

F.O.R.C.E VIDEO SCRIPT - INTRODUCTION TO THE CONSTITUTION

Voice Over: It's one of the most extraordinary governing documents ever created: The Constitution of the United States of America. It promises rights that had perhaps never before been formally granted to citizens of a state or nation: the rights to life, liberty, and the pursuit of happiness.

If only everything were that easy. As it happens, life, liberty, and the pursuit of happiness require some explanation—and protecting them requires spelling them out in some further detail.

So how much do you really know about your rights? If it's been a while since you've considered the constitution, don't worry: Professor Sheila Suess Kennedy, Emerita Professor of Law and Public Policy at the School of Public and Environmental Affairs at Indiana University Purdue University Indianapolis, is an expert...and she's here to help you understand the rights granted to every American citizen.

Sheila: Welcome to what might be called a short course on "Constitutional Competence." It's a "short course" because it isn't intended to turn you into lawyers, or constitutional scholars—but it is intended to give you the basic information every citizen needs.

Why do I say that citizens need knowledge of the Constitution, and America's legal framework?

Well, there's the personal aspect, of course: knowing how government is constructed, knowing who does what, gives citizens the ability to navigate the system. In today's world, unlike when the country was founded, people interact with government every day—from getting a driver's license, to obtaining business permits, to zoning their properties, to applying for social security and Medicare, to encounters with the police and other authorities, and innumerable other points of contact. Knowing how the systems work saves time and avoids frustration.

So the founders also created the Bill of Rights: ten amendments to the constitution that guarantee individual civil rights and liberties to the individual, including freedom of speech, press, and religion...establish rules for due process of law...and grant powers not delegated to the federal government to the people or the states.

(2:38)

Speaking of systems: American government is intended to be "by the people." Government at all levels—national, state, local—depends upon citizens to cast informed votes. When people don't know what government is supposed to do— and even more important, when they don't know what the Bill of Rights prohibits government from doing— when they don't know which part of government is supposed to do what—those ballots aren't informed.

Even more important, in our very polarized age, We the People need to inhabit the same reality. Productive civic engagement requires genuine communication, and a common base of knowledge. If I say a piece of furniture is a table and you insist it's a chair, we're not going to be able to agree on how to use it. If we don't know what the rules are, we aren't going to know when or if public officials A or B broke them. And if we want to make effective and persuasive arguments about what certain laws or policies should be, we need to base those arguments on a sound understanding of what policies are within the constitutional framework.

(4:20)

Finally, civic knowledge is more important in America than elsewhere, because America is more diverse than most other countries. Our citizens do not share a political history, a common religion, or a single race or ethnicity. In some places, citizens don't even speak the same language. In the absence of cultural, theological and linguistic ties, societies require what sociologist Robert Bellah called a "civil religion" through which to forge a common civic identity.

In the United States, that civil religion has centered upon our constituent documents—the Declaration of Independence, the Constitution and the Bill of Rights—and the governing philosophy they embody, what I like to call “The American Idea.”

The tribalism fed by inequality and social media grows more pronounced in the absence of civic literacy. When Americans are ignorant of the history, philosophy and evolution of their constitutional form of government, they may share a common national geography, but they don’t share a civic identity. The absence of a common “civic religion” or overarching allegiance to a theory of government translates into widespread neglect of an important civic obligation, the duty to be sufficiently informed to evaluate government’s conduct of the people’s business
(5:57)

So civic literacy is important for lots of reasons. It is also dangerously rare. Two years ago, 37 percent of Americans couldn’t name a single one of the rights guaranteed under the First Amendment.

Only 26 percent could name the three branches of government.

Fewer than half of 12th graders can define federalism.

Only 35% of teenagers recognize “We the People” as the first three words of the Constitution. There is much more data, and it’s all depressing.

(6:46)

Let me share a bit of history, to put this into context. What few people realize is that America had two very different sets of “founders.” Legal scholars call them the Planting Fathers and the Founding Fathers.

The Planting Fathers were those who first settled in what was then called “the New World.” They came for their version of religious liberty—which was their right to worship the correct God in the correct Church, and their right to establish a government that would require their neighbors to do the same. Think of John Winthrop, and his Shining City on the Hill.

Of course, even then, there wasn’t unanimity about the relationship of religion and government. Roger Williams founded Rhode Island, where all beliefs were welcome, after being forcibly ejected from Massachusetts for practicing the “wrong” religion. Williams, by the way, was the first person we know of to use the metaphor “a wall of separation.”

The Baptists of the day also wanted government out of religion. Baptists were one of what were then called “dissenting” churches—and they endorsed the complete separation of Church and State. One Baptist pastor—John Leland—insisted that government had no more to do with religion than it did with mathematics.

But most of the early settlers defined liberty as “freedom to do the right thing” which included worshipping the right God, and firmly believed government had the right and duty to tell citizens what the “right thing” was.

As the colonies were being settled, and time passed, the European Reformation and the invention of printing led to a rejection of Catholicism’s insistence that clergy was an essential “go between,” between worshipers and God, that priests were needed to “explain” the bible to congregants. Changes ushered in by the Reformation are credited for empowering individuals, who—thanks to Gutenberg— could now read and interpret the bible for themselves.

(8:43)

That new individualism led to the Enlightenment, which ushered in science and empirical inquiry and ultimately, a profound change in the definition of individual liberty. Liberty was no longer “freedom to do the right thing.” It became defined as what we now call the libertarian construct: “, so long as you do not thereby harm the person or property of another, and so long as you are willing to respect the equal right of others.”

150 years after the Pilgrims landed at Plymouth Rock, George Washington took the Oath of Office on a Constitution the Planters wouldn’t have recognized. The Enlightenment had intervened, and its scientists and philosophers had redefined liberty and reconceptualized the scope of legitimate government.

(9:42)

Let me talk a bit more about the Enlightenment, and especially its all-important redefinition of liberty. As I previously noted, liberty was seen by the Founders as an affirmation of personal autonomy—what you might think of as the individual’s right to self-government. After the Enlightenment, government was no longer supposed to tell you how to live your life and what church to attend; instead, it was supposed to protect your inherent human right to decide for yourself what book you’d read, what prayer you’d say, what you’d believe, and what life goals you would pursue. After the Enlightenment, government wasn’t supposed to be headed by a monarch exercising the divine right of kings; it was supposed to gain its authority from the consent of the governed. Obviously, not everyone embraced those changes, but those who created our American government did.

The Enlightenment was a major 18th Century cultural, intellectual and philosophical movement; it produced not just science and empirical inquiry, but also the “natural rights” and “social contract” theories of government legitimacy on which America’s constitutional system is based.

Enlightenment thinkers included Isaac Newton, Voltaire, Montesquieu, Hobbes, John Stuart Mill, John Locke and many, many others. The Enlightenment ushered in profound changes in the way people thought about science, education, liberty and the role of government.

(11:27)

In the colonies, Enlightenment insights were called the “new learning,” and those new learnings were enormously influential among the propertied and educated men who would eventually draft the constitution. It is important, however, to recognize that not everyone then or now agreed with the Enlightenment definition of liberty as personal autonomy—an individual’s freedom to make his own moral and political decisions, free of government coercion. America’s “culture wars” continue to be fought between those who do see liberty as the right to “self-government,” and people who continue to believe that government should impose moral and religious beliefs on everyone—their moral and religious beliefs, of course. The U.S. Constitution, however, is based upon the Enlightenment definition of liberty.

(12:26)

The Enlightenment also gave us John Locke’s “social contract” theory of government. Locke believed that government legitimacy rested on a theorized agreement—a “social contract” –between citizens and their governments. Citizens give the state a monopoly on the use of coercive power, and in return, the state protects their property and maintains public order and safety. (As I said earlier, this was a dramatic change from belief in the divine right of Kings, a belief that had long justified monarchy as “God’s design.”) In Locke’s view—a view adopted by the Founders—government power came from the people, who authorized government to exercise that power for specific purposes, and who could revoke that authority if the government failed to keep its part of the bargain.

(13:25)

The introduction of science and empiricism was seen by many colonists—and is seen by many fundamentalist denominations today— as an assault on religion and the literal interpretation of the Christian bible. That suspicion undoubtedly is one reason for the periodic rejection of science by Americans who don’t like what science is telling us about climate change or wearing masks during pandemics.

Science has been defined as the pursuit of knowledge and understanding of the natural and social world, achieved by following a systematic methodology based on empirical evidence. (Let me repeat that.) Science requires the observation, identification, description, experimental investigation, and theoretical explanation of natural phenomena. Science is generally characterized by empirical inquiry—by examining the world around us and faithfully and accurately recording what we see.

Modern science dates back to Enlightenment figures like Isaac Newton and Robert Boyle, who applied inductive reasoning to the methodological study of the physical world. The scientific method begins by identifying a question or a problem, after which relevant data are gathered, a hypothesis is formulated based upon that data, and the hypothesis is then subjected to additional empirical testing.

(15:20)

When there are sufficient confirmed hypotheses, a theory is constructed—in science, “theory” has a very different meaning than the way we use that word in conversation.

Understanding what human activities can be classified as scientific, rather than philosophical, ideological or religious, is particularly important in the United States, because making that distinction is the only way we can determine whether government should be involved. For example, the House of Representatives’ Committee on Science and Technology is supposed to evaluate matters that are properly before it. But that means that members of the Committee need to understand what counts as science and what doesn’t.

When parents petition public school boards to include alternate theories of planetary and human creation in their science curricula, members of that school board need to be able to distinguish between theories that are genuinely scientific—and appropriate for inclusion in a science classroom—and those that are based upon religious doctrine, and are out of place in a science classroom, although they might be included in a class on comparative religion.

(16:27)

So where are we now, and how did we get here? Knowing a bit about America’s early history provides some important context to the legal framework we have now. After the Revolutionary War, the then-13 colonies came together to create Articles of Confederation and Perpetual Union. That document was approved by the Second Continental Congress after considerable debate on November 15, 1777, and it was then sent to the states for ratification. The states—having originally been independent colonies—were jealous of their prerogatives and extremely reluctant to concede any of their sovereignty; as a consequence, the Articles created a fatally weak central government.

Under the Articles, Congress only had one chamber in which each state had one vote. States could and did operate independently from the central government. Congress needed 9 of the 13 states—a supermajority—to pass any laws. The Articles required unanimous consent to any amendment, so all 13 states would need to agree on a change—which basically meant no Amendment could pass. The central government had no authority to tax, and had to beg states to voluntarily send money.

Since the central government couldn’t count on a steady cash flow, it couldn’t maintain an effective military, back its own paper currency, or repay the huge debts left over from the war. Those problems were exacerbated by the lack of a common currency; the central government and the states issued separate money, which made trade between the states and other countries extremely difficult.

(18:25)

These fatal weaknesses all came to a head with Shay’s rebellion, a tax protest by Massachusetts farmers. The central government simply lacked the resources or authority to put the rebellion down, and had to rely on a Boston militia that had been sponsored by private businesses.

When the men we now call the Founders met in Philadelphia, they created a new and much stronger central government—the structure of which we will be examining. As most Americans know, when that document was sent to the states for ratification, the states conditioned their approval on the addition of a Bill of Rights that would contain explicit protections for the rights retained by the states and their citizens.

Later in this series, I will revisit the debates between the Federalists and Anti-federalists—between proponents of a Bill of Rights and those who were dubious about it. That debate led to the 9th and 10th Amendments—important Amendments that are all too often ignored.

The United States Constitution was the product of numerous trade-offs and compromises.

(19:40)

The Electoral College, for example, was a concession to southern slave states. In a direct election system, the South would have lost every time because a huge percentage of its population was slaves, and slaves couldn’t vote.

The Electoral College allowed states to count their slaves, although at a “discount” thanks to the three-fifths clause, and that gave the South the inside track in presidential elections. Eight of the first nine presidential races were won by a Virginian, thanks in no small part to the fact that Virginia had a massive slave population that boosted its electoral vote count.

I think it is fair to say that the Electoral College has outlived any usefulness it may have had; I will address the problems it causes in a later video in this series.

As the last few years have reminded us, the American ideals enumerated in the Declaration were a good deal loftier than the reality, and far too many of them are still aspirational.

(21:10)

All men—let alone all people—were not “created equal.” Only propertied white males were treated equally— not African-Americans, women or Native Americans. As I go through the Bill of Rights, and the constitutional jurisprudence, I’ll trace the gradual expansion of the country’s commitment to “equality before the law.” The first, and most consequential expansion occurred just after the civil war: the 13th Amendment emancipated the slaves, and the 14th Amendment required states to extend the “privileges and immunities” of citizenship to their own citizens. The 14th Amendment also was intended to require the incorporation of the Bill of Rights, although the reluctance of the Supreme Court meant that process of incorporation was selective, and occurred over a period of time.

(21:52)

Incorporation is an odd legal term that means that the provisions of the Bill of Rights apply to all levels of government, including state AND local government actors. Before the Civil War, the Bill of Rights only restrained the central government. James Madison had wanted the Bill of Rights to apply to all levels of government, but he was outvoted.

So—what did our Founders create? What does our “constitutional architecture” look like?

(22:24)

First of all, our system is one of representative, rather than direct, democracy. The basic idea was that voters would elect people to public office to represent their interests; they would choose as representatives the more educated, thoughtful members of their communities, the “best and brightest” who would study the issues and legislate on their behalf.

Although the Bill of Rights initially only restrained the ability of the federal government to infringe fundamental rights, the ten Amendments did underscore the high value the founders placed upon individual autonomy, what we might call “self-government.”

It is worth emphasizing that the Bill of Rights is an anti-majoritarian document. In our system, a majority of citizens or a majority of lawmakers make most governance decisions—but those decisions cannot infringe on liberties protected by the Bill of Rights, no matter how large a majority wants to do so. A majority of your neighbors may want to ban that dirty book, or make you go to church, but as we’ll see, they cannot do those things. The Bill of Rights is sometimes called a libertarian brake on majority rule.

(23:50)

That brings me to the Founders’ concept of liberty as a negative; liberty as freedom from government constraints. In the United States, our constitutional rights are rights to be free of *State* or government action. Affirmative rights are statutory. When I was Executive Director of Indiana’s ACLU, I was always surprised by how few people understood that if government wasn’t involved, neither was the Constitution.

If Walmart refuses to carry a certain book, that’s not censorship—at least, not in the legal or constitutional sense. If the government required a bookstore to stop selling that book, however, that is censorship and a violation of the First Amendment.

As I explained earlier, the Bill of Rights now applies to all levels of government, not just the federal government. We call the process by which the Supreme Court used the 14th Amendment to apply the restraints of the Bill of Rights to State and local governments Incorporation.

Americans continue to argue about how the courts should apply the constitution to cases before it. There is a continuing debate between legal scholars and others over the meaning of original intent—between advocates of what is sometimes called “living constitutionalism” and “textualism” or “originalism.” Here’s the dilemma: today’s courts are constantly asked to decide how the constitution applies to facts that the founders could never have contemplated. (25:35)

What would James Madison say about porn on the Internet?

What would Jefferson say about police affixing a GPS to a suspect’s car without a warrant?

Most legal scholars would approach these issues by reference to the *value* that the founders were trying to protect. James Madison could never have contemplated the invention of the Internet, but he and the other founders had pretty strong beliefs about freedom of expression and government censorship. How can today’s courts be faithful to the importance of protecting free expression when they are faced with methods of communication that the founders could not have foreseen? What about that GPS example? How did the founders limit government’s search and seizure powers? Why did they require warrants? The question today’s courts must answer is: How can we protect the individual liberties the founders wanted to protect in an environment they could never have imagined?

(End of video)