The Four American Constitutions: A New Perspective

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Essay

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by

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We think of the Constitution in the singular. We speak of it as "the" Constitution. We carry the illusion that it is a self-contained document expressing internally consistent theories and values of one group of draftsmen—the "Founding Fathers." But the more familiar one becomes with its history the more evident it is that "the" Constitution is, in fact, a collection of several Constitutions.

The First Constitution was proclaimed in September of 1787, the work of fifty-five men who gathered periodically in Philadelphia from May until September to propose a new and unique plan of government. Though they feared democracy, agreeing with Homer that "Ill fares it where the multitude hath sway," they accepted some—but not too much—democracy in their plan. Likewise, they accepted some executive power, but not on the model of King George.

They proposed that the sovereign states should surrender a portion of their sovereignty to a new central authority, one limited in scope by the expressed terms of the Constitution—spelled out somewhat in the nature of a contract. Thus, a two-headed creature was envisioned—the national part controlling common interests, such as war, foreign affairs, and interstate commerce, and the states retaining the general police power respecting the health, welfare and morals of the people. Individual rights, for the most part, were left to the protection of state constitutions.

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The plan also divided the national power between the legislature, the executive, and the judiciary. Within the legislature, the basic law-making body, a further split was established between the Senate and the House. The states were given equal power in the Senate, two senators for each state, whereas the House granted representation from the states on the basis of population.

Both houses were required to agree in order to enact a law, thereby giving each a veto over the other. Each checked and balanced the other, with compromise obviously essential.

The executive power, bestowed after some debate on one person, included the authority to administer the federal laws, to conduct foreign affairs, to appoint leading officials, and to exercise substantial war power as Commander-in-Chief of the Armed Forces, though only Congress could declare war. The executive power was also restrained by provisions requiring the advice and consent of the Senate in the making of treaties and the appointment of “Officers of the United States.”

These legislative controls on the executive were equalled or exceeded by the executive's power to veto laws passed by the legislature. Though such vetoes could be overcome by a two-thirds vote of each legislative house, this proved to be very difficult.

The power of the Supreme Court, particularly as a checking or balancing force on the legislature, the executive, or the states, was worded with such obvious ambiguity that it may be regarded as studied. Article Three provided that the judicial power would extend to all cases "arising under" the Constitution, laws and treaties of the United States. Did these vague words grant the power to nullify a law that the Court found contrary to the Constitution?

When the Constitution was written in 1787, some state supreme courts had asserted such a power in cases involving a violation of state constitutions. The “Founding Fathers” were well aware of this fact and evidence indicates that some of them favored similar federal judicial authority. See, e.g., The Federalist No. 78 (Alexander Hamilton); John D. Hicks, A Short History of American Democracy 124 (1943). But Article Three spoke in obscure terms. Perhaps the fear of state opposition in the ratification process to such federal judicial power prompted the use of this unclear choice of words, leaving the resolution of the issue to the future. Indeed, the “future” occurred without much delay, when the avowed Federalist, Chief Justice John Marshall, successfully asserted the power on behalf of the Court in 1803, in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
Even this brief review of the structure of government laid out in the First Constitution should make obvious the basic direction of the Philadelphia meeting. For good reason and on the basis of personal experience, the Founding Fathers had a healthy fear of the power of government, including the power of the new federal leviathan that they were creating. Borrowing the theories of Locke and Montesquieu, their basic idea was to control the dangerous power of government, and the persons possessing it, by dividing it into many parts, and by separating the persons holding the power and giving them partial authority that they could use only with the concurrence of other persons also holding partial power. As James Madison explained in The Federalist Nos. 47 and 48, the First Constitution was designed to provide a system of checks and balances requiring concurrence and compromise in the exercise of power. It was not a plan for fast and efficient action and change. It was a plan for the maintenance of the status quo, a plan for conservation of existing interests, particularly the interests of those holding property and position. It was a plan that strongly sustained the values of those at Philadelphia, who initially would dominate the new positions of influence.

According to the plan, in order to change the status quo, to make a new law or to change or repeal an existing one, many hurdles had to be surmounted. Many interests and points of view had to be satisfied. For example, if a majority of the House, representing the population, voted for a new law, the Senate, representing the states, had to agree. Moreover, the President was given the veto power, thereby checking the will of both the House and Senate. In turn, the plan allowed the House and the Senate to adopt the law, thereby checking the veto, if each of them mustered a two-thirds override vote. In this system of checks and balances, failure to cross any one hurdle prevented the proposed change. Thus, control of any one of the divided powers could be used to thwart the will of all the others. Those favoring the status quo had a significant tactical advantage.

Lord Acton observed that power corrupts, and that absolute power corrupts absolutely. Those at Philadelphia in 1787 clearly agreed. While they could not avoid the necessity of governmental power, including democratic power, they could lessen the danger by splitting that power among different people and by providing checks and balances even to the exercise of the separated authority. The plan was not an original idea, but it was perhaps an original application of the theory in a major governmental structure.

The plan has three main weaknesses, as current United States politics reveals. First, it has a tendency to create a deadlock when govern-
mental action is needed. Second, it permits each branch to avoid responsibility by charging that the other branches are the cause of governmental inaction and failure. Third, it leaves the door open for political demagoguery, the Achilles’ heel of democracy.

This, in brief, is the First Constitution, consisting of only seven short Articles and designed primarily to establish a framework of government. It dealt mainly with the procedure of government, rather than the content. Its mission was a narrow one: To establish a new limited national government, while recognizing the continuing reserved sovereignty of the states; and to apply the theories of Locke and Montesquieu in order to block the corruption of governmental power, by separating it among various people and bodies and carefully checking even the use of partial power in various hands.

When asked to ratify the new government, however, some of the states responded with fear of the new central authority. To pacify them, the Federalists agreed to adopt amendments to the original structure. Whereas the First Constitution of 1787 was primarily a grant of power to the new national leviathan, the Amendments—the Second Constitution—were exactly the opposite. The Bill of Rights, adopted in 1791, set forth both substantive and procedural limits. For example, the First Amendment ensured that Congress could make no law respecting an establishment of religion or prohibiting its free exercise. It provided that Congress could not abridge the freedom of speech, or of the press. In the Fourth, Fifth, and Sixth Amendments, due process of law was required, along with specific protections in criminal cases particularly of a procedural nature.

A Bill of Rights had been given serious consideration at Philadelphia but, when put to a vote of the states, failed for want of a majority. The vote was five states for, and five states against. See The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States: Reported by James Madison 545 (Gaillard Hunt & James Brown Scott eds., 1920). Thus, the explicit declaration of a Bill of Rights to shield individuals and the states from the Federalists constituted a Second Constitution, one with different intent than the First and drafted and sponsored by different people. One must therefore qualify the usual credit given the “Founding Fathers” for the magnificent Bill of Rights. They had rejected it. It was the work of a different set of “Founding Fathers.”

For Americans who were alive between 1791 and 1865, the two Constitutions remained relatively unchanged, the First granting power to the federal government, and the Second limiting it.
By around 1860, the issue of the right of the states to withdraw from the Union gradually became a fighting one. In time, the sin of slavery coupled with economic tensions between the North and the South provoked the outbreak of the Civil War. Tragically, neither of the two Constitutions contained provisions clearly governing the secession problem. But with the victory of the North, national power over the states was established by force and unity was maintained. The results of the victory were reduced to writing and added to the existing two Constitutions in the form of the Thirteenth Amendment, in 1865, the Fourteenth Amendment, in 1868, and the Fifteenth Amendment, in 1870.

These "Civil War Amendments" became another American Constitution. They marked the death knell of strong state sovereignty, so plainly sought and recognized in the cautious grant of limited power to the federal government in 1787. This new Constitution added great power to the national government, facilitating the domination of all the states, not just the South. Thus it can be fairly said that a Third Constitution was adopted, one differing greatly from the restrained federalism of the First Constitution, one drafted by different "Founding Fathers" than those at Philadelphia in 1787 or the other "Founding Fathers" who demanded the Second Constitution of 1791.

Are three Constitutions enough? Well, one would think so and, for many years, this writer in the classroom confined his analysis to three. Yet, as one studies the matter, it becomes increasingly evident that there is at least one more.

The source of this Fourth Constitution is strange indeed. It is the creation of the Supreme Court, and is based on the "due process" clause of the Fourteenth Amendment as it has been defined since 1890 by the Court.

In this regard, it is helpful first to point out that the Fourteenth Amendment actually confines its grant of new power to the Congress. The Fourteenth Amendment explicitly states that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Nothing whatever within the Amendment suggests that the Supreme Court should wield this new control over the nation. And yet today it is mainly the Supreme Court that governs all of us under the Amendment. In fact, the Supreme Court governs even the Congress itself, in contradiction of the Amendment's declaration that "The Congress shall have power to enforce" the Amendment.

The Fourteenth Amendment ostensibly was aimed primarily at freedom and equality for the former slaves. The Thirteenth Amendment, abolishing slavery, and the Fifteenth, granting the right to vote to black
men (no women, black or white, were enfranchised), assisted this goal. But the language of the Fourteenth Amendment was so broad and so ambiguous that it contained the seed of a greatly extended federal power over all the states, going far beyond insuring freedom for the slaves in the South. Some historians have asserted that this was, indeed, a secret objective, a conspiracy, of the draftsmen in Congress. See Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 Yale L.J. 371 (1938).

Whether the conspiracy theory is true or false, it is now evident that the Supreme Court has gradually extended federal power over the states and the people by its interpretation of the words of the Fourteenth Amendment. In doing so, the Court has relied primarily on the words of the Due Process Clause.

Initially, lawyers relied primarily on the “privileges and immunities” clause of the Fourteenth Amendment in seeking to extend the Amendment beyond the protection of African-Americans. The first major effort to extend the Fourteenth Amendment was in the famous *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873). Lawyers urged the Supreme Court to protect butchers of all races from state legislation in Louisiana granting a monopoly favoring slaughter houses that severely limited the freedom of butchers to pursue their means of livelihood. On its face, the Privileges and Immunities Clause of the Amendment was broad enough to authorize federal protection over all “privileges and immunities,” regardless of race.

The majority of the Court refused to accept such an interpretation. They said that the Amendment’s draftsmen could not possibly have intended such an interpretation because it would destroy the basic plan of the First Constitution, a plan designed to maintain strong reserved power in the states, while granting only limited power to the federal government. They rightly recognized that the broad language of the new amendment, if generously interpreted, could subject the states to greatly increased federal control, a fear that subsequent history has fully justified.

Four members of the Court dissented. Justice Field’s dissenting opinion strongly and persuasively supported the “privileges and immunities” clause as the proper words of protection against the state-created monopoly. While joining Field’s opinion, two of the dissenters, Justices Bradley and Swayne, urged their colleagues also to use the “due process” clause as the words giving the protection to the butchers.

The majority opinion not only insisted on maintaining the original plan of divided sovereignty between the states and the nation, but also
prophesied that the Amendment would always be confined to the protection of African-Americans, which they said was its original intended purpose. If the Fourteenth Amendment were truly intended to greatly extend federal power over the states, the “privileges and immunities” clause would appear to be the proper constitutional words to effect this revolutionary change. Justice Field made this abundantly clear in his sharp dissent. But the majority of the Court, using questionable reasoning, rejected such an interpretation and thereby nullified substantially the potential use of the privileges and immunities clause. This nullification prevails to this day.

The two dissenters, who stressed the due process clause as the words intended to revolutionize federalism, adopted an interpretation of “due process of law” that flatly contradicted the historic purpose and meaning of these words. In fact, the majority opinion, which gave scant attention to the “due process” argument, rightly declared that such an interpretation had never before been accepted by the Supreme Court, even though the Second Constitution had contained a “due process” limit on the federal government since 1791. See U.S. Const., amend. V.

The historic meaning of “due process” was the requirement that the trial of cases and parties be in accordance with the “due procedure” of the law. It was not intended to require “due substance of law,” such as the substantive right of butchers to be free from a state-imposed monopoly within their trade. See Edward S. Corwin, Liberty Against Government (1948).

Initially, Justice Field placed no emphasis on the use of the due process clause and apparently accepted the refusal of the majority to give it a meaning that was historically unsound. But Justice Field evidently wanted to find constitutional grounds upon which to base federal judicial protection of business and commercial interests from state laws that, in some cases, hindered the great expansion of the nation to the West, Justice Field’s home base.

So, lo and behold, Justice Field abandoned his impressive and perhaps correct reading of the privileges and immunities clause as the basis for federal judicial protection of substantive rights and adopted the position of his fellow dissenters, Justices Bradley and Swayne, that the due process clause was the correct instrument. Perhaps he reached the pragmatic conclusion that the best opportunity to gain a majority of the Court on the matter was to join forces with the two members of the Court who were so strongly in favor of erecting “due process” as the barrier to undesired state regulation.
What followed is a remarkable incident in the history of the Supreme Court. For a period of seventeen years, the majority held firmly to its limited and correct interpretation of the due process clause, while Justice Field, in one dissent after another, insisted that the due process clause gave the federal courts the power to hold unconstitutional state laws that the Court found unacceptable as to substance, as well as to procedure.

Finally, in 1890, in Chicago, Milwaukee & St. Paul Railway v. Minnesota, 134 U.S. 418 (1890), Justice Field's persistence was rewarded when he succeeded in gaining a majority vote interpreting due process as giving the Court the power to rule on the constitutionality of the substance, as well as the procedure, of state laws. With one master stroke of constitutional misinterpretation, Justice Field and his colleagues gave the Supreme Court the power to invalidate state laws whenever it found the substance of a state law "unreasonable."

The due process clause was thus converted into the instrument for a radically new domination of the states by the federal government. And the possessor of this power was not the Congress, as specified by section five of the Fourteenth Amendment, but the Supreme Court. Justice William O. Douglas referred to the due process clause as the "wild card" in the hand of the Supreme Court. See William O. Douglas, The Bill of Rights Is Not Enough, 38 N.Y.U. L. Rev. 207, 219 (1963). Justice Hugo Black complained that substantive due process allows the Court to "roam at will" in the exercise of power, quoting Justice Holmes who stated that there is "hardly any limit but the sky" to this judicial power. Federal Power Comm. v. Natural Gas Pipeline Co., 315 U.S. 575, 600 n.3 (1942) (quoting Baldwin v. Missouri, 281 U.S. 586, 595 (1930)).

Having wrought this judicial miracle in the assumption of federal and judicial control over the states, the Court went on, in time, to interpret the due process clause of the Fifth Amendment to give the Supreme Court the same supervisory authority over the other branches of the federal government, including the President and the Congress itself. By virtue of this single judicial power-play, the Court's use of the due process clause over a period of years has led to the imposition of virtually all of the Bill of Rights on the states. Even though many will conclude that the practical result has been a good one, others will insist that the result, though desirable, has come about through an abuse of judicial power.

The Fourth Constitution, then, is the due process clause as interpreted by the justices—a reconstruction of the basic frame and structure of United States government of revolutionary proportions. This Fourth Constitution is another constitution, written by different "Founding Fa-
thers" than those of the First, or the Second, or the Third Constitution; written in a different time; written for different and at times conflicting purposes.

And most striking of all, written by judges.
CHIEF JUDGE ROBERT F. PECKHAM
This Issue Is Dedicated to
the Memory of
CHIEF JUDGE ROBERT F. PECKHAM