New Oxford Review, November, 2015

OUR TWO CONSTITUTIONS

Dreams of a Perfected Beehive

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The early Americans, along with their actual new-world political experience, knew Scripture and the classics. They were aware of modern history to their time as well as the modern authors. As things developed, they understood that their revolution and that of the French were radically different. Whether they remain that much different from today's perspective is an issue we must address. The principles of our present republic are inching closer and closer to those of the French Revolution, and further and further away from those of the American Revolution. As a result, according to Fr. Schall, "The nature of the American founding seems rather moot. It is not what governs this country; few seem bent on recalling it with any real chance of success."

It is difficult to deny the ring of truth in Fr. Schall's remarks, especially in the wake of the Supreme Court's 5-4 decision in Obergefell v. Hodges, in which the Court ruled that state laws defining marriage as a bond between one man and one woman violate the Fourteenth Amendment of the Constitution. Chief Justice John Roberts, dissenting from the ruling, noted that many Americans will celebrate the decision for a variety of reasons, and then he warned: "But do not celebrate the Constitution. It had nothing to do with it." This is a startling statement, for here the Chief Justice of the U.S. declares that his Court has just made an historic constitutional decision that has nothing to do with the Constitution! Perhaps it is time to catch our breath and take stock of where we really are in the process of American constitutional development, so as to see how we got from the founding to Obergefell.

The movement away from the principles of the American Revolution to those of the French Revolution was no mere accidental "drift." Rather, it originated at a particular point in time and was initiated deliberately by a group of intellectuals bent on undermining the most important principle of the American Revolution: the principle of inalienable natural rights with which men are "endowed by their Creator." These intellectuals, among them some of the founders of modern academic political science and at least one American president, believed, with the English philosopher Jeremy Bentham, that the idea of such rights amounts to little more than "nonsense on stilts" and is a hindrance to good government.

In the process of attacking the Jeffersonian notion of rights enshrined in the Declaration of Independence, these men also attacked the Constitution, believing it too to be a hindrance to good government. Rather than explicitly calling for a new constitution, which they knew to be futile, they sought replacement of the founding fathers' Constitution by a kind of

subterfuge that would retain the letter of the original while completely transforming its character. The success of this project has given us what is, in reality, a second constitution, usually referred to as the "living constitution." This second constitution "lives," however, only by maintaining the fiction of its rootedness in the founders' Constitution. According to this fiction, the living constitution is merely an interpretive, constructive extension of the founders' Constitution. Thus, the living constitution appears to co-exist more or less comfortably with the written document devised in the eighteenth century. This comforting belief makes it possible for us to feel that we are not only suitably modern but are at the same time in full continuity with a venerable republican tradition.

But this pretended continuity is an appearance, not a reality. In essence, it is a lie that was initially perpetrated and has since been sustained by men who disavow the idea of an essential human nature, substituting instead an idea of an infinitely malleable humanity on which they want to do the malleating. It is an historical fiction of the type defined by Bentham as "a willful falsehood, having for its object the stealing of legislative power, by and for hands which could not, or durst not, openly claim it, — and but for the delusion thus produced, could not exercise it." It is the main reason why presidents govern by decree, why courts create rights and marginalize religion, and why Congress sits by and watches while planning for the next election. It is also the constitutional reason why the hoped-for "Catholic moment" referred to by Fr. Schall never materialized after World War II. By that time, the new constitution, though not fully developed, was nonetheless up and running.

The origins of the movement to substitute the principles of the French Revolution for the principles of the American Revolution are found in the progressive era. One of its most articulate exponents was Frank Goodnow, president of Johns Hopkins University and the first president of the American Political Science Association. In a 1916 address at Brown University, Goodnow contrasted the development of a "private rights philosophy" in France with its development in the U.S. during the period following the two nations' respective revolutions. The document that set this development in motion in France was the "Declaration of the Rights of Man and of the Citizen," promulgated on the eve of that nation's revolution. According to Goodnow, "Almost every clause of the Declaration refers to rights under the law rather than to rights which were natural to and inherent in man."

Goodnow continued: The rights which men have been recognized as possessing have not been considered to be inherent rights, attaching to man at the time of his birth, so much as rights which find their origin in the law as adopted by that organ of government regarded as representative of the society of which the individual man is a member…. The rights which he possesses are, it is believed, conferred upon him, not by his Creator, but rather by the society to which he belongs. What they are is to be determined by the legislative authority in view of the needs of that society. Social expediency, rather than natural right, is thus to determine the sphere of individual freedom of action. Goodnow deplored the fact that in America, individual rights are regarded as granted by a Creator and grounded in natural rather than positive law. This, he believed, is the cause of the "unadulterated

individualism" that he believed characterizes America. Nevertheless, Goodnow found reason to celebrate what he saw as a "process of modification" that he believed would eventually result in the demise of America's "traditional political philosophy." The main instigator of this reassessment would be the "announcement and acceptance of the theory of evolutionary development," which presupposes that society is "dynamic or progressive in character." Acceptance of evolution thus entails rejection of any view that regards rights and laws as eternal or immutable. This means that Jefferson was, according to Goodnow, simply wrong when he asserted in the Declaration of Independence that human beings are endowed by their Creator with "certain inalienable rights," whatever those rights might be.

Goodnow concluded his address by reiterating that "under the conditions of modern life it is the social group rather than the individual which is increasing in importance." According to Goodnow, the fundamental theoretical principle of the American Declaration is erroneous — our rights come from government, not from God.

Goodnow's antipathy toward the natural law and natural rights echoed in the thought of numerous influential progressives of his time. For example, President Woodrow Wilson claimed that "men as communities are supreme over men as individuals. Limits of wisdom and convenience to the public control there may be: limits of principle there are, upon strict analysis, none." In other words, any limits on government that may exist must be "convenient" and easily dispensable, not philosophical, theological, or otherwise fundamental. Nor can such limits be "constitutional," which is another kind of fundamental in the American political context. Thus, progressives found it necessary to supplement their attack on the natural law and natural rights with an attack on the Constitution.

Wilson's elevation to the White House was a defining moment in U.S. history, for it signaled the triumph of a movement destined to transform the Constitution from an instrument of limited government to one of consolidation, much as had been feared by the Anti-Federalist Brutus more than a century earlier. Wilson laid out the essentials of this movement clearly and unapologetically in a 1912 speech in which he called for a revolutionary constitutional transformation, albeit couched in modest language.

Like most modern progressives, Wilson swore fidelity to the Constitution. But it is not the Constitution of 1787 that claimed his loyalty. For Wilson, the Constitution is — or should be — a malleable instrument subject to manipulation by "progressive" policymakers in order to achieve the social ends they desire. This is simply not the Constitution the founding fathers wrote. Notwithstanding the fictitious continuity, it is an entirely different constitution because it develops in an entirely different way — and the most important thing about a constitution is its mode of development.

The founders' Constitution develops according to a carefully constructed amendment process designed to ensure a wide consensus in support of any proposed change. This process is spelled out in Article V and requires extensive participation of both Houses of Congress as well as the legislatures or special conventions in the states. This means that the founders regarded constitutional development as a profoundly democratic process,

involving more and a wider range of decision makers than are required for ordinary legislative, executive, administrative, or judicial acts.

The founders' Constitution also established a balanced governmental framework in which no branch of government can claim ultimate authority to determine the constitutional power of another, a fact of which Wilson and his allies were keenly aware and greatly disapproved. In a book Wilson wrote a few years before his presidential run, he acknowledged that the Constitution's framers "constructed the federal government upon a theory of checks and balances which was meant to limit the operation of each part and allow to no single part or organ of it a dominating force." Then he concluded that "no government can be successfully conducted upon so mechanical a theory" (Constitutional Government, 1908). Adoption of Wilson's constitutional proposal would circumvent both the Article V amendment process and the checks-and-balances system.

Wilson's constitution, like Goodnow's, is "Darwinian," based on the evolutionary biology that had become all the rage among intellectuals in the late nineteenth and early twentieth centuries. Wilson consummated his proposal with the following statement: "All that progressives ask or desire is permission — in an era when 'development,' 'evolution,' is the scientific word — to interpret the Constitution according to the Darwinian principle; all they ask is recognition of the fact that a nation is a living thing and not a machine." Thus began the career of the "living" constitution.

Yet, as always, the devil is in the details. The great question left unanswered is almost too obvious to mention: Who are these progressives who will be permitted to interpret the Constitution according to the Darwinian principle? As noted above, the founders had given their answer by establishing a balanced governmental framework in which no branch can claim ultimate authority to determine the constitutional power of another. This means that each of the three main branches of government is responsible for interpreting the Constitution within its own sphere of authority, and none is permitted to invade the spheres of the other branches. Nor is any branch of government entitled to concede its own constitutional authority to another branch. In this way, the framers raised what they thought would be a permanent barrier against efforts by one branch of government to enlarge its authority at the expense of another.

As a result of their dissatisfaction with the original Constitution, Wilson and other progressives launched, under the guise of "reform," a truly revolutionary constitutional transformation. Rather than scuttling the founders' Constitution altogether, they proposed its transformation via reinterpretation, spearheaded by the action of courts and administrative agencies. This reinterpretation was designed to free political actors in the judicial and executive branches from the restraints placed on them by the mechanics of the old Constitution.

The founders' system was much too fragmented, cumbersome, and inefficient for Wilson, who wanted to increase executive power by unleashing an army of bureaucrats in the growing administrative state of his time, regulators who would be appointed initially by

Wilson himself or his subordinates and who would operate behind the scenes essentially "unchecked" to rebuild American society in their image. In the concluding portion of his 1912 speech, Wilson suggested the image he had in mind, describing his "rebuilt" American society as a "great house…where men can live as a single community, cooperative as in a perfected, coordinated beehive." This utopian vision is the dream of progressives like Wilson, who believe that human beings and human societies are immanently perfectible, that we can transform our natures, and that we can "all be one," if only we rid ourselves of the shackles of the past.

Since the time of Wilson, the rise of the administrative state has continued virtually unabated, its officials often operating essentially unchecked. At the same time, Congress, which is supposed to supervise administrative agencies in the name of the people, appears less and less able (or willing) to do so. Indeed, Congress has handed over much of its lawmaking power to those very agencies through explicit delegation, and it has implicitly conceded a great deal more of it through its failure to perform effective oversight.

Although the primary goal of Wilson and other progressives of his time was to increase executive power, a subtle irony in the legacy of living constitutionalism is the rise of judicial supremacy, according to which the Constitution is thought to mean, in the last analysis, whatever the Supreme Court says it means. The Court itself said as much in Planned Parenthood v. Casey (1992), declaring itself "invested with the authority to…speak before all others for their [read: our] constitutional ideals." In other words, we should look not to the Constitution but to the Court to determine what our true constitutional values are!

This astounding admission of the Court's cavalier assumption of the people's constitutional authority would have been incomprehensible a century ago; but then again, so would have been dozens of judicial decisions made during the past several decades under the living constitution's regime of judicial supremacy. Indeed, we have been looking to the Court to determine our constitutional values for at least the past halfcentury and more, during which the Court has, under the influence of progressive ideology, nudged religion and traditional morality out of the public square.

We are now living under a different constitution than the one the framers devised. The Article V amendment process has been effectively scuttled, replaced by a Court that functions as a constitutional-revision council. The checks-and-balances system has been eroded to the point that its original power structure has been altered beyond recognition. Instead of a powerful Congress, a strong but carefully checked executive, and the "least dangerous branch," as Alexander Hamilton, one of the Constitution's framers, put it, we now have a weak (bordering on dysfunctional) Congress, a powerful and relatively unchecked executive, and a "superduper" Supreme Court with final, ultimate, and exclusive authority to determine the scope and range of power possessed by the other branches of government. In short, the agency of government at farthest remove from the democratic process — the Court — now holds ultimate constitutional authority, and the agency most closely tied to the democracy — Congress — holds the least. That is why it is

appropriate to refer to the transition from the founders' Constitution to the living constitution as revolutionary rather than reformative.

Those who support the living constitution have always done so because they desire particular policy outcomes that would be impossible, or at least very difficult, to obtain under the founders' Constitution. The underlying reason for the progressive assault on the Constitution was, and still is, that the proponents of the living constitution do not really believe in the values and principles that formed the basis of the original Constitution. They do not subscribe to the natural-law/natural-rights theories of the framers. Nor do they believe in limited government, republicanism, or democracy in the sense subscribed to by the framers. Instead, today's progressive political elites subscribe to a scientistic, relativistic, secular public ideology. The living constitution provides the framework for imposition of this ideology. It is the conduit through which a whole worldview contrary to that of the framers has been — and still is being — impressed upon public policy in the U.S.

Political scientist Angelo M. Codevilla described several facets of this worldview frankly: "America now divides ever more sharply into two classes, the smaller of which holds the commanding heights of government, from which it disposes in ever greater detail of America's economic energies, from which it ordains new ways of living as if it had the right to do so, and from which it asserts that that right is based on the majority class' stupidity, racism, and violent tendencies" (The Ruling Class, 2012). He added that "it has become conventional wisdom among our Ruling Class that they may transcend the Constitution while pretending allegiance to it."

No doubt, limited government is frustrating at times, especially for presidents, bureaucrats, and judges who are convinced that they know what is best for society — even if society doesn't know it. Such impatience with the founders' Constitution is alive and well in the White House today. President Barack Obama, while an Illinois senator in 2001, expressed this impatience in a radio interview when he criticized the Warren Court for not breaking free "from the essential constraints that were placed by the founding fathers in the Constitution."

Recovering the founders' Constitution will not be easy. It will require wide public exposure of the progressive deception at the heart of the living constitution. It will require wide public recognition that the politicians, administrators, and judges who claim the living constitution as authority for their acts do not really have the authority they claim, and that their actions — insofar as they depend on the living constitution for their authority — are outside the law.

Something of the spirit of Mary Ellen Bork's comment some years ago that the justices of the Supreme Court were "acting like a bunch of outlaws" must be recovered and nourished by the American citizenry. What, for instance, would the average American think if this plain truth were put before him: that he is being governed not according to the Constitution he was taught about in school, but rather according to an altogether different constitution

put into effect surreptitiously by a succession of political elites who do not believe in the key principles of the Declaration of Independence or the most important features of the original Constitution? He would likely not approve — which was and is, of course, the whole reason for the constitutional subterfuge in the first place.

The price of not recovering the founders' Constitution will be the continued erosion of American democracy and the all-important natural-law/naturalrights tradition that supports it, as unaccountable administrators and judges interpret away its foundations. Even worse, a final cost of not doing so may be virtually to assure that Fr. Schall's "Catholic moment" will never occur in America, or anywhere else.

"The basic principle of democracy is the sacredness of the individual as a creature endowed by God with inalienable rights. The basic principle of… totalitarian systems is that the individual has no rights except those given him by the Party or the State…. In America, man endows the State with rights which he received from God; in [totalitarian systems], the State endows man with rights." — Fulton J. Sheen

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James V. Schall, S.J., in his article "Will Modernity Mean the End of Catholicism?" (NOR, Nov. 2014), lamented the fact that a "Catholic moment" in which "the truths of the faith would be acknowledged in the American public square" failed to occur in the aftermath of the Second World War. Surely this would have been an opportune moment given the heightened awareness of man's propensity for evil in the wake of Nazi atrocities, and the revival of natural-law thinking among some Catholic (and non-Catholic) intellectuals. Fr. Schall rightly pointed out the stark conflict between Catholicism, which is grounded in an historical understanding of rational human nature ("what man is"), and modernity, which is grounded in a relativism "in which man himself could and should be other than what he is." Fr. Schall also rightly noted a sharp contrast between two versions of the American founding, one of which is grounded in the principles of the American Revolution, the other of which finds its inspiration in the principles of the French Revolution.