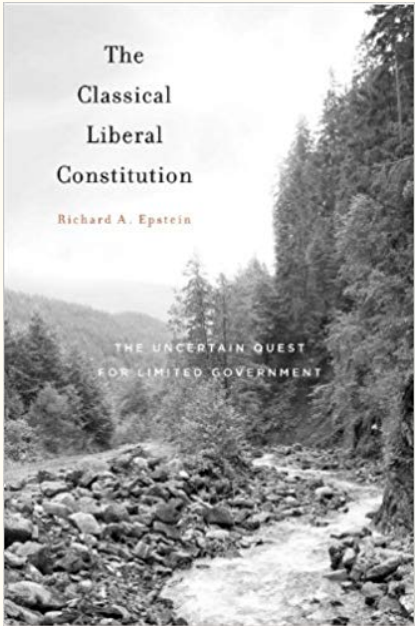
ACTIVE  
LIBERTY

INTERPRETING  
OUR DEMOCRATIC  
CONSTITUTION

.....

"A brisk, lucid and energetic book, written with conviction and offering a central argument that is at once provocative and appealing. . . . Deserves a place of honor in national debates, now and in the future, about the role of the Supreme Court in American life." —*The New Republic*





The  
Classical  
Liberal  
Constitution

Richard A. Epstein

THE UNCERTAIN QUEST  
FOR LIMITED GOVERNMENT

### Article VI, Clause 2

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

## Unwritten and uncodified constitution in the U.S., III

- International treaties: particularly important aspect of Brexit and in the relation between the German Federal Constitutional Court (*Bundesverfassungsgericht*) and the ECB.
- U.S. tends to follow a very different position than most other countries despite some decisions such as *Roper v. Simmons* (2005).
- In particular, U.S. ratifies a human rights treaty, it often adds declarations stating that the treaty is “not self-executing” and limiting scope of treaty.
- Case of the Universal Declaration of Human Rights.

### Article 24 of the Universal Declaration of Human Rights

“Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.”

## Unwritten and uncodified constitution in the U.S., IV

- Uncodified case law: the most famous example is Footnote Four in *United States v. Carolene Products Company* (1938), which effectively created the ranking of rational basis review, intermediate scrutiny, and strict scrutiny.
- Facts of the case are pretty mundane: an interstate trade restriction on filled milk (*Filled Milk Act* of 1923).

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## The most famous footnote in U.S. history

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth... It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation....

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, ..., or racial minorities, ... whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry...

## More on strict scrutiny

- Strict scrutiny applies if a law or policy:
  1. Appears on its face to violate a provision of the US Constitution, especially in the Bill of Rights,
  2. Restricts the political process,
  3. Or discriminates against “discrete and insular” minorities, especially racial, religious, and national minorities and particularly those who lack sufficient numbers or power to seek redress through the political process.
- Strict scrutiny requires:
  1. A compelling governmental interest.
  2. The law or policy must be narrowly tailored to achieve that goal or interest.
  3. The law or policy must be the least restrictive means for achieving that interest.

## A novel contribution to political theory

- New idea in the British colonies: codified constitution.
- Fundamental Orders from 1639 in the Colony of Connecticut.
- Exported to England: *Instrument of Government of the Commonwealth of England, Scotland and Ireland* (1653-1657).
- Other examples:
  1. The first Corsican Constitution of 1755.
  2. Sweden's Instrument of Government of 1772.





**Why did we have a  
Constitutional Convention in  
1787?**

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## Proximate causes

- According to [Mittal, Rakove, and Weingast \(2010; page 10\)](#), five proximate causes:
  1. Providing the national government with independent and reliable sources of revenue to meet its basic expenses.
  2. Funding or retiring the public debt accrued during the war, thereby enabling the United States to have future access to credit markets at home, but especially abroad.
  3. Developing effective strategies for responding to the twin economic threats to postwar prosperity: the flooding of American markets with European goods, and the closure of British harbors, particularly in the West Indies, to American merchantmen.
  4. Enforcing key provisions of the Treaty of Paris relating to the rights of British creditors seeking payment of prewar debts and loyalists seeking recovery of confiscated estates.
  5. Securing effective control of the new national domain above the Ohio River and maintaining the political loyalty of trans-Appalachian settlers more generally, especially after Spain closed the Mississippi River to American navigation in 1784.

— NORTH AMERICA, 1783 —



## Ultimate causes: Three interpretations

- An economic interpretation.
- A neo-whig interpretation.
- The need to build a fiscal-military and/or developmental state.



*Interpreting the*  
**FOUNDING**

GUIDE TO THE ENDURING  
DEBATES OVER THE ORIGINS  
AND FOUNDATIONS OF THE  
AMERICAN REPUBLIC

*Alan Gibson*

SECOND EDITION,  
REVISED AND EXPANDED

"A deeply satisfying account of the political world from which the United States Constitution issued."  
—*The New York Times Book Review*

# Original Meanings



*Politics  
and  
Ideas  
in  
the  
Making  
of  
the  
Constitution*

**Jack N. Rakove**

# An economic interpretation

- Charles Beard: the constitution as a “counter-revolution.”
- The structure of the Constitution reflected the interests of the wealthy bondholders in opposition to the farmers and planters.
- Reaction in 1800s: Jeffersonian democracy.
- Notice close relation with the neo-progressive interpretation of the revolution. More general issue about when does the revolution end.
- Recently revived by Woody Holton: in his interpretation, the primary purpose of the Constitution was to make America more attractive to investment.



# An Economic Interpretation of the Constitution of the United States

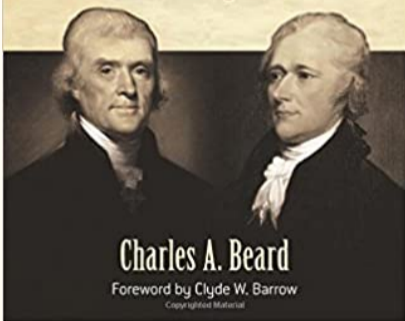
Charles A. Beard



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# Economic Origins of Jeffersonian Democracy

How Hamilton's Merchant Class  
Lost Out to the Agrarian South



Charles A. Beard

Foreword by Clyde W. Barrow

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UNRULY AMERICANS  
*and the Origins of the Constitution*



WOODY HOLTON

## A neo-whig interpretation

- Many of Charles Beard ideas were contested in the 1950s.
- Works by Robert E. Brown and Forrest McDonald showed that Beard's reading of the evidence faced many problems.
- Opens the door to a neo-whig interpretation that highlights republican concerns.
- In this interpretation, a new framework of government was required to ensure the victories of the revolution: “extended republic” and “ambition counteracting ambition” hypotheses of Federalist 10 and 51.
- Again, note relation with the neo-whig interpretation of the revolution.

*Charles Beard  
and the  
constitution*

*A Critical  
Analysis of  
"An Economic  
Interpretation  
of the  
Constitution"*



Robert E. Brown





# WE THE PEOPLE

*The Economic Origins  
of the Constitution*

*Forrest McDonald*

*With a new introduction by the author  
and a foreword by Russell Kirk*

## Building a new state

- Federalists wanted to build a modern fiscal-military state.
  - Think about Alexander Hamilton.
  - Close to Neo-realist interpretation of international relations.
- Alternative (and related) idea: federalists wanted to build a developmental state.
  - Examples in the 20th century.
  - While there are some insights in this interpretation, it misses important aspects of U.S. economic history.
- Connected with the economic interpretation, but not emphasis is different.





# A REVOLUTION IN FAVOR OF GOVERNMENT

ORIGINS OF THE U.S. CONSTITUTION  
AND THE MAKING OF THE AMERICAN STATE

MAX M. EDLING

The HEART *of the*  
**Declaration**  
*The* FOUNDERS'  
CASE *for an* **ACTIVIST**  
Government



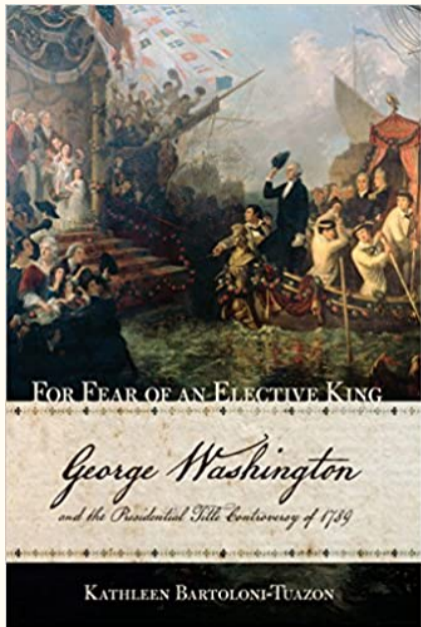
STEVE PINCUS

**Which forces shaped the  
Constitution and its main  
features?**

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# Four forces

- Constitution comes about at a time that is post-aristocratic but pre-democratic (Joseph Ellis).
- Four main forces:
  1. Degree of centralization of government: Enumerated and limited powers of the United States.
  2. Degree of majoritarian rule: Unitary executive, electoral college, indirect election of Senators (until 17th Amendment in 1913). Quasi-monarchic aspects.
  3. Large states vs. small states: House vs. Senate.
  4. Slavery: the three-fifth compromise.
- These forces interact in complex ways: shifting coalitions among states.
- Both at the writing of the constitution and, later, in its development and interpretation over time.



FOR FEAR OF AN ELECTIVE KING

*George Washington*  
*and the Presidential Title Controversy of 1789*

KATHLEEN BARTOLONI-TUAZON

ERIC NELSON



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# THE ROYALIST REVOLUTION

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MONARCHY AND THE AMERICAN FOUNDING

# The Lucas critique and the political economy of constitutions

- **Lucas (1976)**: Observed behavior comes from the decisions of agents under a set of rules. If you change the rules, agents decisions will change.
- Thus, lessons learned from (reduced-form) statistical models, based on observed behavior are useless to forecast behavior under a new set of rules (there are a few exceptions).
- Simple example. In 2016, Hillary Clinton got 65,853,514 votes against Trump's 62,984,828. However Trump won the electoral college.
  1. Naive conclusion: a direct voting system would have elected Clinton.
  2. Lucas critique's answer: we do not know. Under an alternative set of rules, both candidates would have campaigned differently (location of rallies, TV spending, stump speech content, debate strategies, ...) and voters would have behaved differently (did you bother to vote if you were a Republican in California or a Democrat in Wyoming?). In fact, we could even have had different parties and candidates.
- My own experience on both sides (campaigning and voting).

**Why has the Constitution been  
so resilient?**

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# Mechanisms of survival

- First, we need to be nuanced: the U.S. suffers from a Civil War that nearly destroys the Union.
- The Civil War is directly linked with flaws in the Constitution.
- Also, other important conflicts such as the election of 1800.
- Much of what we call the “Constitution” is its interpretation during the first decade after ratification.
- And the U.S. enjoyed, for the longest time, a unique strategic position (Canada, Mexico, two oceans).
- However, we cannot underestimate how much the constitutional convention got “right”:
  1. Optimal mechanism design.
  2. Incomplete contracts  $\Rightarrow$  constitution gets politicized and politics get constitutionalized.

*The  
Second  
Creation*

FIXING THE AMERICAN  
CONSTITUTION IN THE  
FOUNDING ERA

JONATHAN GIENAPP

# Operation

- “Centralized federalism” delivers many favorable features.
- It provides the means (financial and operational) for national defense and security: enough revenue and decisive executive and legislative powers.
- It creates a large internal market (we will come later to this point).
- This aligns, at least in the short-run, the economic interest of the Northeast and the South.
- The federal government becomes the locus of authority of monetary affairs, eliminating behaviors such as Rhode Island’s inflationary politics.
- The federal government can provide important public goods: public credit (including the assumption of state revolutionary war debts), the national Mint, and the Bank of the United States, a bankruptcy law, and the post office.
- And yet, we still maintain much competition among states.

# States as laboratories

- Examples of policies pioneered at the state level:
  1. Banking.
  2. Market-enhancing public good.
  3. Extension of franchise.
  4. Public education.
  5. Party organization.
  6. Women's rights.
  7. Environmental concerns.