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CONSTITUTIONS SHOULD SAY NO

A timely reminder of some profound political truths by a long-time observer, student, and analyst of men and their governments.

TWO THOUSAND YEARS and more of recorded history, confirmed most emphatically by the experience of our own time, prove that tyrannical government, without check, balance, or limitation, is the greatest evil to which humanity is liable. The Greek city-state of Athens and the Roman Republic, on a larger scale, worked out elaborate constitutional safeguards against the emergence of a dictator, tyrant, or king. Athens went so far as to institute ostracism, or banishment, by vote of the people, for any citizen who seemed to endanger the republican constitution.

Rome instituted a complicated system of checks and balances. Executive power was vested for a year at a time in the hands of two

consuls, each a potential watchdog on the other. While important functions were entrusted to the aristocratic Senate, the populace was given a voice and a share in the government through the elected tribunes of the people, whose veto could check any proposed legislation. The Roman constitution could not have been easy to operate. Yet it worked well enough to permit Rome to become the dominant power in the ancient Mediterranean world. Then, for various reasons, not the least being the absence of external challenge and the development of a socially unhealthy system based on slave labor, internal dissensions began to place an intolerable strain on the old constitutional fabric. The old rules and restraints were

more and more disregarded and gave way to sheer tests of factional violence, fought out with all the cruelty and bloodshed characteristic of revolutions and counterrevolutions of the present time.

With the checks and balances discarded, the stage was set for the emergence of the "strong man" who would subdue the whole state to his own will; and this figure appeared in Julius Caesar. Caesar possessed rare energy and genius as soldier and statesman, writer and administrator. But he left behind him a legacy of absolute power which carried within it the seeds of the decline and fall, so brilliantly described in Gibbon's mighty historical work.

The Century of Totalitarianism

It is no accident that the biggest and most shocking crimes against human beings have always been perpetrated by dictatorial governments, operating without any restraint of law or constitution. This century has witnessed more than its share of such crimes: the liquidation of the kulaks and mass starvation of peasants who did not wish to give up their individual farms, the mass arrests, executions, deportations, and slave labor system in the Soviet Union; the horrible slaughter of the Jews and vast cruelties inflicted both on dis-

senters at home and people in occupied countries by the Nazis; the similar acts of terrorism in Red China.

All these measures claimed far more victims than acts of tyranny that shocked the more tender conscience of the nineteenth century, and for an obvious reason. The twentieth century is the century of totalitarianism. And totalitarian terror stifles the voice of protest and takes away from those who live under it any means of denouncing or resisting, because the slightest move in opposition is calculated to bring fearful reprisals not only on the individual, but on members of his family.

This is why one of the most important functions of an effective constitution is that of saying "No" to the invariable temptation of agents of government to stretch and abuse the powers with which they are entrusted. One of many reasons why it is worth while to reread the Constitution of the United States is to note how many prohibitions it contains. To quote a few examples:

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.

No bill of attainder or ex post facto law shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to

the census or enumeration herein before directed to be taken. (This prevented the levy of a graduated income tax until the Sixteenth Amendment, of unhappy memory, was passed.)

Congress shall make *no* law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall *not* be violated and *no* warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Excessive bail shall *not* be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The enumeration in the Constitution of certain rights shall *not* be construed to deny or disparage others retained by the people.

The powers *not* delegated to the United States by the Constitution, *nor* prohibited by it to the states, are reserved to the states respectively, or to the people. (*Italics supplied*)

No Positive Action Promised

Along with this multitude of "Don'ts" to governing power, some of them now diluted or eliminated by amendments or recent decisions of the Supreme Court, there is

conspicuous absence of the promises of affirmative state action which are now the stock-in-trade of every up-and-coming politician and may also be found in the constitutions of totalitarian states. The framers of the Constitution — a process admirably described in Clinton Rossiter's recently published work, *The Grand Convention* (Macmillan, 443 pp., \$7.95) — were not in the vote-buying business. They did not promise the American people to make them healthy, wealthy, and wise. They shared the negative view of the proper role of the state voiced by their great contemporary political thinker, Edmund Burke:

To provide for us in our necessities is not in the power of government. It would be a vain presumption in statesmen to think they can do it. . . . It is in the power of government to prevent much evil; it can do very little positive good in this, or perhaps in anything else.

And the long string of "Don'ts," directed to the address of government, and of Congress itself, in the Constitution reflects Burke's well-turned warning against legislative tyranny:

It would be hard to point out any error more truly subversive of all the order and beauty, of all the peace and happiness of human society than the position that any body of men may make what laws they choose.

Burke Opposed Tyranny

Burke still is regarded in some circles as a reactionary. This is because of a rather lazy intellectual view that, by and large, the French Revolution turned out for the best and that Burke, in his celebrated indictment of this movement, was merely pleading the lost cause of monarchy and aristocracy. What Burke opposed was not constitutional democracy, of the type established under the Constitution of the United States. He spoke strongly for the American cause during the War of the Revolution, on the ground that the colonists were merely asserting the proper rights of freeborn Englishmen.

What Burke denounced, and with good reason, was Jacobin democracy, as preached and practiced by Robespierre and other extremist ideologues of the French Revolution. This, as Burke correctly foresaw, led not to ordered liberty but to a kind of preview of communism, with a small group of dedicated fanatics ruling the masses of the people, supposedly for their own good, with the guillotine as the final sanction. It is interesting to recall that John Adams, who was not one of the framers of the Constitution, but who wrote a long vindication of it, was just as negative as Burke in his reaction to the French Rev-

olution in its extreme terrorist phase. Skeptical of the teachings of Rousseau, the Marx of the Jacobins, Adams called the French Encyclopedists "totally destitute of common sense." His verdict on the Revolution and its intellectual precursors was expressed in language as tart as a New England apple:

Helvetius and Rousseau preached to the French nation *liberty*, till they made them the most mechanical slaves; *equality*, until they destroyed all equity; *humanity*, until they became weasels and African panthers; and *fraternity*, till they cut one another's throats like Roman gladiators.

And, in a letter to the well-known surgeon, Benjamin Rush, Adams explained his difference of opinion on this subject with Thomas Jefferson:

He thought it wise and good and that it would end in the establishment of a free republic. I saw through it, to the end of it, before it broke out, and was sure it could end only in a restoration of the Bourbons, or a military despotism, after deluging France and Europe in blood.

In his *Defense of the Constitution* Adams wrestled hard with the many perplexing issues that confronted the founders of a new nation. After the British rule had been overthrown, it was necessary to create on new foundations a republican government that would

steer a middle course between the twin threats of despotism on one side and chaotic anarchy on the other. With his stern Calvinist background, and the practical knowledge of human foibles which he had experienced as one of the political leaders of the American Revolution, Adams placed little reliance in the natural goodness of human nature. As he put it:

Though we allow benevolence and generous affections to exist in the human breast, yet every moral theorist will admit the selfish passions in the generality of men to be the strongest. . . . Self-interest, private avidity, ambition, and avarice will exist in every state of society and under every form of government. . . .

To expect self-denial from men, when they have a majority in their favor and consequently power to gratify themselves, is to disbelieve all history and universal experience.

A Balance of Power

What then is a safe formula for entrusting the powers of government to fallible human beings who are apt to be selfish and ambitious? Adams comes up with a solution that may not be perfect, but is preferable, on the basis of experience, to any other. He starts from the proposition that "simple unchecked government," whether exercised by a king, by an aristocracy, or by the mass of the people, is equally intolerant, bloody,

cruel, oppressive, and tyrannical. And he reaches the conclusion that the only sound and durable form of government is one so nicely balanced that ambition will check ambition and power will check power.

The international balance of power, abused as it is by advocates of world government and other utopian schemes, has proved as effective as any device for keeping peace among nations. By the same token, the most tolerable formula for stable, free, and orderly government, in the opinion of Adams, the most distinguished political thinker of the Revolution, is a carefully adjusted balance of power between social groups and agencies of government. He regards respect for private property as an indispensable condition for the maintenance of liberty. And his prescription for the type of government with the best assurance of preserving liberty, property, order, and stability is as follows:

The essence of a free government consists in an effectual control of rivalries. The executive and legislative powers are natural rivals; and if each has not an effective control over the other, the weaker will ever be the lamb in the paws of the wolf. The nation which will not adopt an equilibrium of power must adopt a despotism. There is no other alternative.

Rivalries must be controlled, or they will throw all things into confusion; and there is nothing but despotism or a balance of power that can control them.

Even a superficial study of the United States Constitution shows that the Founding Fathers shared John Adams' distrust of unchecked, unlimited power, whether vested in a single man, an oligarchy, or a legislative majority. One need only recall the distribution of power between co-equal branches of government, legislative, executive, and judicial, no one of which is supposed to dominate or disregard the other two. Or the great compromise which made the Constitution possible, the provision of population as the basis for the choice of members of the House of Representatives, while two seats in the Senate were assigned to each state. Or the many prohibitions, based on natural law and the inherent rights of citizens, imposed on action by the three branches of the government. Or the forbidding, in the original version of the Constitution, of the graduated income tax which may well be considered a form of cruel and unusual punishment.

The Founding Fathers were not setting up an egalitarian democracy, which would have horrified most of them. They were laying the foundations of a republic un-

der a government of limited and divided powers, and with as many safeguards as might be devised against any man or body acquiring excessive power, and also with checks and balances against overhasty actions by the sovereign people themselves.

One American statesman, who was also a first-rate political thinker, John C. Calhoun, suggested an additional check and balance in the shape of what he called the concurrent majority. According to this theory, no law should be passed without the approval of all important regional and economic interest groups. This, of course, might create difficulties for the easy functioning of government. However, there are many examples of the inadvisability of using a majority to jam through legislation which is very obnoxious to an important minority or section of the country.

A written constitution is, after all, only a scrap of paper. The real guarantee of preserving a limited government of checks and balances with respect for the rights of minorities must lie in the hearts and minds of the people. Yet, there are advantages in having an instrument plentifully supplied with negatives that offers assurance that there are some things that government may not legally do. ♦

"Creative

Federalism"

LEONARD E. READ

EVERY PROMOTER wants an attractive label regardless of what goods or services or ideas his package contains. So, we sometimes find pronounced discrepancies between the label and the content.

The word *liberal*, for instance, once fairly labeled those who stood for the liberation of the individual from government domination. But this attractive and desirable label has since been expropriated by those favoring what the original liberals opposed — until it now means nothing more than a liberality with other people's money.

Creative federalism is one of the newer masterpieces of labeling. *Creative* conjures up man's highest aspiration; *federalism*, in the American tradition, calls to mind the separation of powers, the checks and balances against unlimited political authority, always with a view toward maximiz-

ing the freedom of choice of the creative individual.¹ Taken together, the two words constitute a semantic *tour de force*.

Each word, however, has been lifted from its traditional setting and made to adorn a concept of opposite content. Yet, a certain rationalization supports the use of both *creative* and *federalism* in the current context. To see the substance beyond the label, we must examine the rationalizations.

Federalism here, of course, denies the historical concept. Instead of the Federal establishment having only those powers specifically ceded by the people and the states — really their agency and nothing more — the new *federalism* aims at the states having such powers and monies as are

¹ See Gottfried Dietze's *The Federalist: A Classic on Federalism and Free Government* (Baltimore: Johns Hopkins Press, 1960), especially pp. 255-285.