

PSCI 1040-004

Jim Battista

University of North Texas

Constitution

Social contract theory

- Notion that government arises from the consent of the governed
- Social contract: pact that brings a people out of anarchy and into some form of government
- Change from rule by divine right/inherent hierarchy
- Thought experiment: state of nature
 - What if people had no government at all?
 - What if people were governed only by own human nature?
 - Doesn't need to be a historical reality

- Dim view of human nature
- Rapacious self-interest
- Indifference to each other, maybe hostility
- Therefore state of nature dangerous place

- Each of us has natural rights
- Most important: self-preservation
- I can do what I think is necessary to keep myself safe
 - Including killing you before you kill me
 - You weren't going to come after me? Well, tough.

Life in Hobbes' state of nature

“In such condition there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.” *Leviathan*

Hobbes' solution

- Collective action problem
 - We all want to be safe from violent death. How?
- Institute government to protect us all
- By creating a social contract
 - We each agree to give our self-defence power to the King
 - We each agree to submit to the King
- Hokey? Real life examples?

The leviathan

- What can the sovereign do?
 - *Whatever he (she?) wants*
 - No control over the sovereign
- Contract isn't between me and the King
- Contract is between me and you
- King has no promises to keep, no contract to abide by
- Therefore revolution is illegitimate, wrong
 - Revolution is crime against everyone else in the Contract

- Starts with different state of nature
- Arrives at different conclusions
- People generally okay, but are a few bad apples
- No unrestricted right of self defense
 - Must give people who wrong you a fair trial, etc
- State of nature inconvenient, not dangerous bloodbath

Inconveniences

- Everyone has to protect his/her own rights (property, speech, etc) – difficult
- No unbiased and fair way to settle disputes (everyone is own judge)
- Without collective action, we get just rule by the strongest

Locke's solution

- Same collective action problem (but less dire)
- How to avoid inconveniences?
- Form government
 - Give up “uncontrollable liberty”
 - In exchange for secure rule of law
 - Hire a government to protect our rights

Lockean government

- Contract is between people and government
- King (or gov't) has duties and limits
- Therefore is right to revolution
 - If the King tyrannizes us and breaks the contract. . .
 - Then the contract is broken
 - Then he isn't King, because he's only King by the contract
- Look at Declaration of Independence
- Limited government

Articles of Confederation

- First attempt at “national” government
- Follow-on from prewar/early-Revolutionary Continental Congresses
- Confederation – much more decentralized than current federation
 - Other countries currently run as confederations – Canada, Switzerland
 - Balance of power closer to local/provincial than national
 - Explicitly union of states, not of citizens
 - U.S. under Articles is like U.N. now

Weak government under the Articles

Congress could not directly affect people, only state governments

- No authority to regulate individuals
- No power of enforcement – states enforced on behalf of national government (or failed to enforce)

Weak government under the articles

Congress could not tax, only “requisition” money from states

- **No** power to compel payment; most states didn't pay much (or even what they had said they would)
- Debt problems after peace – Congress had debt and states wouldn't pay for it (collective action)

Weak government under the articles

- Congress could not regulate interstate and foreign commerce
 - Taxes and customs between one state and another
 - Foreign countries had to negotiate trade treaties with each state legislature
- Each state had one vote – easy for small populations to obstruct bills
 - 9(/13) votes needed to pass legislation
 - Amending the Articles required unanimous consent
- No separate federal executive
 - Not necessarily crippling – modern parliamentary systems
- States and national government could both coin money

Problems under the Articles

- Debt (and currency devaluations)
- Trade problems (incl. no exports to French, British colonies)
- These led to a severe economic downturn
 - Part of why there are few movies about the Revolution
- Increases in personal debt and accompanying foreclosures, etc.

Problems under the Articles

- Shay's Rebellion
 - ... of debtors – terrorized MA gov't
 - National government could offer no help in dispersing
 - Wave of similar uprisings followed
 - State legislatures bowed to pressure – devaluations, inflation
- Argument: gov't isn't protecting people's rights; need new one
- Argument: social contract is broken; we need a new one

Getting to the Constitutional Convention

- 1787 Constitutional Convention
 - Met to discuss amending the Articles
 - **Had no authority from anyone** to propose new constitution
 - Big division: federalists and anti-federalists (round 1)
 - Federalists favored strong(er) central gov't
 - Anti-federalists didn't; thought confederacy better
 - Anti-federalists often didn't show up (Henry, RI)

The Constitutional Convention – setting up

- Framers were strategic actors, not necessarily disinterested
- Framers were revolutionaries
- Large conflict over content of document
 - “Threats” to withdraw during convention common
 - Ratification a near thing in NY, VA, MA
 - Actual Constitution emerged late in the process
- Some people we think of as being pivotal and important weren't
 - Washington
 - Franklin
 - Jefferson
 - Gouverneur Morris

- Agreement that changes needed to Articles, but disagreement about what changes
- Differences:
 - Small states vs. large states – small states knew they'd be losing some power if apportionment was by population or wealth
 - Slave states vs. free states – legality of slavery and importing slaves, apportionment
 - Mercantile/seacoast vs. farming/interior – spending and tariff rates
- But still, agreement that we needed a new social contract

The big problem

- Major disagreement: large vs. small states.
- VA (big state) plan vs. NJ (small state) plan
- Dispute largely over apportionment, but also over questions of how active national gov't should be
- settled by Connecticut Compromise, aka Great Compromise
 - No really great rationale at the time
 - Just what happened to pass the convention

Virginia, New Jersey, & Connecticut plans

Virginia Plan	New Jersey Plan	Final Constitution
Large state Bicameral leg. Both Apportioned by pop. Only lower house elected Senate sel. by House Single executive Exec. sel. by House Judic. sel. by leg. Council of Revision	Small state Unicameral leg. Equal rep. by state Only lower house, period No Senate Plural executive Exec. sel. by leg. Judic. appt'd by exec No clear veto	Compromise Bicameral Mix; one house each Only lower house elect Senate sel. by state leg Single exec. Exec. sel. by elector Judic. appt'd by exe & confirmed by Sen Presidential veto

The problem for the Framers

The problem the Framers faced was constructing a new government that was stronger and more active but not too strong or too active. . .

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself.

Or, how do you control the guy you hired to whip you?

Federalist 10 argues that the problem is **faction**

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

Solution 1: Prevent factions

How could we prevent factions from forming? Only two ways:

- 1 Give everyone “the same opinions, the same passions, and the same interests” – likely?
- 2 Abolish the “liberty which is essential to its existence” – a cure worse than the disease

So we can't prevent factions, we can only limit their mischief. The Constitution does this two ways:

- 1 A large republic
- 2 Representation

A large republic

- This is new, new, new – old thought had been you need a small state for democracy
- Don't need to worry about minority faction – so how to keep them minority?
- Large republic means that many factions elected to Congress
 - None a majority, therefore must compromise
- Helps solve problem of local majority imposing will on minority
- Really an argument for taking power from states

Representation

- Madison argues that representation is better than pure democracy
- Electoral process “refines” preferences of voters
- Theoretically we’ll elect those smarter than the average bear

Under such a regulation, it may well happen that 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, convened for the purpose.

When factions attack!

- What if the worst happens?
- What if a faction wins an election?
- Different lengths of term
 - 2 for House
 - 4 for Pres
 - 6 for Senate
 - If you want control of gov't, need to win all 3 branches
- Also checks and balances, separation of powers
 - Really separated institutions sharing power
 - Give each branch tools to defend itself
 - Then rely on self-interest

Antifederalists

- Antifederalists (round 1 and 2) disagreed
- Thought solution was stronger state gov'ts
- Legislature too small and therefore elitist
- Derided lack of limits on gov't power
- So they wanted:
 - Bigger Congress
 - More power to states
 - "Rotation" of legislators (term limits)
 - Bill of rights
- Federalists won, but with important concessions

General features of the Constitution

- We'll deal with what the Constitution says about Congress, the Presidency, and the Courts in the relevant sections of the course
- We'll deal with federalism next
- Focus here is on general trends

Distrust of democracy

- Framers didn't trust the mass of people to have really good judgment
 - Figured we'd just vote ourselves bread and circuses, vote to expropriate the rich
 - Not necessarily crazy – remember Shays' Rebellion

Distrust of democracy

- Wanted many checks on popular opinion, popular passions
 - Bicameral Congress
 - Indirect election of Senators
 - Limited government (can only do what Const. says it can do)
 - Indirect election of President
 - Strong, independent courts
 - Later, a bill of rights

Fear of unstable preferences

Video-store problem again

Usual solution: make it hard to change things

- Bicameral Congress with indirectly elected Senate
- Amendment process difficult
 - Usual way:
 - 2/3 of each House of Congress (hard to do, esp. before direct election of Senators)
 - Then ratification by 3/4 of state legislatures
 - 21st: ratification by state conventions
 - Other ways:
 - 2/3 of state legislatures can call a convention
 - Never done – fear that it would be Const. Convention II

State constitutions generally

State constitutions differ in many ways from the federal Constitutions:

- Longer
 - Average 28000 words (US is about 7000)
 - Longest: Alabama 1901, 175000 words
 - Shortest: Vermont 1793, 7500 words

State constitutions generally

- Much more specific and detailed
 - Statutory vs. liberal constitutions
 - Details that would be plain law in for Feds specified in state constitutions
 - Way to lock in your implementation / interpretation?
 - States deal with much wider array of issues than federal gov't does

State constitutions generally

- Many amendments – 24 states have more than 100
 - Many exceptions to general rules granted by amendment
 - Many grants of authority to cities/counties/etc granted by amendment
 - Contributes to length, complexity

State constitutions generally

- Younger – it is not uncommon for states to adopt new constitutions when the old one is too unwieldy
 - Newest: Georgia, 1982; LA 1975, MT 1973
 - Oldest: Massachusetts, 1780; NH 1784, VT 1793
 - Attempt in TX 1974 ended in failure

- Currently under seventh constitution, from 1876
 - 1826 – Coahuila y Tejas
 - Created TX as Mexican state
 - 1836 – Texas Republic
 - 1845 – Const. under which TX admitted to US
 - 1861 – TX Confederate const.
 - 1866 – Modified version of Const. of 1845
 - TX seeking readmission to US
 - Modifications abolished slavery, gave freedmen rights
 - Later rejected by Congress

- 1869 – Reconstruction Constitution
 - Centralized state government
 - Governor appointed many officials
 - Edmund Davis
 - Elected Governor in 1869 (dubiously)
 - New laws passed by legislature, Davis
 - Martial law by gubernatorial whim
 - New state police force responsible only to Davis
 - Some controls on press

TX Constitutions since 1869

- More on Constitution of 1869
 - 1873, Davis loses election to Confederate veteran Richard Coke
 - Refuses to leave office
 - Eventually forced from office by TX militia
- 1876 – What we still use

How current TX Constitution fits

- Current TX constitution typical of state constitutions
- Long – 80,000 words (US Const. is 7,000)
- Detailed
 - Talks about sewer placement, hospital districts in several counties
- Very amended – 432 approved, 174 rejected as of 2003
- Middling oldish – 14 older

Broad outlines of TX Constitution

- VERY limited government
- Reaction to experience under Davis
- Dispersal of powers

- Plural executive
 - Many executive offices elected (common in states)
 - Power dispersed to many officials
 - Old saw that Lt. Gov. is more powerful than Gov.
 - Many, many powerful boards and commissions

- Restrictions on what legislature can do
 - Often done through specific language in Const.
 - Also part-time, low-pay legislature has effects