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SOME VITAL PRINCIPLES OF THE AMERICAN CONSTITUTIONAL GOVERNMENT*

JOHN H. HATCHER**

Many people regard our national Constitution as complex. A modern humorist, Goldberg, fairly expressed the popular attitude in this manner: "I am glad to vote for the Constitution so long as I don't have to read it." This attitude is unfortunate. The constitutionality of a law may not be clear; but the vital principles of American Constitutional Government are as plain as the Ten Commandments. The conscience of the people should be awakened recurrently to the simplicity and the perfection of our plan of government, for the Bill of Rights, which is perhaps the greatest single document of human rights ever drawn by man, admonishes that "Free government and the blessings of liberty can be preserved to any people only by . . . frequent recurrence to fundamental principles."

Most governments which existed prior to 1787, had been arbitrarily or fortuitously formed. They had also been impaired, or improved by circumstances usually beyond human foresight. Our national government was founded differently. It was the result of patriotic wisdom and of popular consent. True, the founders lived in the age of horse and coach, but for that we should be thankful. The moderate pace of that age afforded opportunity for deliberation; the speed of the present age discourages thought beyond the curve ahead. It is an historical fact that no country save ancient Greece ever furnished at one time as many great states-

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men as did America during the constitution-forming period. Our nation is thirty times as populous now, but we have not yet matched the genius of the constitution-makers. They were deeply versed in political science. They knew the strength and the weakness of every preceding form of government, and they sought to fashion a government without inherent civil malady. They were not mere theorists, however; they were in fact very practical politicians. Every state had been under constitutional government since 1776. Prior thereto, every colonial charter had been, in effect, a constitution. So the framers and their fathers before them had actually lived for more than a century under various forms of constitutional government. Theory only aided experience in ripening the national Constitution. Moreover, the terrible plight of the people in 1787 forced the framers to be sincere as well as practical. "We must take man as we find him," said Alexander Hamilton. Man as they found him was not ordinarily dependable whether as a follower or a leader. As a follower, he was generally emotional and beguiled by catchy slogans; as a leader, he was generally egocentric and unmindful of earlier promises. Every failure in government was attributed by the framers to the incapacity or the selfishness of man. Their impatience with political altruism was reflected in this sentence of Thomas Jefferson: "In questions of power . . . let no more be heard of confidence in man, but bind him down from mischief by the chains of the constitution." And so the framers designed a government in which laws were set above men; a government with legal checks to protect men from their own improvidence and their own opportunism.

The genitor of our constitutional government is the principle that the people are the sovereign power of a nation. One of the first official statements of that postulate appears in a declaration of rights (afterwards called the Bill of Rights) made by the representatives "of the good people of Virginia" on June 12, 1776, "as the basis and foundation of government." Prior to 1776, there had been no national recognition of that principle for many centuries. Popular sovereignty is an ancient idea. It dominated Greece at one time, Rome at another. It flourished among the early Nordic tribes, whose freemen decided public questions by a loud shout, and we may well surmise, by knocking on the head any persistent minority opposition. All the ancient popular governments had fallen prey to those we would now call gangsters. The chief gangsters then called themselves kings and invented the

absurd dogma that they ruled by divine right; nevertheless, the dynasty of each king was generally started and perpetuated by gangster methods. Every large nation of Europe was still dominated by such gangsters in 1776, when the American colonists reverted to the age-old idea that the people — not the kings — were sovereign. A corollary of that idea is that a government derives its just powers only from the consent of the governed. In that conception beats the heart of constitutional government. Conforming to that idea, the national Constitution is proclaimed with the line: "We the people . . . do ordain and establish this Constitution." That instrument, therefore, is simply an ordinance of the people authorizing public officials to administer government. It follows that anything those officials do at variance with the Constitution is usurpative because they have no authority except what the Constitution confers. So, *we the people* should rid ourselves of any notion that governmental officials are our masters, for they are not; they are merely our servants executing our constitutional orders.

The aspiration of constitutional government is the popular welfare. In aid whereof, the Constitution again borrowed from the Bill of Rights the fundamental doctrines that the personal conduct of the citizen, as well as his property rights, should be inviolate from governmental interference, except through due process of law. And bear in mind that any official interference with personal liberty or private property not authorized by the Constitution, is *not due process of law*.

Continuity of constitutional government is ensured by the division of governmental powers. All such powers are embraced in the right to make, the right to construe, and the right to execute law. Unite those three powers in one man or one group of men and the risk of tyranny is gravely increased. Separate those three powers effectually and orderly government should result. The separation of governmental powers had become "an axiom in the science of government," said James Madison to an early Virginia Assembly. The Constitution of Virginia, adopted June 29, 1776, expressly provided: "The legislative, executive and judiciary departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to the other." A like division of governmental powers, while not expressly declared, is explicitly recognized in the national Constitution. Division of power alone, however, would not have conserved our system. The founders well

understood that while each department of power must be kept distinct in office, yet to prevent autocracy and secure coöperation each department must be connected with, and in some manner amenable to the others. Their understanding was clearly voiced by Alex Contee Hanson of Maryland in 1787 when he said in defense of the Constitution: "I am apprised of the almost universal disposition for the increase and abuse of power. . . . The perfection of political science consists chiefly in providing mutual checks amongst the several departments of power." Because of this understanding, never before had there been a clearer separation of legislative, executive and judicial departments; never before had the checks between these departments been so carefully considered or so well adjusted. These checks are the sinews of constitutional government.

Looking over the work of the founders, from the vantage ground of 1936, Fred Rodell, a Professor of Law, Yale University, observes: "And the cleverest and most effective restriction they used was . . . the splitting up of the government into three different branches, each with some sort of check on the others."¹ That restriction is arranged in the following manner: The executive power of the federal government is vested in the President with the right to appoint certain officials, the right to make treaties, and the right to veto acts of Congress. But his appointments are for the most part subject to the check of senatorial confirmation, his treaties are subject to the check of senatorial concurrence, and his veto may be overridden by two-thirds of Congress. Furthermore, the constitutionality of executive action may be tried by the federal courts, and the integrity of such action may be tried by the Senate. The entire judicial power of the federal government is vested in the federal courts. But the President nominates and, with the advice and consent of the Senate, appoints the judges; and they are answerable for official misconduct before the Senate. Certain legislative powers are vested in Congress. But Congress itself is divided into two branches, for the purpose that each may check the other; every state is given two senators, so that the smaller states may check the senatorial influence of the larger ones; and congressional legislation is subject to the check of presidential veto, as well as to the check of judicial review.

The learned James Wilson of Pennsylvania, thinking little of

¹ *RODELL, FIFTY-FIVE MEN* (1936) 220 (a sensible book deriving its title from the number of delegates who attended the Federal Convention.)

the efficacy of an oath, said to the Federal Convention in 1787, that an oath was "a left-handed security only." But the other framers, not agreeing with him, provided as a final check on departmental power that every official should swear (or affirm) to support the Constitution. When the other checks on usurpation are thus capped by the check of the constitutional oath, it would seem that constitutional government should be secure against undue expansion of departmental power, as long as officials should be men to whom an oath is not merely a *left-handed security*.

In one of his historical works, Woodrow Wilson records that the early administrations of our government were amazingly successful, and were so because they were "simple, inexpensive and unmeddlesome." That method of administration is precisely what the founders intended, since the Bill of Rights enjoins a firm governmental adherence to moderation and frugality. That initial success welded the nation into a constitution-minded people.

All that constitutional government has done need not be recited. Suffice to say it has waged successfully five separate wars; it has withstood a number of depressions, some of which were more trying to the people generally, than the one just endured; it has attempted to curb monopoly and special privilege, to guard the health of the nation, and to preserve our national resources against private waste; and it has afforded more freedom, greater material comfort and fairer opportunity to every class of citizens than any other government, past or present. It could not change man's nature and make him essentially moral and just, nor can any other form of government. It has not eliminated inequality, exploitation or injustice, nor have the socialistic dictatorships of Europe; but our government has come nearer doing so than any of them. Unless the angels should condescend to govern mankind, an administration free from blame should not be expected. Human administration cannot rid itself of human fault. What constitutional government has accomplished, demonstrates that when fairly administered, it is adequate for the needs of a free and prosperous people.

Since the framers were so wise, since they designed our Constitution with such care, and since constitutional government has been comparatively so successful, I would be concerned at any change whatever in our system of government. I could tolerate a number of amendments without actual alarm, if the vital principles of the government were not disturbed. However, despite the na-

tion's unprecedented progress, one of those principles is threatened. A school of political thought, newly revived in this country, has become impatient with the division of governmental powers. According to a sympathetic analyst, this school "*envisages the legislative authority as the supreme authority of government; and endeavors to adapt this authority to modern conditions. . . . by associating with it Presidential leadership. . . .*"² Under modern conditions Presidential leadership is but a more acceptable term for *Presidential domination*. So, those fine phrases but thinly veil the vision of a dictatorship.

This school is an extension of one which dominated a number of the states prior to 1787. It sought then to establish the legislature as the supreme authority of the state. It curried favor with the populace by passing a series of laws for the relief of debtors, laws described in *The Federalist* (No. VII) as "atrocious breaches of moral and social justice." It was thoroughly discredited then, and its reanimation now is due to recent judicial decisions that several acts of Congress are unconstitutional. It would capitalize against the courts whatever discontent has followed those decisions. It has drawn recruits from all the political parties. It numbers among its exponents some university professors, some newspaper editors and some Congressmen, as well as other men of influence. Consequently, this school should have the gravest consideration.

In sorrow more than in censure, I charge that this school has failed to comprehend the past, has failed to conceive the present and has failed to envisage the future. The school has not comprehended the past, else it would know that supreme legislative power under executive domination, as proposed by it, had always constituted the very definition of tyranny. Thomas Jefferson wrote that "the generalizing and concentrating of all [governmental] cares into one body" had destroyed liberty in every government which had done so. The school has not conceived the present, else it would realize that such concentration of governmental power, as it proposes, produced the recent dictatorship in our own state of Louisiana, and the present dictatorships of Europe. Due to the protection of the federal courts, the people of Louisiana were deprived of little, if any, personal liberty. But, according to General Smuts, a competent authority on world affairs, there is less "freedom of thought, speech, action [and] self-expression" in the totali-

² CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934) 148.

tarian nations of Europe today "than there has been during the last two thousand years." If the future may be judged by the past and the present, this revived school has not envisaged the future, else it would foresee that such concentration of governmental power, as it proposes, would inevitably result in curtailment, if not destruction, of our personal liberty.

Some of the school admit willingness to stand by the Constitution if it be treated as "made for an undefined and expanding future" (Marshall). I have no fault with that proviso, for I find nothing in the Constitution or in the attitude of the framers to intimate that constitutional government was not so designed. They did not conceive that our Constitution was perfect. They had no thought of a refrigerated government. They knew that change is frequently more conservative than stability. Madison expressly warned the Federal Convention that "In framing a system which we wish to last for ages, we should not lose sight of the changes which ages will produce." So the framers anticipated and made express provision in the Constitution itself for orderly constitutional amendment. This provision was designed so as to delay a proposed amendment until the people should have time for deliberation. Complaint is made by the revived school that this delay precludes resort to amendment in emergencies. Wherefore, some exponents of the school would, on occasion, set executive leadership above the Constitution. They would justify their position by the act of President Jefferson in making the Louisiana Purchase, and by the act of President Lincoln in signing the Emancipation Proclamation, both of which they assert were intentional acts of usurpation. Both references are inept. The Louisiana Purchase was included in a treaty negotiated with France. President Jefferson was at first doubtful of constitutional authority to make the purchase. He so wrote Wilson C. Nicholas saying: "If, however, our friends shall think differently, certainly I shall acquiesce with satisfaction." Their friends did think differently. Congress was called in special session; the Senate ratified the treaty; the House voted bonds to pay for The Purchase; and then Jefferson signed the treaty. The Constitution confers on the President the power to make treaties, "with the advice and consent of the Senate." That power, of necessity, includes the right to agree on the terms of treaties. The Constitution also makes treaties so concluded, *the supreme law of the land*. Thus, the treaty with France,

including the Louisiana Purchase, made by the President and approved by the Senate, became the supreme law of the land and the Supreme Court stilled the Jeffersonian critics of that day with these unequivocal words: "The Constitution of the United States confers absolutely on the government of the Union the power of making war and of making treaties. Consequently, that government possesses the power of acquiring territory either by conquest or by treaty."³ And the court expressly recognized the validity of the Purchase in a number of cases.⁴

The Emancipation Proclamation was a war measure, taken by President Lincoln under his constitutional warrant as war leader. The following language of the Proclamation not only presents its own justification but shows his thought to have been that he was proceeding constitutionally: ". . . Now, therefore, I, Abraham Lincoln, President of the United States, by virtue of the power in me vested as commander-in-chief of the army and navy of the United States, and as a fit and necessary war measure for suppressing said rebellion, . . . do order and declare . . . And upon this act, sincerely believed to be an act of justice, warranted by the Constitution upon military necessity I invoke the considerate judgment of mankind . . ." Mr. Lincoln's unrestricted power to determine what were acts of military necessity and the lawfulness of the Proclamation as an exercise of that power, were expressly recognized not only by the Supreme Court of the United States but by the courts of southern states as well.⁵ When both the Louisiana Purchase and the Emancipation Proclamation have been consistently upheld by the highest courts of the land, how willful is this political school which still asserts that both acts were unconstitutional! Or is it merely like the owl, who, sailing athwart the noon, "drops his blue-fring'd lids and holds them close, and hooting at the glorious sun in heaven, cries out, where is it?"

As further precedent for executive absolutism, this school emphasizes the refusal of President Jackson to honor a decision of the Supreme Court. I would point the people to Woodrow Wilson's estimate of Jackson based largely upon that refusal: ". . .

³ *American Ins. Co. v. Canter*, 26 U. S. 511 (1828).

⁴ *Foster and Elam v. Neilson*, 27 U. S. 253, 301 *et seq.* (1829); *Garcia v. Lee*, 37 U. S. 511 (1838); *Pollard v. Files*, 43 U. S. 591 (1844); *United States v. Lynde*, 78 U. S. 632, 643 (1870).

⁵ *Texas v. White*, 74 U. S. 700, 728 (1868); *Slaback v. Cushman*, 12 Fla. 472, 475 *et seq.* (1868) and authorities cited.

he [Jackson] was the sort of man who might very easily twist and destroy our whole constitutional system, were the courts robbed of their authority, and the great balance wheel of their power shaken from its gearings."⁶

To foment dissatisfaction with the federal judiciary, this school stresses the remark of Chief Justice Hughes, when Governor of New York, "We are under a Constitution, but the Constitution is what the judges say it is." That remark, if accusatory, was so, like many other epigrams, mainly to be clever. For, who else save the judges have the constitutional right to say finally what the Constitution is? And they are well within their prerogative as long as their saying is a reasonable interpretation of the words, the spirit and the purpose of the Constitution. Should they say arbitrarily what it is, they would be subject to impeachment; for they hold office only during good behaviour and such conduct would not be good behaviour. Chancellor Kent, who walked with the founders and knew their thoughts on this subject, said in his introductory lecture to the Columbia University Law School in 1794, that in case the federal judiciary substituted "arbitrary will" for "rational judgment . . . the judges may be brought before the legislature [Congress] and tried and condemned and removed from office."⁷ Thus, whenever the federal court has pronounced a statute unconstitutional, the conduct of the court in turn may be judged; and that judgment is lodged by the Constitution in the Senate, a branch of the very body whose enactment has been invalidated. This provision has proved an ample check on judicial despotism. I am aware that following certain constitutional decisions, the Court has been arraigned severely in the halls of Congress. Justice Story, in his later years, resented such attacks, saying that one of the functions of the Supreme Court was to "perpetually thwart the wishes and views of demagogues." He further said that since the Court had no patronage to distribute, it had no defenders against insidious attack of thwarted politicians, except defense by "the wise and the good." The failure hitherto of all partisan attacks on the Court in Congress would show, according to Story, that Congressional wisdom and goodness have concurred in what the Court has said the Constitution is.

⁶ WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (1908) 160.

⁷ Kent's *Introductory Lecture* (1903) 3 COL. L. REV. 330, 377. Accord: THE FEDERALIST, No. LXXIX.

The irrational antagonism of the revived school against the federal courts would indicate that it has again closed its lids, like the owl, rather than observe the proper constitutional status of the courts. Neither narrow nor inconsistent judicial decisions can affect that status. The Constitution no more exacts broad vision and absolute consistency of the judicial department than of the executive and legislative departments. With full appreciation of judicial fallibility, the framers nevertheless conferred upon the federal courts the untrammelled judicial power of the United States. In the proper exercise of that power, those courts *must declare the law*. The Constitution is a law (so defined in Article VI); and its construction is essentially as much a judicial act as the construction of any other law. An act of Congress pursuant to the Constitution is law; an act unauthorized by the Constitution is not law. The office of the courts, in this respect, has never been stated more clearly than in a recent opinion of Associate Justice Roberts, as follows: "When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty, — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."⁸ In the squaring, however, the method of the Court should not be Procrustean. Industry, society and other vital forces have changed since 1787. As those forces change, the interpretation of the instrument which would control them must be reasonably adjusted to the changes. The final thought in constitutional construction must be the present, not the past. A man who has not demonstrated that he regards the Constitution in this spirit should not be appointed to the bench. If a federal judge has not this spirit, that fault is no argument against the judicial department or against the threefold division of governmental powers; that fault is chargeable solely to want of care in his selection. Some federal judges have been ultra-conservative; but, led by Marshall, most federal judges have been progressive. An infrequent decision, such as that in the New York Minimum Wage Law case, may disappoint some friends of the Supreme Court. Their disappointment should be composed upon reviewing the long list of liberal

⁸ *United States v. Butler*, 297 U. S. 1, 56 S. Ct. 312 (1936).

laws which have been upheld.⁹ That list reflects customary liberality of construction; that list sustains the judicial plan of the framers.

A change in the present retirement system of federal judges should be of no great consequence, if made solely to improve judicial quality or efficiency, and if the independence or the dignity of the courts would not be affected. The number of federal judges, or the number required to invalidate an act of Congress, is not of paramount importance, unless thereby the integrity of the courts is impaired. Because of difference of opinion some former executive may have decried, or scolded or even chastened the courts, but that is no warrant for a later executive doing so. The Constitution itself confers on the executive department no dominion whatever over the judiciary. The temper of the Federal Convention thereon was shown in the summary rejection of a motion, providing that judges might be removed by the President upon the application of Congress, Gouverneur Morris saying: "It is fundamentally wrong to subject judges to so arbitrary an authority". Rather let later executives revert to the kindly judicial conception of James Madison, sometimes called the father of the Constitution, who said to the first federal Congress that the judges of the Supreme Court "are the guardians of the laws and the Constitution of the United States." Let later executives also catch the vision of Woodrow Wilson, who declared that this judicial guardianship must not be disturbed if we are to maintain "that nice adjustment between individual rights and governmental power which constitutes polit-

⁹" . . . the limitation of hours of employment in mines and smelters (*Holden v. Hardy*, 169 U. S. 366); the requiring of redemption in cash of store orders or other evidences of indebtedness issued in payment of wages (*Knoxville Iron Co. v. Harbison*, 183 U. S. 13); the prohibition of contracts for options to sell or buy grain or other commodities at a future time (*Booth v. Illinois*, 184 U. S. 425); the forbidding of advance payments to seamen (*Patterson v. Bank Eudora*, 190 U. S. 169); the prohibition of contracts to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (*McLean v. Arkansas*, 211 U. S. 539); the regulation of the size and weight of loaves of bread (*Schmidinger v. Chicago*, 226 U. S. 573; *Peterson Baking Co. v. Bryan*, 290 U. S. 570); the regulation of insurance rates (*German Alliance Insurance Co. v. Lewis*, 233 U. S. 389; *O'Gorman & Young v. Hartford Insurance Co.*, 282 U. S. 251); the regulation of the size and character of packages in which goods are sold (*Armour & Co. v. North Dakota*, 240 U. S. 510); the limitation of hours of employment in manufacturing establishments with a specified allowance of overtime payment (*Bunting v. Oregon*, 243 U. S. 426); the regulation of sales of stocks and bonds to prevent fraud (*Hall v. Geiger-Jones Co.*, 242 U. S. 539); and the regulation of the price of milk (*Nebbia v. New York*, 291 U. S. 502." From dissenting opinion of the Chief Justice in *Morehead v. New York*, 298 U. S. 587, 628, 56 S. Ct. 918 (1936).

ical liberty." Whenever the citizen's idea of his constitutional right conflicts with the legislative or the executive department's idea of its constitutional authority, orderly government must furnish an impartial forum, where the conflict may be debated and determined. The courts constitute that forum. It is in this sense, wrote Mr. Wilson, "That the whole efficacy and reality of constitutional government resides in the courts. . . . it is in this sense that our judiciary is the balance-wheel of our entire system."¹⁰

Centralization of power results from popular ignorance and apathy as much as from despotic intention. Before this revived school arrays the legislative and executive departments against the judicial, let the people take thought. Can the radical ends of this school conceivably be of more importance to the people than the maintenance of divided governmental powers? Mr. Rodell says that the economic distress which preceded the Federal Convention in 1787 was caused by a rampant democracy in the states which "soaked the rich with paper money laws, 'levelling laws', high taxes on business, and other schemes tending toward a more equal distribution of wealth. And [he proceeds] the delegates, founding a national government to stop that sort of stuff in the states, wanted none of it in the government they were founding."¹¹ So they had the Constitution provide: "No state shall . . . make any thing but gold and silver coin a tender in payment of debts; pass any . . . ex post facto law, or law impairing the obligation of contracts." The framers recognized the immutable fact that since the abilities and the aspirations of men are unequal, inequality of personal achievements and personal acquisitions must naturally follow, if men are permitted to exercise those abilities and pursue those aspirations; and that such imparity will exist as long as liberty exists. If there was one thing more than any other upon which the founders were touchy, it was the preservation of that personal liberty for which many of them had risked their lives on the battle fields of the Revolution. Hence, they did not purpose that the national government should control individual enterprise or coddle one group of citizens at the expense of the others. On the contrary, an express reason advanced in the Federal Convention for having checks on governmental power was that the checks would

¹⁰ WILSON, *op. cit. supra* n. 6, at 18, 142-3.

¹¹ RODELL, FIFTY-FIVE MEN 167-8. *Accord*: SMITH, THE SPIRIT OF AMERICAN GOVERNMENT (1912) 297 *et seq.*; 5 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION (1845) 120, 136, 138, 162-3, 484-5; U. S. CONST. Art. I, § 10.

stop laws of that character.¹² President Wilson spoke in spirit with the founders when he said: "It is still intolerable for the government to interfere with our individual activities except where it is necessary to interfere with them in order to free them." Liberation of individual action, however, whether from monopolistic, industrial, or other restraint, does not require a change in our policy; such liberation, if and when necessary, can be accomplished under the present provisions of the Constitution or through amendment. But, every proposal to improve human relations should be weighed as the founders counselled, by its probable effect on man as he is, rather than on man as we would have him to be. After nearly one hundred and fifty years of national progress without such laws as pestered the states in 1787, let the nation ponder well whether many of such laws shall be re-enacted, lest those laws destroy the morale of their beneficiaries, bankrupt the government, and re-occasion conditions described by James Madison as "distracted and disheartening." Before the people heed the quixotic teachings of this revived school, let them first study the practical teachings of the founders. Then, let the common sense of America determine whether the framers were wrong when they divided governmental powers in order to check man as they knew him. If that policy was not wrong in 1787, what change has come since in human nature to warrant that man be unchecked now? My three score years have observed no such change. And I cannot conceive of man as a ruler needing no official restraint, until that millennium shall have dawned, which was envisioned by John The Disciple when on the Isle of Patmos.

¹² 5 ELLIOT, *op. cit. supra* n. 11, at 138, 186, 203, 334.