

THE CONSTITUTION'S CONSERVATIVE CHARACTER

by Russell Kirk

In the sense that all constitutions are formed with the purpose of maintaining some sort of political order--or at least in that pretense--all constitutions are conservative. But the Constitution of the United States, now two centuries old, is especially and deliberately conservative of a social inheritance. Permit me to discuss the subject from three aspects: first, the analysis of the American Constitution by several observers from abroad; second, an examination of the assumptions, interests, and intentions of the Framers; third, the conservative functions of the Constitution today.

Less than half a century after the Constitutional Convention of 1787, Alexis de Tocqueville described the United States Constitution as a work of political wisdom uniquely successful in maintaining in a healthy tension the claims of central authority and the claims of state or local freedom. He found in the Constitution restraints upon the egalitarian impulse which helped much to preserve America from the menace of what Tocqueville called "democratic despotism." In his lengthy analysis of the Constitution's articles, Tocqueville indeed points out a few grave flaws, especially the possibility of presidential reelection and its consequent dangers. But in general Tocqueville heartily approves the Constitution as a strong means of maintaining liberty under law--a device very different from the several French constitutions that had arisen and fallen during his own lifetime.

"All Sail and no Anchor." Throughout the first half of the nineteenth century, indeed, European and British observers often remarked with some degree of wonder the stability of the American constitutional structure by contrast with the upheavals of 1830 and 1848 in the European Continent and, even in Britain, the violence that preceded the Reform Bill of 1832 and other reform movements. But this approbation had some strong exceptions, particularly that of Thomas Babington Macaulay, the great historian and political thinker. In 1857, old Lord Macaulay wrote to Henry S. Randall, the American biographer of Thomas Jefferson, that Jeffersonianism would bring about the ruin of the American Republic. The paper Constitution would be of no avail in an hour of social crisis; America, unlike Britain, had no ruling class of educated and propertied gentlemen accustomed to command and to restrain popular appetites--no body of customs and usages that could allay popular discontent. The following passage from Lord Macaulay's letter is famous:

It is quite plain that your government will never be able to restrain a distressed and discontented majority. For with you the majority is the government, and has the rich, who are always a minority, absolutely at its mercy. The day will come when, in the State of New York, a multitude of people, none of whom has had more than half a breakfast, or expects to have more than half a dinner, will

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choose a Legislature. Is it possible to doubt what sort of a Legislature will be chosen? On one side is a statesman preaching patience, respect for vested rights, strict observance of public faith. On the other is a demagogue ranting about the tyranny of capitalists and usurers, and asking why anybody should be permitted to drink Champagne and to ride in a carriage, while thousands of honest folks are in want of necessities. Which of the two candidates is likely to be preferred by a working man who hears his children cry for more bread? I seriously apprehend that you will, in some such season of adversity as I have described, do things which will prevent prosperity from returning; that you will act like people who should in a year of scarcity, but of absolute famine. There will be, I fear, spoliation. The spoliation will increase the distress. The distress will produce fresh spoliation. There is nothing to stop you. Your Constitution is all sail and no anchor. As I said before, when a society has entered on this downward progress, either civilisation or liberty must perish. Either some Caesar or Napoleon will seize the reins of government with a strong hand, or your republic will be as fearfully plundered and laid waste by barbarians in the twentieth century as the Roman Empire was in the fifth;--with this difference, that the Huns and Vandals who ravaged the Roman Empire came from without, and that your Huns and Vandals will have been engendered within your own country by your own institutions."

Endured as a Conservative Power. What Macaulay predicted has not yet come to pass--although the twentieth century has not altogether run its course; and we now have in America a genuine proletariat of the sort Macaulay dreaded, although that proletariat as yet is very much a minority of the population in any state. Is the American Constitution indeed "all sail and no anchor"? Four years after Macaulay wrote to Randall, the Union fell apart and the Constitution, in effect, was suspended for four years. But whatever the weaknesses of that Constitution, and by whatever favorable circumstances it has been assisted, still it has endured as a conservative power when every other country's written constitution has been abandoned or revised out of recognition; and has been altered far less, over the generations, than has the British Constitution. Much that Macaulay thought essential to the Constitution of England has been effaced, especially the domination of the propertied classes; while the American Constitution, despite a good many amendments and yet more grand changes by decisions of the Supreme Court, remains a hundred and thirty years after Macaulay's warning a barrier to radical alteration of American society.

By 1885, when Sir Henry Maine published his strong book *Popular Government*, it had become clear enough that the American Constitution, despite its Reconstruction Amendments, was more of a conservative power than the British Constitution had become. The great historical jurist allotted a fourth of his book to an examination of the Constitution of the United States; and as Sir Ernest Barker remarked half a century later, for Maine it was *ex America lux*.

Radical Egalitarians. In Britain, by 1885, thoughtful men had taken alarm at the dissemination of socialist ideas. The total exclusion of king or queen from politics; the diminishing of the authority of the House of Lords; the admission of most of the working people to the franchise; the fact (first made plain by Walter Bagehot) that in effect Britain was now governed by a committee of the House of Commons, called the cabinet--these and other large alterations in the old British

Constitution had opened the way for the radical egalitarians. Separation of powers no longer prevailed in Britain: the House of Commons was supreme, judicial restraint upon Parliament never had existed, and altogether the British Constitution in the closing decades of the nineteenth century had lost many of the features that Montesquieu had praised at the middle of the eighteenth century.

"The Federal Constitution has survived the mockery of itself in France and in Spanish America," Maine wrote. The American Constitution's success, he went on, has been "great and striking." Especially Maine emphasized the conservative function of the Supreme Court, the indirect creation of Montesquieu, but also founded in part on English methods of adjudication.

Bulwark of Individualism. Constitutional protections of property and contract, reinforced by Supreme Court rulings, are praised by Maine. "I have seen the rule which denies to the several States the power to make any laws impairing the obligations of contracts criticized as if it were a mere politico-economical flourish," Maine remarks, "but in point of fact there is no more important provision in the whole Constitution. Its principle was much extended by a decision of the Supreme Court [*Dartmouth College v. Woodward*, 1818] which ought now to interest a large number of Englishmen, since it is the basis of the credit of many of the great American Railway Incorporations. But it is this prohibition which in reality secured full play to the economical forces by which the achievement of cultivating the soil of the North American Continent has been performed; it is the bulwark of American individualism against democratic impatience and Socialistic fantasy."

Maine's analysis of the root assumptions of the American Constitution, and of the British origins of American constitutionality, ought to be read by everybody who is seriously interested in celebrating the Bicentenary of the Constitution. No one ever understood the *Federalist Papers* better than did Maine; and no writer better explains the Constitution's conservative functions. His concluding sentences must suffice us here:

"When the American Constitution was framed, there was no such sacredness to be expected for it as before 1789 was supposed to attach to all parts of the British Constitution. There was every prospect of political mobility, if not of political disorder. The signal success of the Constitution of the United States in stemming these tendencies is, no doubt, owing in part to the great portion of the British institutions which were preserved in it; but it is also attributable to the sagacity with which the American statesmen filled up the interstices left by the inapplicability of certain of the then existing British institutions to the emancipated colonies. This sagacity stands out in every part of the *Federalist*, and it may be tracked in every page of subsequent American history."

Will of Parliament. Three years after the publication of *Popular Government*, James Bryce brought out the first edition of his famous two volumes entitled *The American Commonwealth*, which were to pass through many editions and printings. In Bryce's chapters one encounters the fullest recognition of the conservative character of the American Constitution. The passages I shall quote here are from the edition of 1917.

Bryce describes two general types of constitutions, the Flexible and the Rigid. England's constitution is flexible: "The Constitution of England is constantly changing, for as the legislature, in the ordinary exercise of its powers, frequently passes enactments which affect the methods of government and the political rights of the citizens, there is no certainty that what is called the Constitution will stand the same at the end of a given session of Parliament as it stood at the beginning." As Bryce points out, the first statesman clearly to understand this point was James Wilson, of St. Andrews, one of the principal framers of the Constitution of the United States. Recently I visited the upland farm Carskerdo, in the heart of Fife, where Wilson was born--a disagreeable and avaricious man, James Wilson, but a shrewdly intelligent Scot. During the Pennsylvania debates on ratification of the Constitution drawn up in 1787, Wilson emphasized that the British Constitution existed wholly at the will of Parliament.

"The idea of a constitution limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain. There are at least no traces of practices conformable to such a principle. The British Constitution is just what the British Parliament pleases. When the Parliament transferred legislative authority to Henry VIII, the act transferring could not, in the strict acceptance of the term, be called unconstitutional. To control the powers and conduct of the legislature by an overruling constitution was an improvement in the science and practice of government reserved to the American States."

Perilous Flexibility. Recently, in a public lecture at the University of St. Andrews, in Scotland, comparing the British and the American constitutions, I touched upon this somewhat perilous flexibility of positive law in the United Kingdom: even the greatest statutes and charters would not be proof against a radical and reckless majority in the House of Commons today. I found that my British auditors were painfully aware, most of them, of this clear and present danger to the British Constitution in 1987: the shift of fifty or sixty seats in a general election might conceivably bring about "nationalization" of the land, abolition of the famous boarding schools, and the ruin of the British economy--not to mention other permanent damage to the rule of law in Britain.

But let us turn from the flexible constitution of Britain to the rigid constitution of the United States--for so Bryce styles the American Constitution, indeed declaring that "As the English Constitution is the best modern instance of the flexible type, so is the American of the rigid type." In countries with rigid constitutions, Lord Bryce tells us, "the laws and rules which prescribe the nature, powers, and functions of the government are contained in a document or documents emanating from an authority superior to that of the legislature. This authority may be a monarch who has *octroye* a charter alterable by himself only. Or it may be the whole people voting at the polls; or it may be a special assembly, or combination of assemblies, appointed *ad hoc*. In any case we find in such countries a law or group of laws distinguished from other laws not merely by the character of their contents, but by the source whence they spring and by the force they exert, a force which overrides and breaks all conflicting enactments passed by the ordinary legislature."

Equilibrium between Powers. Even a rigid constitution, Bryce remarks, must undergo gradual alteration. In his words, "No constitution can be made to stand unsusceptible of change, because if it were, it would cease to be suitable to the conditions amid which it has to work, that is, to the actual forces which sway politics. And being suitable, it would be weak, not rooted in the nature of the State and in the respect of the citizens for whom it exists; and being weak, it would presently be overthrown."

The Constitution of the United States, however, remained suitable in 1914--and, one may add, remains suitable today--because it has changed and developed in response to national necessities. Bryce lists three ways in which such change has occurred: formal Amendment, Interpretation, and Usage. Altogether, he calculates, the constitutional changes which have occurred in the United States between 1789 and 1914 were far smaller than those which the British Constitution underwent during the same century and a quarter. (Bryce, incidentally, was British ambassador to the United States from 1907 to 1913.) As he puts it, "So far, therefore, the Rigid Constitution has maintained a sort of equilibrium between the various powers, whereas that which was then supposed to exist in England between the king, the peers, the House of Commons, and the people (i.e., the electors) has vanished irrecoverably."

Praise from Britain. Bryce recognizes certain weaknesses, or potential weaknesses, in the American Constitution, reminding his readers that "To expect any form of words, however weightily conceived, with whatever sanctions enacted, permanently to restrain the passions and interests of men is to expect the impossible. Beyond a certain point, you cannot protect the people against themselves any more than you can, to use a familiar American expression, lift yourself from the ground by your own bootstraps." But he concludes his lengthy examination of the American national government with hearty and specific praise of the conservative character of the Constitution of the United States, the more noteworthy because Bryce was a pillar of British Liberalism:

"Nevertheless the rigid Constitution of the United States was rendered, and renders now, inestimable services. It opposes obstacles to rash and hasty change. It secures time for deliberation. It forces the people to think seriously before they alter it or pardon a transgression of it. It makes legislatures and statesmen slow to overpass their legal powers, slow even to propose measures which the Constitution seems to disapprove. It tends to render the inevitable process of modification gradual and tentative, the result of admitted and growing necessities rather than of restless impatience. It altogether prevents some changes which a temporary majority may clamour for, but which will have ceased to be demanded before the barriers interposed by the Constitution have been overcome.

"It does still more than this. It forms the mind and temper of the people. It strengthens their conservative instincts, their sense of the value of stability and permanence in political arrangements. It trains them to habits of legality as the law of the twelve tables trained the minds of the educated Romans. It makes them feel that to comprehend their supreme instrument of government is a personal duty, incumbent on each one of them. It familiarizes them with, it attaches them by ties of pride and reverence to, those fundamental truths on which the Constitution is based."

Not for Export. Those sentences form a fitting conclusion to these remarks of mine on the analysis of the American Constitution by observers from abroad. One might easily extend the citing from other visitors to the American Republic, down to the present year; but time runs on, runs on. Discernment of the conservative virtues of the United States Constitution does not mean that America's fundamental law may be transplanted readily to other lands: attempts at that generally have failed. As Tocqueville pointed out forcefully, the American Constitution is the product of American mores, convictions, customs, and previous political experience; it was formed out of peculiar American circumstances; other democracies could not well adopt it. As Daniel Boorstin put this point more than thirty years ago, "The Constitution of the United States is not for export." Over and over again, nevertheless, in both Democratic and Republican national administrations, the Department of State and major media of opinion have behaved and pontificated as if the troubled states of Asia, Africa, and Latin America, not to mention Europe, could readily frame constitutions very like that of the United States, if only they would behave sensibly. Doubtless it would be well for "emergent nations," say, to take heed of the conservative spirit of the American Constitution; but it is not possible for the politicians of very different cultures to emulate thoroughly the American framework of institutions, for their circumstances and necessities are very different from ours; and even if they were so to copy the details of the American Constitution, that house of cards would fall to its ruin within a few years, at most. "I'll huff, and I'll puff, and I'll blow your house down." This naivete about the transplantability of American institutions, incidentally, reflects a good many of the folk nowadays called "neo-conservatives," who sometimes seem to fancy that if only we shout loudly and often enough the words "democracy" and "democratic capitalism," by some magic and a measure of American support the world can be transformed upon our model.



Bulwark of Permanence. We turn now to our second principal point: did the Framers of the Constitution, and the men of the state ratifying bodies of 1788, actually intend that the Constitution should be a conservative instrument, a bulwark of permanence? Aye, most decidedly they did, with few exceptions. Even the Anti-Federalists, most of them, were conservatives of another stamp, fearful that the proposed Constitution might break in upon the established powers and patterns of government of the several states. The cry of 1775-1776 had been for liberty; the cry of 1787-1788, among the same classes of Americans, was for order.

The purpose of calling the Convention of 1787 was to conserve and improve the political order of the United States; the Articles of Confederation had not sufficed for that purpose. The proximate cause of the Convention was Shays' Rebellion, a debtors' endeavor to intimidate the courts and legislators and impair contractual obligations: that rising greatly alarmed George Washington and many other leaders of the early Republic, who perceived that a conservative constitution was required for the general welfare. (Of course they did not employ the word conservative: that word did not become a term of British politics until the first decade of the nineteenth century, and was not much employed in American until the 1840s.)

Influence of Demagogues. And the underlying reasons for the calling of the Convention were conservative in nature. A "more perfect union" was advocated because of the nation's need for sound money; because revenues must be found to support the general government; because both overseas commerce and interstate commerce languished for want of sound public policy; because the legislatures of the several states frequently were irresponsible, under the influence of demagogues; because intelligent diplomacy and defense against external enemies could not be carried on without a competent general government. The motives for forming a closer-knit political structure, in short, were those of experienced public men seeking, conservatively, political and economic security.

The Framers, and the people who sent them to Philadelphia, were themselves men of substance who consciously built upon the experience of their ancestors. They stand in remarkable contrast to the leaders of the French Revolution, which would break out just as the Constitution of the United States began to take effect. Liking America much as they found it, these Framers were not intending to create Utopia: what they aimed at was the preservation of the rights and benefits they had inherited, and for which many of them had fought.

They were men strongly influenced by historical and juridical precedents. With few exceptions, they had paid close attention to the eighteenth century constitution of Britain and to English law; about half of their number had been judges or lawyers, much read in Sir William Blackstone's *Commentaries on the Laws of England*. For the most part, the political concepts held by the Framers were developed from the great tradition of classical and Christian civilizations, as modified by the American colonial experience. They respected the wisdom of their ancestors. Nearly all of them had been reared on the King James Version of the Bible. The radical French *philosophes* and Encyclopedists of the eighteenth century had next to no influence upon them.

Protecting Private Property. This intellectual and moral conservatism was paralleled among the Framers by their conservative attachment to private property and private enterprise. Most of them were men of some wealth, the times considered; many possessed large tracts of land or valuable commercial properties, and desired more. No economic levellers were to be encountered among them. As a class, they were eighteenth century gentlemen, not demagogues. Charles Beard and other historians have sufficiently established the fact that the Framers generally sought to protect private property and to make possible greater economic prosperity for the nation--themselves included. What is surprising about that? What is reprehensible about it? In Samuel Johnson's words, a man is seldom more innocently occupied than when he is engaged in making money.

The Constitution of the United States was drawn up by men of conservative background and conservative interests, not by radical ideologues. Democracy--that is, government by the crowd--had no advocates among them. The Framers were a more deeply conservative set of public men than could possibly be assembled in the United States today.



Finally, whatever may be said of certain Supreme Court decisions since the Second World War, the Constitution continues to function today as a conservative framework for the Republic. No other national constitution of our time extends such protections to the Permanent Things. The British Constitution now lies at the mercy of any majority in the House of Commons; and the population of England, still a "deferential people" when Walter Bagehot wrote his famous book on the British Constitution a hundred and twenty years ago, are by no means so attached to custom and convention as they were then--although they still vote in Conservative governments, much to the vexation of the declining Socialist mentality.

Rooted in Britain. No other written constitution in 1987 is very old; few can be expected to live very long. All constitutions of recent years pretend to be democratic; most of them are whited sepulchres. Some are mostly ideological pronouncements, full of sound and fury, signifying nothing; others are lengthy and tedious administrative documents, expressing in fundamental law what ought to be left to statute and administrative practice; others, most notably that of the Soviet Union, are mere political facades, ignored in practice, all power actually being exercised by a fanatical party or a set of squalid oligarchs. What sensible constitutions survive to our time are rooted, most of them, in the British constitutional experience--as is our American constitution.

The only good constitution, I make bold to declare, is a conservative constitution. I offer you four norms by which a constitution should be judged; they are conservative norms.

First, a constitution should provide for stability and continuity in the governing of a country. The subjects or citizens of a political state should be assured by their constitution that the administering of the laws and of major public policies will not change abruptly from one day or year to another day or year. What was lawful yesterday must not be declared unlawful tomorrow, without formal and prudent constitutional procedures. The people must be able to live their lives in the confidence that if they obey certain rules, they will not be made to suffer. Such a constitution encourages the growth of economic prosperity, among other benefits. When the constitution of a country does not guarantee stability and continuity, no man or woman can make major decisions without fear of unhappy consequences.

Safeguards against Arbitrary Actions. Second, a constitution should divide political power among different branches of government, and should restrain government from assuming powers that belong properly to other social organizations, social classes, or individuals. A wise constitution may allocate certain powers to a central government and other powers to regional or local governments; or it may assign certain functions and prerogatives to each of the major branches of government--the executive, the legislative, the judicial. Certainly a prudent constitution will provide safeguards against arbitrary and unjust actions by persons who hold power temporarily.

Third, a constitution should establish a permanent arrangement by which holders of political authority are representatives of the people they govern. To put this another way, under a constitutional order the people ought not to be ruled by a group or class of persons quite different from themselves, who do not have at heart the best interests of the majority of the people. This does not necessarily mean that a constitutional government has to be democratic, and still less that it necessarily must provide for one man, one vote: there have been decent

constitutional systems that were monarchical, or aristocratic, or formed without popular elections. What matters is that the persons who make public decisions and hold political authority should represent the general public interest and usually be accepted by most of the people of the country.

Fourth, a constitution should hold accountable the persons who govern a state. That is, a governing class or body of public officials should be held responsible for their actions while in public office, and should give an account of their actions on leaving office. Under a truly constitutional government, no man can be permitted to exercise arbitrary power. All officials must be accountable to regular authorities--to courts of law, to some representative or legislative body, to fiscal inspectors, to the voting public at election time, or to some other group or organization competent to judge performance in office.

A Conservative Tribunal. There is more to any constitution, of course, than the four points I have emphasized; but a constitution deficient in those matters must be defective. The Constitution of the United States is conservative in the sense that it has conserved and enforced these general principles for two centuries.

The really distinctive feature of this old Constitution of ours is the Supreme Court, intended to be a conservative tribunal. As Tocqueville expressed this point, without the justices of the Supreme Court, "the Constitution would be a dead letter; it is to them that the executive appeals to resist the encroachments of the legislative body, the legislature to defend itself against the assaults of the executive, the Union to make the states obey it, public interest against private interest, the spirit of conservation against democratic instability....The President may slip without the state suffering, for his duties are limited. Congress may slip without the Union perishing, for above Congress there is the electoral body which can change its spirit by changing the members.

"But if ever the Supreme Court came to be composed of rash or corrupt men, the confederation would be threatened by anarchy or civil war."

Beginning of Reform. Tocqueville goes on to emphasize the need for a strong and independent Supreme Court--a court of broad scope, the powers of which, if abused, will be highly dangerous. We have experienced much judicial usurpation of power over the past three decades and more; and nowadays the chief contemner of the Constitution is an elderly person who himself is a justice of the Supreme Court.

Yet, as Disraeli said once, prevailing opinions generally are the opinions of the generation that is passing. We have seen already the beginning of a conservative reform of the Supreme Court; that improvement will continue, despite the wails of people who would prefer to conserve next to nothing of our patrimony. By 1989, the bicentennial year for the Supreme Court, once more that judicial branch may have returned to its old intended purpose of conserving the Constitution.

The Constitution of the United States was framed and adopted on the principle that order and justice and freedom are difficult for a people to obtain, and ought to be preserved through a fundamental law that cannot be cast aside quickly, or by a temporary majority of the public. No written document ever has better achieved that conservative purpose. Up with John Marshall and down with Thurgood Marshall! If in the year 2087 the Constitution still prevails, ladies and

gentlemen, that Tercentenary will have been in consequence of a conservative renewal of constitutionalism near the end of the twentieth century.

