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Educational materials for Modern Constitutionalism

In this article, Walter Berns outlines the history of ideas leading up to the modern constitutional principles embodied in the Constitution of the United States. The most salient principle in modern constitutionalism is that of popular sovereignty: the belief that a government derives its legitimacy from the consent of those governed. This principle, which can be traced to John Locke, marked a significant break from the British constitutional system, whose authority extended from a long-standing heritage of contract, precedent, and common law. Though the American Founders relied on many British ideas in the formulation of their Constitution, they justified the American Revolution, not on the basis of tradition or their rights as Englishmen, but by appealing to the universal natural rights to which all men are entitled. The other key principle of modern constitutionalism explored in the article is that of limited government, achieved by means of a written constitution that moderates majority rule by complex representative arrangements and institutional contrivances.

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EDMUND BURKE

Edmund Burke was born in Dublin, Ireland, in 1730. The son of a wealthy attorney, he began his undergraduate education at Trinity College when he was fifteen. As a student, Burke started a debating society through which he practiced his public speaking abilities in the areas of morality, theology, politics, and economics.

Though he was admitted to the Middle Temple School of Law in London, Burke soon turned aside from the legal profession to philosophical writing. In the late 1750s he produced *A Philosophical Enquiry into the Origin of Our Ideas of the Sublime and Beautiful* and his *Vindication of Natural Society*, a treatise that proposed a society without civil government, organized religion, or large amounts of private property.

Over time, Burke became more invested in political activity and commentary rather than philosophy, presumably for practical reasons. In 1765, he was appointed the private secretary to the Marquis of Rockingham, and in the same year he was elected a member of the British House of Commons. He remained highly active as a public speaker and political writer until his retirement from the House in 1794. His speeches, many of which he published, addressed a wide range of issues, including British rule overseas (*American Taxation*, 1774; *Conciliation with America*, 1775) and the French Revolution (*Reflections on the Revolution in France*, 1790).

Despite a break with the Whig party in 1791, Burke continued to spend the last years of his life writing on political affairs. Like his contemporary Berkeley, he consistently held that society's improvement was the responsibility of wealthy educated members in British society. His final publications (*An Appeal from the Old to the New Whigs*, 1791; *Letters on a Regicide Peace*, 1795; and *A Letter to a Noble Lord*, 1796) spoke out against corruption in the British government.

To read more about the life and works of Edmund Burke, see this *encyclopedia article or visit* TheGreatThinkers.org/Burke.

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Aristotle:

(384-322 BC) an influential Greek philosopher who favored a "mixed regime" of oligarchy and democracy to encourage faction-free moderation. This polity was his version of constitutional

government. For more information about Aristotle and his relationship to the natural law tradition, please see the section of this website on "Aristotle, Natural Law, and the Founders."

Mixed Constitution:

a form of government first adopted by ancient Rome, and embodied in the British Constitution, that attempts to achieve stability and non-oppressive rule by balancing the interests of the many common people (the democracy) and the few defined by birth, wealth, or honor. This is fostered by having different houses of the legislature represent different social classes, e.g., the House of Commons and the House of Lords.

Bill of Rights of 1689:

guaranteed free parliamentary elections and the right to petition for grievances, and forbade cruel and unusual punishment. Click here to read the Bill of Rights of 1689.

Burke, Edmund:

(1729-1797) an English statesman, author, and philosopher who served as a Whig in Parliament. He viewed a constitution as a "superior law," more legitimate because of prescription (*see* PRESCRIPTION). He also famously supported the American Revolution and opposed the French Revolution.

Cicero, Marcus Tullius:

(106-43 BC) a Roman politician, philosopher, and orator who looked favorably on the Roman Republic's balance of powers. For more information about Cicero and his relationship to the natural law tradition, please see the section of this website on "Cicero and the Natural Law."

Executive Branch:

the branch of the government that executes the laws. In the United States, the president is the head of the executive branch and Commander in Chief of the military.

Hobbes, Thomas:

(1588-1679) a British philosopher whose most famous work, *Leviathan*, popularized the idea of social contract theory. In contrast to Burke, who thought that tradition was the source of natural law, Hobbes believed in a fundamental law of nature, "to seek peace and follow it," which he derived from the right of nature. For more information about Thomas Hobbes and his relationship to the natural law tradition, please see the section of this website on "Thomas Hobbes: From Classical Natural Law to Modern Natural Rights."

House of Representatives:

the "lower house" of the Congress of the United States. Members are elected to the House of Representatives popularly, each state receiving a number of representatives proportional to its population, and each member is elected by the majority of a particular district. Each seat is up for reelection every two years.

Judicial Branch:

the branch of the government, constituted by a system of courts, concerned with the administration of justice and the interpretation and application of law

Legislative Branch:

the branch of the government concerned with making the laws. Montesquieu and the American Founders believed that the legislative branch should be split into two, a lower house and an upper house. In Montesquieu, the two houses represent different class interests. In the American constitutional order, they represent different constitutionally granted functions and powers.

Locke, John:

(1632–1704) an English philosopher who greatly influenced the American Founders (he is quoted thrice in the U.S. Constitution). From his belief that all men are equally endowed with certain unalienable rights, Locke concluded that the people's consent was the source of a government's legitimacy. This belief, known as popular sovereignty, is a major feature of modern constitutionalism. The American Founders, calling upon Locke's ideas, concluded that if a government failed to uphold the rights of the people, including the rights to be represented properly in the government, then the people could abolish it. For more information on John Locke and his relationship to the natural law tradition, please see the section of this website on "John Locke and the Natural Law and Natural Rights Tradition."

Magna Carta:

the "great" English charter issued in 1215 to limit the powers of King John and to protect certain privileges of some of his subjects (namely, the English feudal barons). The document, with the civil and political liberties granted therein, is recognized as an important part of the unwritten common law tradition. Click here to read the Magna Carta.

oligarchy:

a form of government characterized by rule by the few whose claim to rule rests on birth, wealth, or honor rather than equal citizenship.

Paine, Thomas:

(1737-1809) a Founding Father whose most famous pamphlet "Common Sense" advocated independence from Britain. He defined a constitution as being an act of the people upon which the government defines its authority.

Polybius:

(c. 200-120 BC) a Greek historian who praised Rome's ability to balance oligarchic and popular interests

popular sovereignty:

the belief that the authority of the government is derived from the consent of those governed. By this understanding, if a government ignores the people's right of consent it cannot be legitimate. Locke, like the American Founders, was a strong proponent of this idea, and it is the foundation of modern constitutionalism.

prescription:

in Roman law, prescription gave title to landed property by long-continued use, even without a deed. Burke applied this idea of private law to public law, arguing that the government could gain its legitimacy in a similar way.

Revolution of 1688:

the overthrow of King James II, the last Catholic monarch of England. Also called the Glorious Revolution.

Senate:

the upper house of the Congress of the United States. Originally, senators were elected by their state legislatures but today, senators are chosen in state-wide popular elections. Senators are elected for six-year terms, with one-third of senatorial seats electorally contested every two years.

St. Thomas Aquinas:

(1225-1274) a Dominican philosopher who authored the *Summa Theologiae*. In contrast to Burke, who thought that tradition was the source of natural law, Aquinas believed that natural law was rooted in the eternal law, and ultimately originated from God. For more information about Thomas Aquinas and his relationship to the natural law tradition, please see the section of this website on "The Natural Law Theory of Thomas Aquinas."

Septennial Act of 1716:

a British statute increasing the maximum length of Parliament from three years to seven, which served to keep the incumbent Whig party in power longer

Triennial Act of 1694:

an act dictating that Parliament meet annually and hold general elections once every three years

Toleration Act of 1689:

an act of Parliament granting religious liberty to Protestants who dissented from the Church of England (it did not extend to Catholics)

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I. Classical Origins of Constitutionalism

A. Aristotle favored a "mixed regime" of oligarphy and democracy

B. Rome had the first mixed regime

II. On British Constitutionalism

A. Montesquieu (French) argued that political liberty is best secured with three divided branches of government, where the legislative branch is split into an aristocratic and democratic house (he misleadingly attributed this separation of powers to the British Constitution)

B.Viscount Bolingbroke (British) argued that the constitution is an "assemblage of laws, institutions, and customs, derived from certain fixed principles of reason, directed to certain fixed objects of the public good... according to which the community hath agreed to be governed."

1. Has in mind the Magna Carta, the Toleration Act of 1689, the Bill of Rights of 1689, and the Triennial Act of 1694.

2. Sees Septennial Act of 1716 as violation of the principles of the Revolution of 1688, known as the Glorious Revolution.

3. Thomas Paine (American) concurs and determines that Britain has no constitution (defined as an act of the people antecedent to government which defines the government's authority)

C. Burke (British) argued that the constitution is a partnership between living, dead, and those to be born; not based on self-interest; gains legitimacy and higher authority as law from "prescription," i.e., because of extended use (this diverges from Aquinas' and Hobbes' views about the source of higher authority)

III. On the American Revolution and Constitution

A. Burke supports the American Revolution, calls it English in spirit (though the Founders relied primarily on natural rights, not on traditional rights of Englishmen)

B. like the French revolution in that both relied on universal principles of the rights of man and claimed to establish a new order; different in not overthrowing Christian or religious inheritance

1. based new democratic principles from Locke:

a) all men are equal and endowed with unalienable rights

b) government instituted to secure these rights, failure to do so grants citizens the right to alter or abolish it

c) popular sovereignty: people are the source of governmental legitimacy

IV. Features of the US Constitution

A. Written constitution limits the government by demanding

1. a president chosen by electors who disband upon selection

2. two Senators per state, chosen by each state's legislature

3. House of Representatives chosen by the majorities within each district into which a state is divided

4. a Supreme Court with the power to veto popular legislation, with members serving for life

B. A governing majority intentionally difficult to assemble

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Part I. Basic Interpretation

If you are interested, after reading Walter Berns' essay, in learning more about modern constitutionalism, please go to the Primary Source Documents to read some of the works that relate to the article. A biography of Edmund Burke is also available. As you go back to the primary sources, keep in mind the following questions:

1. What are the classical antecedents of modern constitutionalism?

2. What was the standard view of British constitutionalism, and how did Burke substantially alter it?

3. What was distinct and original about American constitutionalism, and how did its account of consent differ from the British contractual theory?

4. What is the main substantive difference between Burkean natural law and the Thomistic account?

5. How does American constitutionalism differ from Aristotle's mixed polity?

6. How are the French and American revolutions similar, and what implications do these similarities have for modern American constitutionalism?

Part II. Connections to Other Thinkers

As you look deeper into modern constitutionalism, consider the following questions in light of the broader history of ideas.

1. How did Locke's view on rights and constitutionalism influence the position Thomas Jefferson stakes out in "A Summary View of the Rights of British America"?

2. How does Burke's criticism of the French Revolution compare with the criticisms of natural law offered by legal positivists like H.L.A. Hart?

3. How does Cicero's account of natural law compare with the rights talk that underlies modern constitutionalism, and how might he have influenced the American founders and their predecessors?

4. Is Aquinas' attempt to ground natural law in eternal, divine law compatible with modern constitutionalism and its principle of popular sovereignty?

5. What are the principal criticisms of American constitutionalism offered by proponents of progressivism like Woodrow Wilson?

6. How does modern constitutionalism contrast with the British common law tradition?

Part III. Critical Interpretation

With a basic understanding of modern constitutionalism, let us examine more critically the works of the thinkers who influenced its development. Are the arguments persuasive? How do the various constitutional theories differ? Use the questions below as your guide:

1. Modern constitutionalism relies both on popular sovereignty and the idea of individual rights. Is there a tension between these two principles? If a majority of people agree to violate the rights of an individual in the minority, how can the competing principles of modern constitutionalism adjudicate the dispute?

2. Thomas Paine emphatically claims in his Rights of Men that there cannot be any right to commit future generations to the current form of government. On what basis does he argue this? How can he rationally and non-arbitrarily distinguish between real rights and false ones? How can we discern what the rights of man actually are?

3. Paine writes that he hates war and violence, and yet he is prepared to defend the very violent French Revolution on the grounds that it advanced the rights of man. Is there a trade-off in natural law thinking between the protection and implementation of rights and the preservation of peace and unity?

4. John Quincy Adams labels the rights undergirding the American Constitution "self-evident." Is he correct that these rights are self-evidently obvious to all people at all times? How would Adams account for the fact that our understanding of these "self-evident" rights has changed over time?

5. The Declaration of Independence uses the idea of equality and the endowment of rights to make its

case for the American Revolution. Without the idea of a Divine Creator, would the Framers have been unable to make their case for equality and rights?

Part IV. Contemporary Connections

These constitutional developments have had a significant influence on contemporary considerations of legal thinking and practice in Western society. Therefore, let us now turn to some contemporary issues and see how constitutional theorists mentioned might have addressed them.

1. There seems to be a proliferation of identified basic rights in recent years, including the right to education, to healthcare, to privacy, to marriage, etc. This list is much more ambitious than the moderate “life, liberty, and the pursuit of happiness” contained in the Declaration of Independence. Do these rights also have a source in natural law?

2. If they do have such a source, should they also be read into the Constitution, even if they are not explicitly mentioned? In other words, should natural law control and direct constitutions such that they should directly reflect the best contemporary lists of natural rights, or should there be some distance between the dictates of natural law and the content of constitutions?

3. In modern political discourse, people on opposite sides of a political question often both invoke some right in defense of their cause. Abortion is the paradigmatic case of this principle, for in the fight over abortion one side claims the right to choose and the other the right to life. Does the natural law thinking that undergirds modern constitutionalism help us to navigate rights conflicts?

4. There is a serious debate today between those who think the American Constitution is a living document that needs to change significantly to embrace and address modern concerns and those who think it should be read strictly according to the intent behind its original words. Which of these views, if either, seems more consistent with the philosophy propounded by modern constitutionalists?

5. Both in historical and contemporary America there is widespread disagreement about the desirability of sacrificing certain liberties for the sake of security and defense. In the midst of the Civil War, Abraham Lincoln famously argued that it may sometimes be necessary, and consistent with his oath of office to “preserve, protect, and defend the Constitution,” to violate a part of the Constitution in order to save the whole, just as it is sometimes necessary to amputate a limb in order to save a living body. And in the 20th century, Supreme Court Justice Robert H. Jackson wrote, “The Constitution is not a suicide pact.” In response to the War on Terror, some today might argue, for example, for expanding government’s ability to conduct electronic surveillance of in favor of the Patriot Act on similar grounds. How should the balance between national security and personal liberty be struck, and who should decide?

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