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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

