1987

The Constitution: The Framers' Intent, the Present and the Future

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JEROME V. SIDEL MEMORIAL LECTURE

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I should state at the outset that I am somewhat embarrassed by the Paper that I am about to deliver. I am embarrassed for two reasons. The first is that what I shall have to say really fits neither the title assigned to me "The Constitution: The Framers' Intent, the Present and the Future" nor the label put on the conference about the Constitution in a new age of technology.

I really want to talk about what the Convention of 1787 put into the document called the Constitution and why they did what they did. Obviously, in the time allotted me I cannot by any means exhaust the subject however much I may exhaust your patience. This embarrassment is somewhat abated by the foresight of the sponsors who have gathered a distinguished panel of jurists and jurisprudes who will more than make up for my deficiencies.

The second cause for my discomfort is less easily cured. I feel somewhat like a Philistine at the altar of the Temple. The Sidel Lecture has established itself as a noted forum for the explication and advancement of what we have come to call civil liberties and civil rights, or, sometimes, "minority rights." One of my difficulties as a constitutionalist—if there is such a thing—is that I do not believe that minorities have rights. Individuals have rights, whether they are members of minorities or majorities. I am sure that whatever the special rights of minorities may be—and they must exist because the Supreme Court, the press, and academics talk of them all the time—they were not conferred by the Constitution.

Indeed, although the watchword of the makers of the Constitution

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* Professor Philip B. Kurland, professor at the University of Chicago, delivered this paper at The Jerome V. Sidel Memorial Lecture at Washington University School of Law in St. Louis, Missouri, on September 21, 1986.

was "liberty," the Constitution itself created few if any rights for anyone. What it did do was to establish a frame of government, a government which was inhibited from invading the political and civil liberties that were in 1787 the rights of Americans, however they came to exist in the new American polity. How they came to exist is too long and complex a story to be recited here, except to say that I do not think natural law had anything to do with it. Unlike the French Revolution which followed hard on our own achievement, the American Constitution-makers knew better than to attempt a catalogue of the rights of man in a democratic republic. And so, we are still on our first republic, while the French are on their fifth.

Read the Constitution. It will probably surprise you. You will see, for example, that what has often been termed the most fundamental of our civil rights, the right to habeas corpus, is not conferred by the Constitution at all. What the Constitution says is that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it."[1] Even the Bill of Rights, which was not the appellation appended by its authors to the first ten amendments, did not purport to create the most fundamental rights. The rights of free speech and free press and freedom to worship were not the government's to grant. The first amendment sought to see to it that they were not the government's to take away. The fifth amendment did not create a right to life, liberty, or property, it denied government power to deprive anyone of life, liberty, or property, except according to due process of law. The fourteenth amendment makes no provision for equality; it protects only the right to "equal protection of the laws." When the Constitution speaks of the "privileges and immunities" of citizenship, it does so without anywhere defining what those "privileges and immunities" might be, by connotation or denotation.

The fact is that, with a few exceptions, which need not detain us here, the Constitution is concerned with procedure—procedural rights if you will—and not with substance or substantive rights. Moreover, to the extent that it deals with rights, it is concerned with the rights of individuals, not classes or castes—or in the contemporary vernacular—"minority rights." There is no right to arbitrarily impose burdens on or deny benefits to members of a "majority" whatever that may be. The rights to due process and equal protection of the laws belong to "persons," all persons, and the privileges and immunities of which the Constitution speaks are those of "citizens."

I have, however, gotten somewhat ahead of myself. Let me return to the principles that were the concern of the Founding Fathers in the document which they composed. I would draw a distinction you may find picayune. It is that the Constitution is not the same as constitu-

1. U.S. CONST. art. I, § 9, cl. 2.

tional law. You can read that sentence backwards or forwards. The Constitution is a frame of government; constitutional law consists of a series of judicial decisions purportedly based at least in part, but only in part, on the fundamental document. The Constitution is both more and less than constitutional law: it commands legislative and executive behavior as well as judicial. But it lacks the detail and specificity that courts may provide in their decisions. However plastic the provisions of the Constitution may be, they are more substantial and long-lived than any of the products even of the High Court. Suffice it to say here that whatever the scope of the authority of the judicial branch to interpret the Constitution's text and implications in the resolution of a particular case or controversy before it, judicial decisions are not amendments to the Constitution, they are but a gloss upon it. The Constitution can be amended only by proposals put forth by extraordinary majorities of representatives of the people and ratified by extraordinary majorities of what are usually different representatives of the people, just as the Constitution was proposed and ratified in the first place. A decision of the Supreme Court may be reversed by a simple new majority of the Supreme Court. Both processes of proposing and changing constitutional provisions or readings must be indulged only with the greatest circumspection if we are to have that continuity and the rule of reason based on experience that alone can sustain what is the most fragile form of government: a democratic republic, a representative democracy.

The principal and primary objective of the 1787 Convention was for the people to establish a mechanism for self-government. If liberty of the individual were the goal of the Constitution-makers—and liberty for them was not license—that liberty was to be maintained through the structure of the new government. Government by the people was not enough, however, for concentration of power, even in a democracy, meant tyranny. Power for them was the ultimate antithesis of freedom. The forces of government must not only be kept in the hands of the people, none of it could be allowed to accumulate in any person, office, or branch. Five-sixths of the Constitution is to be found in its first three articles describing the limited powers to be exercised by the national government. The powers of government were to be limited because to the Founders the new national government was a necessity, not a good: it was necessary to assure protection against external enemies and it was a necessity to prevent internecine conflict that could sunder the new nation and leave it vulnerable to conquest by internal and external forces of tyranny. Surely there were those, like Hamilton, who dreamed of empire even then. Even then there were some, like Hamilton, for whom democracy was anathema. But for the time being—if only for the time being—the Virginians proved capable of winning the battle, even if the Hamiltonian creed has long since become dominant over the Jeffersonian model.

Self-government meant responsibility of government to the people through short terms of office and legislative representation directly or indirectly chosen by the people. The legislature was the body to which government power was largely entrusted; there is no hint of an intent to tolerate the maintenance of an executive prerogative. And the judiciary was regarded then by all as little threat to their aspirations for popular rule, because the judges had no authority over either the purse or the army, the two principal forces by which democracy was thought to be vulnerable to tyranny.

Governmental power being intrinsically the enemy of individual liberty, the first three articles made multiple provisions for dispersing power within the new government. Essentially two devices were used. The first was federalism of a new kind, which allowed the national government to act directly on the people in some specified matters but otherwise left the general governance of the people to the states. The second was what we have come to mislabel "separation of powers," but not in the simple sense that certain functions were legislative, others executive, and some adjudicative. Not only were the powers of government divided among three branches, but almost none was exercisable solely at the discretion of any one branch. A system of checks and balances required the oversight of one branch by another. Lord Acton's dictum was not pronounced until late into the nineteenth century. But our eighteenth-century forebears well understood that power corrupts and absolute power corrupts absolutely.[2]

It should not be forgotten that the role of government was a much simpler one in 1787 and far short of what we regard as appropriate government on this the eve of the bicentennial of the Constitution. The difference may be marked by a comparison of Jefferson's inaugural address with John Kennedy's, especially the words we have all admired but seldom analyzed: "Ask not what your country can do for you. Ask what you can do for your country." The fact is that, as government has come to control more and more of the lives of American citizens, the primitive devices written into the Constitution, limited government powers, federalism, and separation of powers have become more or less obsolete in assuring individual liberty as the prime objective of government.

Federalism is dead. I do not mean that state and local governments have become redundant. Surely we are today as overburdened by state and local regulations and bureaucracies as by national ones. What I do mean is that there is no substantial governmental power that the states can call their own; almost every governmental power that they

2. Lord Acton wrote in a letter to Bishop Mandell Creighton, "Power tends to corrupt and absolute power corrupts absolutely." J. ACTON, ESSAYS ON FREEDOM AND POWER 364 (H. Finer ed. 1948).

now exercise requires either the acquiescence or subsidy of national authority. "What is necessary for the federal principle," K.C. Wheare once wrote, "is not merely that the general government, like the regional governments, should operate directly upon the people, but, further, that each government should be limited to its own sphere, and within that sphere, should be independent of each other."[3] State governments can no longer be said to be independent of national authority. The loss of that independence started early in our history. It has never been reversed. If, as the Founders certainly seemed to think, liberty of the individual was dependent on preventing the concentration of government power, our liberties are more tenuous today than when governmental authority over us was divided between the nation and the states.

If the second device for procuring liberty by limiting power, that of separation of powers, is less than moribund, it can hardly be said to remain vital. After a long period of legislative hegemony, of what Woodrow Wilson when still a scholar described as *Congressional Government*, power has more and more left the hands of Congress and has been concentrated more and more in the executive and its handmaiden, the judiciary. Part of this is certainly due to the complexities of modern government, which call for extensive administrative apparatus; part of it is due to an abdication of function by Congress, which has become a body without a head; and, in no small part, some of the change has been due to a usurpation of function by the presidency. The result, as Louis Heren wrote in his 1968 book *The New American Commonweath* is that

> The modern American Presidency can be compared with the British monarchy as it existed for a century or more after the signing of magna carta in 1215. . . .
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> Indeed, it can be said that the main difference between the modern American President and a medieval monarch is that there has been a steady increase rather than a diminution of his power. In comparative historical terms the United States has been moving steadily backward.[4]

Nor has the role of the Supreme Court been a glorious one in the defense of the ideal of separation of powers. With perhaps but two major exceptions, the first, *The Steel Seizure Case*,[5] where the Court ruled for Congress over the President and the second, *The Nixon Tapes Case*,[6] where the Court ruled for the judiciary over the executive, the Court has, since the Civil War, almost always approved the vast trans-

3. K. WHEARE, FEDERAL GOVERNMENT 15 (3d ed. 2d impression 1956).
4. L. HEREN, THE NEW AMERICAN COMMONWEALTH 8-9 (1969).
5. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
6. Nixon v. United States, 418 U.S. 683 (1974).

fers of Congressional power, approved the exercise of authority in the legislative field by the executive, and forbidden Congress even the pretense of a role in the administration of the laws which it enacts, usually at the behest of the executive branch. I think that this pattern of power bodes ill for freedom. With Mr. Justice Jackson in *The Steel Seizure Case*, I would submit that: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."[7]

In addition to its republican form of representative government, federalism, and separation of powers, the Founders would have protected the individual liberty by another device immanent rather than explicit in the original document. Underlying the entire structure was the English notion, later to be labelled the "rule of law." This was the essence of that amorphous conception called the English Constitution, or what our forefathers referred to as the rights of Englishmen. Specifically, it included the idea that whatever laws were promulgated even by an omnipotent Parliament, they were to be applied equally to everyone; the laws were to be created and enforced by an established procedure which foreclosed the arbitrary exercise of will, whether by legislators, executives, or judges; and the laws were not to be applied retroactively to actions or events that occurred before they were made known to those to whom they were to be applied. Some of these precepts were, in fact, specifically written into the Constitution, as in its ban on impairment of contracts and ex post facto laws, in its foreclosure of bills of attainder, in its definition of treason, in the various provisions for criminal trials, and the provision for the equal protection of the laws. But the rule of law was broader than any or all of these. And the particular American contribution was one which the British themselves have never adopted, the idea of judicial review. If you read the records of the debates at the 1787 Convention and the ratifying conventions and the debates "out of doors," as they said, you will find a general assumption that there would be judicial review—in the context of a case or controversy, even if you would be hard put to find its justification in any specific language of the Constitution itself. You will find, too, a general expectation of the survival of the basic principles of the common law, among them trial by jury, habeas corpus, and the privilege against self-incrimination.

Certainly the rule of law has survived in greater vigor than either federalism or separation of powers as a protector of individual liberties. Not that it, too, has not suffered the ravages of time and the sophistries of Supreme Court judgments. Try to find, if you will, for example, recent evidence of bans on retroactive legislation or inhibitions on that

7. *Youngstown Sheet & Tube*, 343 U.S. at 655.

kind of wilfullness that makes for a government of men and not of laws, especially in the administrative law area. But on the whole the individual liberty sought to be assured by the machinery of the Constitution has been less dependent on the terms of the Constitution than on the spirit in which it has been invoked.

The best hope of the Founders for a government that would preserve the liberties of the citizenry lay in their provision that the new government would be of the citizens and by the citizens and hopefully for the citizens. With classes and castes abolished, the self-interest of some citizens would necessarily be the self-interest of all citizens, under two conditions. First, that the rule of law prevailed and the same rule that applied to anyone would be applied to everyone. Second, that the citizens who chose among themselves for their governors would make it their business to be well informed in their choices of men and about the business those men entered upon. Even so, they understood both the need to limit the authority of any man or office, lest the corruption of power they had witnessed in their motherland also take over in their new nation. They recognized, too, that there were strong forces that made for a need to deal with local problems in terms related to local interests.

These drafters of the Constitution were sophisticated people. They had examined closely the histories of many societies that had formed governments before them. Perhaps a poll of the fifty-six conventioners would not have revealed great expectation for a very long-lived national government, at least of one maintaining the same form with which it was begun. But underlying the enterprise was a faith that they were building a new order for mankind that the entire world would do well to emulate. The faith was not so much in the words of the master document as in the goal it was meant to achieve: individual liberty under law. As Learned Hand put it, almost sixty years ago:

> [Liberty] is the product, not of institutions, but of a temper, of an attitude towards life; of that mood that looks before and after and pines for what is not. It is idle to look to laws, or courts, or principalities, or powers, to secure it. You may write into your constitutions not ten, but fifty amendments, and it shall help not a farthing, for casuistry will undermine it as casuistry should, if it have no stay but law. It is secure only . . . in that sense of fair play, of give and take, of the uncertainty of human hypothesis, of how changeable and passing are our surest convictions, which has so hard a chance to survive in any times, perhaps especially our own.[8]

That last note—"especially our own"—chills me. For, as we are about to celebrate the two hundredth anniversary of the Constitution, I find that the George Babbitts and the Elmer Gantrys are again loose in

8. L. HAND, *Sources of Tolerance,* in THE SPIRIT OF LIBERTY 66, 77 (1952).

our land. Even, or perhaps especially in the halls of government there seems to be a spirit abroad that is based on an unwarranted self-righteousness, a certitude that rejects all doubts, a formula that prescribes that all who refuse to follow the leader must be regarded as enemies of the administration, enemies of the state, and enemies of the people. We have as a people legitimate historical claims on such attitudes: they burned witches in old England as well as in New England. Indeed, Harvard in its three-hundred and fiftieth anniversary year in its alumni bulletin proudly displays a representation of Cotton Mather, "A.B. 1678", encouraging the hanging of George Burrough, "A.B. 1670", for what the great divine Cotton Mather regarded as heterodoxy and called witchcraft. And we have had the *Dred Scott*[9] case and Senator Joseph McCarthy and Attorney General Mitchell Palmer and the "Know-Nothing" Party to afford but a few reminders of the consequences of "The Sleep of Reason."

If we are to celebrate two centuries of the American Constitution, let us do so by reviving that "spirit of liberty" which, to use Learned Hand's words again,

> is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, nearly two thousand years ago, taught mankind that lesson it never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.[10]

It was this spirit of liberty that was revealed in the making of the Constitution two hundred years ago; it is this spirit of liberty that has maintained American constitutionalism for two centuries. The words of the document are important, but they have life only through this spirit. I would remind you that there was nothing intrinsically lacking in the provisions of the Constitution of the Weimer Republic except a historical commitment by the people of Germany to the kind of faith that created and maintained our own. Our future depends not so much on new amendments or new Supreme Court decisions as on a renewed common commitment to the Constitution's original purpose: "one Nation indivisible, with liberty and justice for all."

The revolution that culminated in the Constitution of 1787 was not a political revolution: at least it did not dismiss one political faction to be replaced by another. It was not an economic revolution: the distribution of wealth and the means of acquiring it remained unchanged. It

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9. Dred Scott v. Sandford, 19 How. 393 (1857).
10. L. HAND, *The Spirit of Liberty*, in THE SPIRIT OF LIBERTY 189, 190 (1952).

was not a religious revolution: no dominant belief or sect replaced another, rather the role of religion in government was virtually eliminated. It was not a social revolution: the classes were already too indeterminate and too malleable to recognize any castes or estates. It was a humanistic revolution: it was the beginning of a government to be concerned with man's humanity towards man. The Constitution marked the point when the nation consciously began—to use Oliver Wendell Holmes' phrase—"to become more civilized," not more efficient, not more powerful, not necessarily more knowledgeable, certainly not more saintly, just more civilized. We began two hundred years ago and perhaps our goal will never be fully achieved. But it is our hope for salvation in the future, and the Constitution can serve—if we choose—as our guidepost.