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# The Meaning Of The Constitution

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The Constitution of the United States has endured for over two centuries. It remains the object of reverence for nearly all Americans and an object of admiration by peoples around the world. William Gladstone was right in 1878 when he described the U.S. Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man."

Part of the reason for the Constitution's enduring strength is that it is the complement of the Declaration of Independence. The Declaration provided the philosophical basis for a government that exercises legitimate power by "the consent of the governed," and it defined the conditions of a free people, whose rights and liberty are derived from their Creator. The Constitution delineated the structure of government and the rules for its operation, consistent with the creed of human liberty proclaimed in the Declaration.

Justice Joseph Story, in his *Familiar Exposition of the Constitution* (1840), described our Founding document in these terms:

> We shall treat [our Constitution], not as a mere compact, or league, or confederacy, existing at the mere will of any one or more of the States, during their good pleasure; but, (as it purports on its face to be) as a Constitution of Government, framed and adopted by the people of the United States, and obligatory upon all the States, until it is altered, amended, or abolished by the people, in the manner pointed out in the instrument itself.

By the diffusion of power—horizontally among the three separate branches of the federal government, and vertically in the allocation of power between the central government and the states—the Constitution's Framers devised a structure of government strong enough to ensure the nation's future strength and prosperity but without sufficient power to threaten the liberty of the people.

The Constitution and the government it establishes "has a just claim to [our] confidence and respect," George Washington wrote in his Farewell Address (1796), because it is "the offspring of our choice, uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers uniting security with energy, and containing, within itself, a provision for its own amendment."

The Constitution was born in crisis, when the very existence of the new United States was in jeopardy. The Framers understood the gravity of their task. As Alexander Hamilton noted in the general introduction to *The Federalist*,

> [A]fter an unequivocal experience of the inefficacy of the subsisting federal government, [the people] are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own impor-

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> tance; comprehending in its consequences nothing less than the existence of the Union, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world.

Several important themes permeated the completed draft of the Constitution. The first, reflecting the mandate of the Declaration of Independence, was the recognition that the ultimate authority of a legitimate government depends on the consent of a free people. Thomas Jefferson had set forth the basic principle in his famous formulation:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men deriving their just powers from the consent of the governed.

That "all men are created equal" means that they are equally endowed with unalienable rights. Nature does not single out who is to govern and who is to be governed; there is no divine right of kings. Nor are rights a matter of legal privilege or the benevolence of some ruling class. Fundamental rights exist by nature, prior to government and conventional laws. It is because these individual rights are left unsecured that governments are instituted among men.

Consent is the means by which equality is made politically operable and whereby arbitrary power is thwarted. The natural standard for judging if a government is legitimate is whether that government rests on the consent of the governed. Any political powers not derived from the consent of the governed are, by the laws of nature, illegitimate and hence unjust.

The "consent of the governed" stands in contrast to "the will of the majority," a view more current in European democracies. The "consent of the governed" describes a situation where the people are self-governing in their communities, religions, and social institutions, and into which the government may intrude only with the people's consent. There exists between the people and limited government a vast social space in which men and women, in their individual and corporate capacities, may exercise their self-governing liberty. In Europe, the "will of the majority" signals an idea that all decisions are ultimately political and are routed through the government. Thus, limited government is not just a desirable objective; it is the essential bedrock of the American polity.

A second fundamental element of the Constitution is the concept of checks and balances. As James Madison famously wrote in *The Federalist* No. 51,

> 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 controul the governed; and in the next place oblige it to controul itself. A dependence on the people is, no doubt, the primary controul on the government; but experience has taught mankind necessity of auxiliary precautions.

These "auxiliary precautions" constitute the improved science of politics offered by the Framers and form the basis of their "Republican remedy for the diseases most incident to Republican Government" (*The Federalist* No. 10).

The "diseases most incident to Republican Government" were basically two: democratic tyranny and democratic ineptitude The first was the problem of majority faction, the abuse of minority or individual rights by an "interested and overbearing" majority. The second was the problem of making a democratic form of government efficient and effective. The goal was limited but energetic government. The constitutional object was, as the late constitutional scholar Herbert Storing said, "a design of government with the powers to act and a structure to make it act wisely and responsibly."

The particulars of the Framers' political science were catalogued by Madison's celebrated collaborator in *The Federalist*, Alexander Hamilton. Those particulars included such devices as representation, bicameralism, independent courts of law, and the "regular distribution of powers into distinct departments;' as Hamilton put it in *The Federalist* No. 9; these were "means, and powerful means, by which

the excellencies of republican government may be retained and its imperfections lessened or avoided."

Central to their institutional scheme was the principle of separation of powers. As Madison bluntly put it in *The Federalist* No. 47, the "preservation of liberty requires that the three great departments of power should be separate and distinct," for, as he also wrote, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."

Madison described in *The Federalist* No. 51 how structure and human nature could be marshaled to protect liberty:

[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives to resist encroachments of the others.

Thus, the separation of powers frustrates designs for power and at the same time creates an incentive to collaborate and cooperate, lessening conflict and concretizing a practical community of interest among political leaders.

Equally important to the constitutional design was the concept of federalism. At the Constitutional Convention there was great concern that an overreaction to the inadequacies of the Articles of Confederation might produce a tendency toward a single centralized and all-powerful national government. The resolution to such fears was, as Madison described it in *The Federalist*, a government that was neither wholly federal nor wholly national but a composite of the two. A half-century later, Alexis de Tocqueville would celebrate democracy in America as precisely the result of the political vitality spawned by this "incomplete" national government.

The institutional design was to divide sovereignty between two different levels of political entities, the nation and the states. This would prevent an unhealthy concentration of power in a single government. It would provide, as Madison said in *The Federalist* No. 51, a "double security. .. to the rights of the people." Federalism, along with separation of powers, the Framers thought, would be the basic principled matrix of American constitutional liberty. "The different governments;' Madison concluded, "will controul each other; at the same time that each will be controulled by itself."

But institutional restraints on power were not all that federalism was about. There was also a deeper understanding—in fact, a far richer understanding—of why federalism mattered. When the delegates at Philadelphia convened in May 1787 to revise the ineffective Articles of Confederation, it was a foregone conclusion that the basic debate would concern the proper role of the states. Those who favored a diminution of state power, the Nationalists, saw unfettered state sovereignty under the Articles as the problem; not only did it allow the states to undermine congressional efforts to govern, it also rendered individual rights insecure in the hands of "interested and overbearing majorities." Indeed, Madison, defending the Nationalists' constitutional handiwork, went so far as to suggest in *The Federalist* No. 51 that only by way of a "judicious modification" of the federal principle was the new Constitution able to remedy the defects of popular, republican government.

The view of those who doubted the political efficacy of the new Constitution was that good popular government depended quite as much on a political community that would promote civic or public virtue as on a set of institutional devices designed to check the selfish impulses of the majority As Herbert Storing has shown, this concern for community and civic virtue tempered and tamed somewhat the Nationalists' tendency toward simply a large nation. Their reservations, as Storing put it, echo still through our political history.[1]

It is this understanding, that federalism can contribute to a sense of political community and hence to a kind of public spirit, that is too often ignored in

1. Herbert J. Storing, "The Constitution and the Bill of Rights." in Joseph M. Bessette, ed., *Toward a More Perfect Union: Writings of Herbert J. Storing* (Washington, D.C.: The AEI Press, 1995).

our public discussions about federalism. But in a sense, it is this understanding that makes the American experiment in popular government truly the novel undertaking the Framers thought it to be.

At bottom, in the space left by a limited central government, the people could rule themselves by their own moral and social values, and call on local political institutions to assist them. Where the people, through the Constitution, did consent for the central government to have a role, that role would similarly be guided by the people's sense of what was valuable and good as articulated through the political institutions of the central government. Thus, at its deepest level popular government means a structure of government that rests not only on the consent of the governed, but also on a structure of government wherein the views of the people and their civic associations can be expressed and translated into public law and public policy, subject, of course, to the limits established by the Constitution. Through deliberation, debate, and compromise, a public consensus is formed about what constitutes the public good. It is this consensus on fundamental principles that knits individuals into a community of citizens. And it is the liberty to determine the morality of a community that is an important part of our liberty protected by the Constitution.

The Constitution is our most fundamental law. It is, in its own words, "the supreme Law of the Land." Its translation into the legal rules under which we live occurs through the actions of all government entities, federal and state. The entity we know as "constitutional law" is the creation not only of the decisions of the Supreme Court, but also of the various Congresses and of the President.

Yet it is the court system, particularly the decisions of the Supreme Court, that most observers identify as providing the basic corpus of "constitutional law." This body of law, this judicial handiwork, is, in a fundamental way, unique in our scheme, for the Court is charged routinely, day in and day out, with the awesome task of addressing some of the most basic and most enduring political questions that face our nation. The answers the Court gives are very important to the stability of the law so necessary for good government. But as constitutional historian Charles Warren once noted, what is most important to remember is that "however the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law, not the decisions of the Court."[2]

By this, of course, Warren did not mean that a constitutional decision by the Supreme Court lacks the character of binding law. He meant that the Constitution remains the Constitution and that observers of the Court may fairly consider whether a particular Supreme Court decision was right or wrong. There remains in the country a vibrant and healthy debate among the members of the Supreme Court, as articulated in its opinions, and between the Court and academics, politicians, columnists and commentators, and the people generally, on whether the Court has correctly understood and applied the fundamental law of the Constitution. We have seen throughout our history that when the Supreme Court greatly misconstrues the Constitution, generations of mischief may follow. The result is that, of its own accord or through the mechanism of the appointment process, the Supreme Court may come to revisit some of its doctrines and try, once again, to adjust its pronouncements to the commands of the Constitution.

This recognition of the distinction between constitutional law and the Constitution itself produces the conclusion that constitutional decisions, including those of the Supreme Court, need not be seen as the last words in constitutional construction. A correlative point is that constitutional interpretation is not the business of courts alone but is also, and properly, the business of all branches of government. Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions. In fact, every official takes a solemn oath precisely to

2. Charles Warren, *The Supreme Court in United States History* (Boston: Little, Brown, and Company, 1922-1924), 3 vols., 470-471.

that effect. Chief Justice John Marshall, in *Marbury v. Madison* (1803), noted that the Constitution is a limitation on judicial power as well as on that of the executive and legislative branches. He reiterated that view in *McCullough v. Maryland* (1819) when he cautioned judges never to forget it is a constitution they are expounding.

The Constitution—the original document of 1787 plus its amendments—is and must be understood to be the standard against which all laws, policies, and interpretations should be measured. It is our fundamental law because it represents the settled and deliberate will of the people, against which the actions of government officials must be squared. In the end, the continued success and viability of our democratic Republic depends on our fidelity to, and the faithful exposition and interpretation of, this Constitution, our great charter of liberty.

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