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The Constitution from a Conservative Perspective

By James McClellan

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by James McClellan

The extent to which the conservative tradition in American law and politics upholds our constitutional edifice is a question that is seldom raised. This is so because it has always been generally assumed that conservatives have no basic quarrel with the American constitutional system and throughout American history have been its most avid, loyal supporters. Indeed, we are hard pressed to name a single book or article written from the conservative perspective that is critical of the Constitution or rejects any of its fundamental principles.

This is an oversimplification of the constitutional struggles that have gripped our nation since the founding, however, and upon closer examination we shall see that it is also somewhat misleading. The truth of the matter is that our Constitution, as we know it today, may be seen in retrospect to contain a number of inherent flaws, flaws that conservatives have or should have observed with profound dismay long before the New Deal Court and its successors made them abundantly obvious. When we speak of the Constitution, of course, we are speaking not merely of the Constitution of 1787, but of the entire Constitution as amended – the original Constitution and the twenty-six amendments that have been added since 1791. Whereas the original Constitution and the Bill of Rights (as originally understood) have enjoyed the universal acclaim of thoughtful conservatives, a number of amendments, particularly the 14th, have proved to be anathema not only to conservative political values, but also to limited government.

THE CONSTITUTION OF THE FOUNDERS

Before we evaluate these amendments, let us first review the original Constitution from a conservative perspective. This may seem futile or unintelligible at first because the Constitution of 1787 predates the emergence of a coherent conservative intellectual tradition in American politics. As we are reminded by Russell Kirk in his superb classic, *The Conservative Mind*, "Conscious conservatism, in the modern sense, did not manifest itself until 1790, with the publication of [Edmund Burke's] *Reflections on the Revolution in France*. In that year the prophetic powers of Burke defined in the public consciousness, for the first time, the opposing poles of conservation and innovation. . . . If one attempts to trace conservative ideas back to an earlier time in Britain, soon he is enmeshed in Whiggism, Toryism, and intellectual antiquarianism; for the modern issues, though earlier

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taking substance, were not distinct. Nor does the American struggle between conservatives and radicals become intense until Citizen Genet and Tom Paine transport across the Atlantic enthusiasm for French liberty."

Remarkable Consensus. It is not surprising, therefore, that the great Federal Convention of 1787 was remarkably free of ideological rancor. There were no liberal or conservative factions contending for power in Philadelphia, let alone libertarians, egalitarians, or socialist splinter groups. The Convention functioned under a broad consensus respecting our fundamental principles of government. There were no great debates on the merits of separation of powers. No one questioned the need for rotation of officeholders. The desirability of bicameralism was taken for granted. Most everyone agreed that a democratic republic, operating under enumerated and thus limited powers, was the best political regime for the American people. The factions that did exist were generally transient and unorganized, and were based principally on local and sectional interests. What divided the delegates more than any other issue was federalism — the nature of this new union they were creating and the appropriate division of powers between the two levels of government.

This was the theme song of the Convention, and it colored the entire proceedings from beginning to end. States' Rightists, usually but not always representing the small states, doggedly insisted upon protecting the interests of the states in structuring the three branches of the federal government; and the nationalists, or Federalists as they later came to be known, labored unceasingly to reduce the power and influence of the states and to energize the central government. The conflicting views expressed in the Convention over the role of the states in the new republic stemmed not so much from fundamental differences over the nature of man, the functions and ends of government, or the scope and meaning of freedom, but over questions of power. In sharp contrast to the nationalists, who envisioned a strong central government and may even have entertained notions of a vast empire in the making, the States' Rightists harbored a deep suspicion of political power and were ever mindful of the oppressive nature of distant, centralized government, such as that experienced under George III. Acutely aware of the cultural differences that separated the several states, they found safety and comfort in local independence, diversity, and the idea of loosely associated small republics. Not a few were prescient doomsayers who foresaw the great sectional conflict that would later engulf the nation and destroy the Union. The Constitution that emerged from these proceedings was a compromise between these two schools of thought, both sides relatively satisfied with the end result by the time the first Congress convened in 1789. Instead of mounting the barricades or falling into permanent opposition, the defeated anti-Federalists rallied around President Washington, pledged their allegiance to the Constitution, and joined their fellow countrymen to forge a new nation. Such a remarkable consensus was not achieved a few years later in revolutionary France, of course, where the armed doctrine of ideology, eradicating established political, social, and religious institutions in the name of liberty, equality, and brotherhood, brought the nation to ruin and left it deeply divided.

Act of a People. Though distinctly American and unique in many ways, the Constitution thus created was also Anglican in character, a tributary of the English constitutional tradition. Its essential features included the following: first, it was based on the idea that the only legitimate constitution was that which originated with, and was controlled by, the

people. Thus a constitution was more than a body of substantive rules and principles. As Thomas Paine wrote, "A constitution is not the act of a government, but of a *people* constituting a government, and a government without a constitution is power without right." This principle is declared in the Preamble of the Constitution, which proclaims that the Constitution is ordained and established not by the government, but by "We the People." American jurists in the early 19th century commonly referred to the Constitution as an expression of "the permanent will" of the American people.

Second, the U.S. Constitution subscribed to the view that the government must in all respects be politically responsible both to the states and to the governed. This was achieved through the election and impeachment process, with only the members of the House of Representatives being directly accountable to the electorate. Though not directly represented, the states exercised some influence by virtue of the indirect election of Senators, the electoral college, exclusive control of the franchise, and the amendment process.

Third, the U.S. Constitution rested on the proposition that all constitutional government is by definition limited government. A constitution is a legal, not just a political limitation on government; it is considered by many the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law. The modern tendency toward legal positivism, identifying all law with legislation, is thus hostile to the American Constitution, which declares that the Constitution shall be the supreme law of the land.

Fourth, the U.S. Constitution embraced the view that, in order to achieve limited government, the powers of government must be defined and distributed – that is, they must be enumerated, separated, and divided. A unitary or centralized government, or a government in which all the functions or functionaries were concentrated in a single office, or a system built upon the supremacy of one branch, such as the legislature, over the other branches was a government that invited despotism and would inevitably become tyrannical and corrupt. This tendency toward "tyranny in the head" might be prevented, or at least discouraged, through a separation of powers among the three branches of the federal government, and a reservation to the states of those powers that were not delegated to the federal government.

Share of National Sovereignty. Conversely, the Framers were also mindful that, in order to be limited, it did not follow that government must also be weak. Too little power was as dangerous as too much, and if left unattended, might produce "anarchy in the parts," or a state of disorder into which the man on the white horse would ride to forge tyranny out of chaos. The solution for avoiding these extremes of too much and too little power was to balance power and to balance liberty and order, allocating to the people and to each unit of government a share of the national sovereignty.

Fifth, the U.S. Constitution was premised on the seemingly unassailable assumption that the rights and liberties of the people would be protected because the powers of government were limited, and that a separate declaration of rights would therefore be an unnecessary and superfluous statement of an obvious truth. Since the government of the United States was to be one of enumerated powers, it was not thought necessary by the Philadelphia delegates to include a bill of rights among the provisions of the Constitution. "If, among the

powers conferred," explained Thomas Cooley in 1871, "there was none which would authorize or empower the government to deprive the citizen of any of those fundamental rights which it is the object and duty of government to protect and defend, and to insure which is the sole purpose of bill of rights, it was thought to be at least unimportant to insert negative clauses in that instrument, inhibiting the government from assuming any such powers, since the mere failure to confer them would leave all such powers beyond the sphere of its constitutional authority." In short, the Constitution itself was a bill of rights because it limited the power of the federal government.

Hamilton's Warning. Indeed, said Alexander Hamilton in *Federalist* No. 84, it might even be dangerous to add a bill of rights. "For why declare," he queried,

> that things shall not be done where there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed. I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge, with a semblance of reason, that the Constitution ought not be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a right to prescribe proper regulations concerning it was intended to be vested in the national government.

In addition, the proponents of the Constitution thought that a bill of rights would be inappropriate for a fundamental law resting on popular sovereignty. However important under a monarchical government, a bill of rights was rather meaningless in a constitutional system established by and for the people themselves, whereby public affairs were to be administered by publicly controlled agencies of government. Bills of rights are for kings and their subjects, argued Hamilton, not for the American people, "Here, in strictness, the people surrender nothing; and, as they retain everything, they have no need of particular reservations."

THE BILL OF RIGHTS

These claims notwithstanding, the Federalists acceded to the demands of the anti-Federalists that a bill of rights be adopted. Why were the Federalists so easily won over to a position they had earlier rejected? The principal reason is that the Bill of Rights changed nothing as far as the constitutional structure was concerned. It neither reduced federal power nor increased state power. It simply declared what was already understood — that the national government had no authority in the general area of civil liberties.

In its original form, the Bill of Rights had a twofold purpose. The first and most obvious was to protect each individual from encroachments upon his liberty by the federal government. Thus the First Amendment provides that Congress shall make no law abridging the free exercise of religion, and by inference, leaves the question of religious

freedom as practiced in the states to the states themselves. The second purpose of the Bill of Rights was to calm the fears of the anti-Federalists and States' Rightists that the new government under the Constitution would use its powers to nullify state bills of rights, and to assure the states that they would retain exclusive jurisdiction over all civil liberties disputes within their borders, except on those instances where they had agreed to submit to a uniform national standard, as exemplified by Article I, Section 10. By exempting the states from its provisions, the Bill of Rights thus guaranteed to each state the right to decide for itself, under its own constitution, bill of rights, and statutes, all matters of public policy regarding the rights of speech, press, religion, and other personal freedoms that its citizens claimed against the state. The Bill of Rights, in other words, was a States' Rights document, the bulwark of American Federalism. It rested on the assumption that personal freedom was far too important a matter to entrust to a central government and that individual liberty would best be protected at the local level, where the citizens had a greater say in public affairs and public officials were near at hand and were likely to share the same values and beliefs or cultural background. In other words, the Bill of Rights was not only entirely consistent with the basic scheme of the Constitution, but actually reaffirmed and strengthened the federal system embodied in it.

Canons of Conservative Thought. What, historically, has been the conservative response to the Constitution and the Bill of Rights, and in what respects are the basic principles of the Constitution we have previously discussed consistent with the conservative intellectual tradition in America? The answer seems clear enough. Taking as our guide the canons of conservative thought analyzed by Kirk in *The Conservative Mind*, we are compelled to conclude that both the Constitution and the Bill of Rights, taken together, are in every respect a conservative document.

The first canon, according to Kirk, is a belief that a divine intent rules society as well as conscience. Over the centuries, the Judeo-Christian tradition, because it promotes freedom, virtue, order, and justice, has been a salutary influence on government. In the interest of good government, it behooves the state, therefore, to encourage morality and religion among the people. The Constitution has no quarrel with this assumption. As the careful research of M.E. Bradford has recently demonstrated, all but one or two of the Framers were men of religious faith, even though they produced an essentially secular document. By prohibiting Congress from establishing a national religion, however, they provided a harbor of safety for religion. In these respects, the Constitution was not neutral toward religion, but actually exerted a positive influence.

A second canon of conservative thought, Kirk observes, is diversity, or an affection for the proliferating variety and mystery of traditional life, as distinguished from the narrowing uniformity and egalitarianism and utilitarian aims of most radical systems. The federal system, of course, smiles upon diversity, and in so many different ways, rejects uniformity and inhibits consolidation. There is not even a hint in the Constitution of 1787 that political, social, or economic equality among the general population is a desirable or valid objective.

No Privileged Class. Nor does the Constitution establish or recognize a privileged class. It implicitly favors a free society, which affords men of natural abilities every opportunity to

rise by their own efforts, and resists the radical notion that either privilege or equality of station and wealth could benefit society.

A third canon — and this ties in with the second — is the conviction that property and freedom are inseparably connected. Indeed, the Constitution not only makes free enterprise possible, but promotes as well the sanctity of property rights through such provisions as the Contract and Takings Clauses.

Still a fourth canon of conservative thought in the American political tradition, notes Kirk, is a suspicion of concentrated power and a consequent attachment to our federal principle and to division and balancing of authority at every level of government. Notwithstanding the occasional lapses of certain Federalist Party members in the formative era, conservatives have generally and with increasing regularity rejected big government, rallying to the defense of the states, separation of powers, and the checks and balances system.

And finally, a fifth canon: recognition that change and reform are not identical and that innovation is a devouring conflagration more often than it is a torch of progress. Society must alter, for slow change, as Burke noted, is the means of its preservation; true and enduring reform requires time, thoughtful consideration, and the establishment of a general consensus. The Constitution recognizes the wisdom of this principle. The deliberate process in our bicameral Congress, for example, rejects the notion that speed is a virtue in law making; and our cumbersome amendment process shields the Constitution from the forces of innovation, requiring determined, not transitory, majorities for alteration of the fundamental law.

AMENDMENTS AFTER THE BILL OF RIGHTS

And so it would seem, then, that the American Constitution tends to embrace, if not promote, conservative values. This may explain why, throughout much of American history, particularly during the last century, liberal and radical elements in American society have been at war with the Constitution in a great number of ways, and have labored long and often successfully to change its fundamental structure in order to implement liberal programs and policies. This liberal assault on basic constitutional principles is, in fact, a dominant theme of American constitutional history since the War between the States.

It involves first and foremost an interminable struggle to increase the powers of each branch of the federal government and reduce substantially the reserved powers of the states. Beginning with the Reconstruction Amendments, which enlarged the powers not only of the federal courts but of Congress as well, the radical Republicans cut the heart out of federalism by stripping the states of their sovereignty respecting citizenship, state criminal procedures, and voter qualifications. Using an interpretive device known as the doctrine of incorporation, the federal courts later used the Due Process Clause of the 14th Amendment to obliterate the reserved powers of the states respecting nearly all of the liberties enumerated in the Bill of Rights, thereby accomplishing a complete nationalization of all civil liberties and overturning the main purpose of the first ten amendments.

Whittling Down State Powers. Since 1870, eleven amendments have been added to the Constitution, or just nine if we eliminate the 18th and 21st involving Prohibition. It is noteworthy that of these remaining nine amendments, six – the 15th, 17th, 19th, 23rd, 24th, and 26th – have dealt with voting. Taken together, they have whittled down the reserved powers of the states regarding the suffrage to the point of extinction. The few remaining powers left to the states have been eliminated by the Voting Rights Act and judicial embellishments of the "Times, Places and Manner" clause of Article I, Section 4, the 14th Amendment, and the 15th Amendment. It is difficult to contend that the several states are sovereign in any sense in light of these changes. They have no real voice as to who shall be their citizens, they cannot shape any of their voting districts as they wish, they must now provide for the direct election of their Senators, they have little control over who votes and thus determines their political leadership, and they no longer have any authority to determine the scope and meaning of most civil liberties that their citizens exercise.

As a result of the Income Tax Amendment, adopted in 1913, the states have also lost their economic base of power and financial independence and are now dependent upon federal largess or subject to federal control in providing for the health, safety, and welfare of their citizens under their police powers. In addition, the few remaining powers they enjoy under the 10th Amendment, such as education and local or intrastate commerce, have been usurped by the federal government through congressional statutes and Supreme Court decisions. So sweeping is federal control of the states that they cannot even determine the salaries for their state employees. In truth, the fifty states are little more than administrative units of the central government, and the United States is a federal system of government in name only. With the death of federalism, we thus witness the destruction of what must surely be the main pillar of the Constitution.

CHANGES THROUGH LEGISLATION

But the lust for power does not stop at the tomb of federalism. Since the dawn of the progressivist era in the late 19th century, liberal and radical forces have also assaulted, root and branch, the separation of powers and checks and balances system of our Constitution. From Woodrow Wilson down to Lloyd Cutler's committee on the constitutional system, there has been an outpouring of books, monographs, and articles among prominent liberal thinkers, which purport to show that separation of powers produces political paralysis, or "deadlock" as James MacGregor Burns puts it, and that our presidential system of government should therefore be scrapped in favor of a parliamentary scheme. Along these same lines, they have proposed various constitutional reforms to promote greater harmony among the three branches, including the establishment of a disciplined two-party system on the British model.

Champions of the Judiciary. Depending on whose ox was being gored, or more particularly which branch was blocking the road to serfdom, the liberals over the past century have targeted different branches for attack at different times. When, in the late 19th and early 20th centuries the Supreme Court stood in the way of economic regulation and the welfare state, liberal scholars produced a whole library of books challenging the legitimacy of judicial review. Charles A. Beard supplied the moral ammunition for a major

overhaul of our constitutional system with the flimsy and subsequently refuted thesis that the Framers were not disinterested patriots, but selfish men of greed who designed the Constitution as they did to line their own pockets and oppress the poor. Since 1937, of course, the liberals have become the stalwart champions of the judiciary, urging it to assume a more activist posture. Similar reversals have occurred regarding the office of the President, which at one time was said to be too weak but is now subjected to increasing restraints, as exemplified by the War Powers Act.

The liberals have been no less dissatisfied with the Constitution's preference for slow and gradual change over rapid innovation. Unmindful, or perhaps indifferent to the fact that the amendment process is designed to protect federalism and the interests of the states, they have routinely argued that the system is "undemocratic" because it requires extraordinary majorities. Fearing a popular uprising, they have on the other hand vigorously opposed constitutional amendments initiated by the people and the states through the convention method.

Filibuster Spared. Frustrated by the cumbersome legislative process, which once provided considerable protection to legislative minorities, the liberals have also endeavored, with much success, to streamline the flow of legislation. Since the Legislative Reform Act of 1946, they have implemented numerous changes to speed up the legislative process and eliminate pockets of resistance to hasty legislation. The Senate filibuster, long an object of liberal opprobrium and now weakened, was nevertheless spared the axe after liberals came to the realization that they could use it for their purposes.

And so it seems that the liberal tradition in American politics not only has been forcefully at odds with the basic principles of our Constitution but has indeed weakened some and subverted others. The record points to the conclusion that their alleged loyalty to this document is less than convincing.

What is particularly disturbing is the subtle transformation that has taken place over the past fifty-some years concerning the meaning, scope, and constitutional basis of our liberties. To an alarming degree, the American people are losing control over their own rights and liberties, which are now defined for them by an unelected judiciary. If, when the Constitution and Bill of Rights were presented to the American people for ratification, they had been told that they would be free to regulate their own affairs except as regards their personal freedom, would any citizens have agreed to such a constitution? Did the American people surrender their right to decide what their rights shall be when they ratified the Bill of Rights? Or the 14th Amendment? Such does not appear to be the common understanding of the time. Yet this is precisely what has happened.

WHY THE LOSS OF FEDERALISM

There are at least two underlying causes of our present predicament. The first is the emergence of the notion — when it first took hold is unclear — that the purpose of the Bill of Rights was not to protect the right of the people in the states to define their rights as they saw fit, in the democratic tradition of majority rule, but to protect minorities, in the abstract. In whatever way minorities were to be protected, however, they were expected to

look to their state assemblies, state courts, and state bills of rights for protection, not to the Supreme Court. For the American democratic republic was never established under the belief that minorities would govern the affairs of the communities on all matters respecting civil liberties through some Olympian Supreme Court. In other words, the main purpose of the Bill of Rights was not to protect minorities, but to protect separate and distinct majorities in the several states. As we noted at the outset of this paper, the American Constitution is based on the idea that the only legitimate constitution is that which originates with, and is controlled by, the people. The practice of imposing the will of the minority upon the majority, through the Bill of Rights, is inconsistent with the democratic premise of the Constitution and the Bill of Rights.

Cart Before Horse. The second explanation as to how we arrived at our present state of affairs, it seems to me, is the gradual emergence of the delusion that the primary purpose of the Constitution is not to provide for limited government but to protect rights, or perhaps even to increase the powers of government in order to grant even greater protection for more and more rights; and further, that only the Supreme Court has the right to say what these rights shall be. Such an approach puts the rights cart before the constitutional horse and robs the people of their most precious freedom — the right of self-government.

It is the Jacobins of revolutionary France, of course, who put rights ahead of their constitution, not the delegates of our constitutional convention. Rejecting the American principle that individual liberty is derivative of limited government, the French erroneously believed that too many limitations on the powers of government impeded the "general will" and that a mere assertion of their rights — a parchment barrier as it were — would be amply sufficient to safeguard liberty. And so they drafted their famous *Declaration of the Rights of Man and of the Citizen* and made it the preamble of their first Constitution in 1791. Fifteen constitutions later they are still paying lip service to it under the Fifth Republic. The Declaration was, and continues to be, a social constitution as distinguished from the political, and it has remained a philosophical call for action that was sometimes heeded and sometimes not. Unlike the U.S. Constitution, it has never provided limitations on the powers of government. As for the first French Constitution of 1791, it lasted less than two years. A curious mixture of monarchical and republican principles, it rejected either in principle or by operation all of the five essential elements of the U.S. Constitution for limiting the powers of government. It is worthy of notice that, when they first organized, the Jacobins called themselves "friends of the Constitution."

Supreme Court Dictatorship. It is no exaggeration to suggest that the Jacobins who run our constitutional system have converted it into a Declaration of the Rights of Man by divorcing the Constitution from its amendments. Indeed, the 14th Amendment, unencumbered by the restraints of the Constitution and the federalism of the Bill of Rights, is virtually a Constitution itself, a sort of Declaration of the Rights of Man that gives the Supreme Court, our very own Committee of Public Safety, plenary authority to determine the rights and liberties of about 250 million people as it pleases — a dictatorship as absolute as any royal government has ever been, and far more powerful than that of George III.

The ideology of civil rights that has been imposed upon the American people, we should further note, has had an international impact of catastrophic proportions. It is not limited

to the American republic. In sharp contrast to earlier times, when American diplomats were selling the Constitution abroad, and works such as Joseph Story's *Commentaries on the Constitution* were being translated into foreign languages and used as guides for the structuring of foreign constitutions, the emphasis today is on human rights in the tradition of the French Declaration of Rights. The United States and a multitude of human rights organizations keep elaborate records of human rights violations throughout the world, but are indifferent to structural infirmities that in most cases are the cause of those violations. Perhaps if we paid greater heed to limited government and constitutionalism, the problem of human rights would become less prevalent.

In the final analysis, it is incumbent upon us to understand that our current constitutional struggle, highlighted by the defeat of Judge Robert Bork, is a struggle for the soul of a Constitution that is rapidly slipping away. The ability of the nation to encourage religion and promote morality, to limit the powers of those who govern us and hold them accountable for their actions, and to resist the forces of ill-considered innovations has been severely weakened by an activist judiciary and its army of collaborators. In this situation there is a glimmer of hope, for the American Constitution has deep roots and is still a powerful force. But it will require a massive educational effort to kindle this glimmer into a flame. To paraphrase Eric Voegelin, who long ago recognized that we must repress gnostic corruption if we are to restore the forces of civilization, so too we must repress constitutional corruption if we are to save our conservative Constitution. At present the fate of our civilization and our fundamental law is in the balance.

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