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Essay #3 Questions #1

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The American era from 1776 to 1791 should be called a new beginning for constitutionalism. At that time, the Americans took to the task of creating a government that would best resemble the ideals of society and facilitate the practices that flowed from this unique American society. Broadly speaking, a constitution resolves what shall the form of government be and what shall be its power. (Greene, *Colonies to Nation,* p.312) This process began with the Virginian Declaration of Rights and culminated with the adoption of the Bill of Rights. The Americans knew what bad government looked like and they had a good vision of what good government would feel like. These documents bear a remarkable similarity to each other, but it took them several years and attempts to create the look of government that would equal the feeling. Although Thomas Jefferson was referring to the Virginia Constitution when he said, “This constitution was formed when we were new and unexperienced, in the science of government…No wonder then that time and trial have discovered very capital defects” (Greene, p.369), his assessment can be broadened to the American experience of the greater time period. As greater experience and enlightenment was attained by the Americans, a blue print, in the form of the federal Constitution, was written.

For Americans, a constitution addresses what James Madison felt was the great desideratum in government, in balancing sovereignty to be neutral towards different interests and factions, as well as between individual and society. (Greene p.519) As road markers for this balance, I will use the two declarations from 1776, the Articles of Confederation and state constitutions, and conclude with the federal Constitution and Bill of Rights. Each of these markers are part of the constitutional history of the country and served as either a de facto or de jure law of the land at some point. The constitutional process included defining where sovereignty lay and what form and structure of government would perpetuate a union of many different people who wanted their voice to be heard.

The goals of the Revolution were contained in the Declaration of Independence; that government should not interfere with “certain unalienable Rights” that include “Life, Liberty and the pursuit of Happiness”. (Greene p.298) Together with the Virginia Declaration of Rights, these documents laid forth the ideals of what the American society yearned for and expected. The Virginia document opened by stating that rights are the basis and foundation of government; and that government ought to be instituted for the common benefit and security of the people and nation. (Greene p.333) The question that was constantly being grappled with what was the role of the people and what structure of government best exemplified this enlightened republicanism.

The Declaration of Independence states that governments are “instituted among men”, to be founded on upon principles that will “effect their Safety and Happiness”. Now perhaps it would have been helpful for George Mason or Jefferson to have further defined these terms, liberty, happiness, benefit, safety, and security. However, it is also possible that by not fleshing these terms out, it did allow these documents to be widely accepted by Americans who came from many different backgrounds of life, as well as staying relevant to Americans and supporters of freedom around the world into the 21st century. The situations of life are different for all of these people and it was believed that a constitution should create a government to protect and promote such ideals. The Declaration states that government is “instituted among Men, deriving their just powers from the consent of the governed”. (Greene p.298) The Virginia Declaration similarly stated that all power is derived from the people. This document did take it a step further, when it called for frequent elections of representatives and that action taken without consent of the representatives should not be exercised. (Greene p.333) But therein did lay the irony of this constitutional period. Power was to come from the people, but consent was to be given by the representatives.

There was a great deal at stake to ‘effect’ safety and security. There were big issues, such as fighting a war, financing the war, and managing a growing paper money enterprise. It was nearly universally agreed that smaller issues would be left to the states. But there were many issues caught in between, such as taxation and regulation of commerce. It was argued that American government should be formed to suit all the variety of the people, which could best be handled by granting the Provinces full power within them. The Provinces would be smaller bodies that could best manage internal affairs, yet be concerned jointly for the success and prosperity of the nation. Any national government would be significantly limited, concerning itself only with war, peace, trade, and treaties with foreign nations, as well as settling disputes between the states. (Greene, p.316-317)

The Articles of Confederation articulated this belief in Article II when it did give the states complete sovereignty, freedom and independence, excepting expressly delegated powers to the United States, in Congress assembled. (Greene p.429) The states entered a firm league of friendship, delegates would be selected in a manner each State directed, and each state would have one vote. These were all examples of how sovereignty was controlled by the states equally and not the people.

Yet the sovereignty of the states was fraught with short-comings. To generalize the thoughts of many leaders at this time, the states were acting poorly. Madison highlighted many examples, which included a failure to comply with requisitions, encroaching on Federal authority, and violating laws and treaties that had been agreed to by the United States in Congress assembled, (Greene p.514-515) and their constant vicissitudes and uncertainties. (Federalist #37, p.181) The state of New York was violating a provision in the Treaty of Paris when it did not protect the property rights of Tories. Alexander Hamilton characterized the attitude of the states as simply compliance as they pleased. (Greene p.447) The states were at least consistent; compliance with requisitions received the same optional and conditional treatment as provisions of treaties. Hamilton continued his criticism by stating the fundamental defect of Congress is its lack of power, due to too much reliance on liberty, a lack of utilizing the power delegated to Congress, and a lack of sufficiently being able to deal with internal exigencies. (Course Packet, p.306) The Articles of Confederation did give plenty of attention to dealing with an armed external threat, but the confederated government had little guidance or ability to address much else.

Consent was a troubling ideal during this period as well. Without true consent from the people, the actions of government lacked true validity. In the confederated government, consent was by the states, or more particularly, the State legislatures. The state constitutions, which established the state legislatures, were an example of a circular argument. The Virginia Constitution of 1776 derived power from the delegates and representatives (Greene p.336) and many other states were similar. And yet the very document that dictated where power originated was in itself written and ratified by the very body that wrote the document. Jefferson recognized the weakness of this action when he said one of the weaknesses was, “That the ordinary legislature may alter the constitution itself.” (Greene, p.317) It was difficult to see how a ruling document could have any validity from the people, when assemblies had the ability to change the rules at any time.

Jefferson felt that the control of power needed a revision to protect the people and protect the government from abuse and said, “An elective despotism was not the government we fought for” (Greene p.370) and a town meeting in Concord resolved that the Massachusetts Legislature was by no means a proper body to form a government or constitution. (Greene p.347) This was the progression away from constitutions receiving their authority from State legislatures; there was a need to constitute governments whose source of power was derived more directly from the people. Massachusetts had separate elections for representatives to write and ratify their constitution. The Framers of the Constitution followed this example when they directed that ratification was to be done in independent conventions. Many constitutions also dealt with consent as it applied to elections. Qualifications for those to vote and how often elections would take place were clearly spelled out by the later documents relating to constitutionalism.

The preservation of the Union was certainly an ideal front and center in the minds of many, including George Washington, who ventured to say that an indissoluble union of the states under one federal head was essential to the well-being and existence of the country (Greene p.439). The opening desire of the Articles of Confederation was to create a perpetual Union between the states (Greene p.428), and the federal Constitution does begin with “In order to form a more perfect Union”. (Greene p.547) The ideals of 1776, which included safety and security, are accomplished in part through the continuity of a Union. The concerns of Americans about these ideals are further demonstrated by the fact that five of the articles in the Articles of Confederation deal with war and defense, the state constitutions included language about the regulation of state militias, the Constitution did give Congress powers to make and maintain an army and navy, and the Second Amendment in the Bill or Rights protects a state’s right to a militia. The country meandered along in defining how this safety and security would be provided, needing a large and standing army during the time of the Revolution, indirectly hoping or wishing that any obligations to it would disappear, then coming to the realization that a perpetual Union needed protection against both exterior and interior threats. (Federalist #9 p.37)

One theme throughout the period was that a republican form of government was the only option for the states and new nation. John Adams said that the end of government is the happiness of society (Greene p.307), and continued on by stating, “That there is no good government but what is republican.” (Greene p.307) By republican, it was meant to have a few making decisions for the many. Republicanism was to be manifested in the states through representatives of the people (Greene p.333), through the Congress assembled in the confederated government (Greene p.430), and in the Congress of the United States, whose membership shall be representatives of the people. (Greene p.547-548) There were different incarnations of the legislative power. Pennsylvania (Greene p.339) and the confederal government adopted a unicameral body, while Virginia established and the United States morphed into a bicameral structure that was established by the Constitution. (Greene p.326) In these various forms, the ultimate belief was still validated on having a republican form of government. A unicameral legislature was brushed aside when Thomas Jefferson wrote about the value of having more interests represented in different houses of legislation and compensating for the evils of oversight. (Greene p.370) In creating one house with more prestige than the other, the rights of the people could be better protected and government could be better protected against abuses by factions.

The federal Constitution created a larger national government with the creation of a separate executive and judicial branch. Hamilton argued that safety and security of liberty both internally and externally was best provided by an energetic executive (Federalist #70, p.362), while an impartial administration of the laws by an independent court would be the best protection against an over-zealous legislature. (Federalist #78, p.402-403)

A Bill of Rights was added to limit the national government’s influence on the people and the states. This protected a person’s right to thoughts, words and actions from a national government intrusion. Benjamin Rush said that every free government should consist of a bill of rights, a constitution, and laws. (Greene p.359) While many felt these amendments unnecessary, it completed the circle. The Bill of Rights articulated at a national level many of the same rights that were already part of State constitutions. It demonstrated a sincere belief in self-government and it helped to better articulate the goals of the Revolution as guaranteed rights and part of the federal Constitution.

The adoption of the Bill of Rights was the culmination of the struggle from 1776 until 1791 to create a constitution that was worthy of the Revolution. The people were given the power through republicanism, elections their national government leaders, and a protection against encroachments by the national government on their rights. National and state government structures were established to perpetuate the Union and create a government that could govern over a wide range of issues; to balance a strong and lasting federalism government that was for the people and by the people.

Final Note –

Professor Nelson, thank you for your time and efforts with the Summer Institute and for challenging myself to become a better scholar and writer.