

• FOREWORD BY CONGRESSMAN PAUL HENRY •

Liberty & LAW

Reflections on the
Constitution in American
Life and Thought

Edited by
RONALD A. WELLS &
THOMAS A. ASKEW

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Edited and Introduced by

Ronald A. Wells

Thomas A. Askew

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Contributors

Thomas A. Askew is Professor of History at Gordon College.

Richard H. Clossman is Professor of History at Judson College.

David E. Maas is Professor of History at Wheaton College (Ill.).

Paul Marshall is Senior member in Politics and Vice-President of The Institute for Christian Studies, Toronto.

Richard V. Pierard is Professor of History at Indiana State University.

Richard Pointer is Associate Professor of History at Trinity College (Ill.).

Kathryn J. Pulley is Assistant Professor of Religious Studies at Southwest Missouri State University.

Johan D. van der Vyver is Professor of Law at the University of Witwatersrand.

Ronald A. Wells is Professor of History at Calvin College.

Preface

This book was conceived by the editors four years before its publication. With the bicentennial of the American Constitution four years hence, we hoped to produce a volume in 1987 that would reflect on the Constitution and the constitutional. Moreover, we wanted to find the best writing available by Christian scholars who would bring their Christian commitments to bear in their study. The editors were commissioned by the officers of the Conference on Faith and History to convene the organization's fifteenth annual meeting, focusing on Christian perspectives on the Constitution. With the generous support of the Lilly Endowment we were able to convene and chair a meeting at Gordon College in October 1986. Gordon College also sponsored the conference as one of its centennial colloquia. The chapters in this book originated as papers at that meeting. It should be said, however, that this book is not merely a reprinting of conference proceedings. The authors have worked closely with Ronald Wells in transforming their spoken remarks into carefully constructed literary efforts.

The essays are as diverse as the people who wrote them. Some essays are broadly humanistic while others are more oriented toward the methods of the social sciences. Some are wide ranging while others are more particularly focused. Five of the authors are historians while the others are professors of law, politics, and religious studies. Six of the authors are United States citizens while one is a Canadian and another a South African.

What the essays share is a common aspiration of thinking Christianly about the American frame of government, the Constitution. Within that common aspiration there is no party line or unified set of political beliefs. While some of the essays are notably laudatory of the beneficial effects of the Constitution in American life and thought, others are more critical of that ideology and practice. The diversity of views is the hallmark of this effort, because we believe that the study of history is an on-going process in which there are many honorable views.

There are certain persons whose contribution to this volume must be acknowledged publicly. Thomas Askew's colleagues in the Gordon

College history department, especially Russel Bishop, were of great help in organizing the conference from which this book comes. Robert Lynn, Vice-President of the Lilly Endowment, worked closely with Ronald Wells in providing financial support for the conference. Calvin College deserves thanks for giving logistical support to Ronald Wells. Jacqueline de Vries, research assistant in Calvin's history department, contributed significantly in bringing these essays to their current form.

We hope and trust that readers will find it worthy of their time to join us in reflecting on both the Constitution and American liberty and law.

February 1987

RONALD A. WELLS,
Grand Rapids, Michigan

THOMAS A. ASKEW,
Wenham, Massachusetts

Foreword

Congressman Paul B. Henry

Nineteen eighty-seven marks the two hundredth anniversary of the drafting of the Constitution of the United States of America. Despite the relative youth of the nation, the Constitution survives as the longest-serving national legal charter in the history of mankind.

When the fifty-five delegates to the Constitutional convention gathered in Philadelphia, they were responding to a breakdown of governmental institutions under the Articles of Confederation. They were motivated not by philosophical or academic or religious visions of some grand scheme of human governance. They were responding to the practical problems of the young American republic.

But as they proceeded in their deliberations, they drew from a shared tradition of moral and intellectual assumptions from which the practical questions of the new national charter would find their answers. A joining of Judeo-Christian values, eighteenth-century Enlightenment rationalism, and the classical history of ancient Greece and Rome provided the soil from which the Constitution received its nourishment.

One cannot, for example, fully appreciate the Constitution's guarantees of human rights without acknowledging the presumed belief its authors shared concerning the divinely rooted origins of human existence—despite the fact that the Constitution remarkably makes no direct reference to the Divine Being. One cannot fully appreciate the Constitution's protections for free expression without acknowledging the presumed belief its authors shared regarding the substantive nature of truth. The First Amendment freedoms were championed not as ends in themselves, but as the most secure path to truth itself. One cannot fully appreciate the Constitution's elaborate system of political checks and balances without acknowledging its authors' deep suspicion of human nature.

The Constitution is the meeting place between belief in man's capacity for good and practical insights about his penchant for evil. It

demonstrates that prudence and practical experience in human affairs are necessary correlates to abstract philosophy and religion. And it demonstrates, with equal intensity, that philosophic and religious values underlie that which is deemed prudent and practical.

Americans, in particular, tend to forget that the Constitution was not a "perfect" document. Its ratification was secured only with advance commitment to adoption of what we now know as the "Bill of Rights," the first ten amendments to the Constitution. It fundamentally compromised its own moral assumptions and foundations in forging a political accord on the slavery issue. But even in its failures, we can learn lessons on the frailty of human governmental institutions and procedures which can inform and strengthen the constitutional tradition in subsequent generations.

The impact and significance of the United States Constitution extends well beyond the borders of the people whose life it governs. It served as the inspiration for the Latin American constitutions of the eighteenth century, it brought forth European constitutions in the nineteenth century, and it strongly informed the constitutional charters of the postcolonial world in the twentieth century. And it has beguiled many into equating the presence of a written constitution with the practice of constitutional government.

We need to be reminded that the concept of "constitutional" government is a separate question from the existence of a written constitutional charter. The English tradition of constitutional government preceded and strongly informed our own Constitution, despite the fact that the United Kingdom has never relied on a written charter. And until only recently, our neighbor to the north, Canada, had no document of truly constitutional standing. Indeed, it is the unwritten moral and intellectual assumptions about man and society which truly guide the political behavior of nations. There are numerous examples today of nations with splendid written constitutional charters whose actual behavior is far removed from anything which most of the community would regard as "constitutional" government.

Thus, we return to the beginning assumption of this brief introduction, and the underlying thesis of the essays which follow. Ideas have consequences. There were certain underlying ideas and concepts which informed the authors of our Constitution and which are reflected in that document. The question remains: Can the document continue to exercise its authority if and when the moral and intellectual assumptions upon which it is based are called into question?

Introduction

In 1878, in respect of the Constitution's centennial, British Prime Minister William Gladstone described the American Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man." While surely hyperbole, the remark lends point to the suggestion that the young republic's frame of government was—and is—a remarkable achievement. Even though the United States is a relatively new nation, it is governed by the oldest and most durable written constitution.

Adopted by a nation of about 4 million citizens scattered thinly across the thirteen original states, the Constitution now governs the lives of 250 million persons in fifty states. Despite the nation's evolution from rural republic to industrial giant, the Constitution as basic law has been amended a mere twenty-six times. 26

The Constitution, however, is not an artifact, a parchment to be revered like an icon. It is an amalgam of ideals, principles, compromises, and authorizations for action that embody the spirit and determination that shaped the American experiment in its formative years. Composed at the end of a quarter century marked by conflict with Britain and a search for effective government at home in the new nation, the document of 1787 was built on experience as much as theory, on concrete interests as much as ideals. Once fashioned and ratified, the Constitution became a dynamic instrument whose meaning and application could evolve with America's history, politics, economy, and society.

The longer-term success of the Constitution derives from the insights and good sense of the fifty-five convention delegates, thirty-nine of whom finally signed it. By today's standards they were strikingly youthful. Five were still in their twenties. A number, including Alexander Hamilton and James Madison, were in their early or mid-thirties. Another group clustered in the early forties. George Washington, along with two others, was fifty-five. Only four exceeded sixty, the oldest being Benjamin Franklin at eighty-one. In addition they reflected a cross-section of leadership within the infant state. Twenty-eight had

served in the Confederation Congress; most of the others had state legislative experience. Several had been college professors and two were college presidents. At least twenty-eight held baccalaureate degrees. Nine were born abroad; four others learned law in London at the Inns of Court. Many developed a sense of national loyalty and identity while serving in the Continental Army. With the exception of John Adams and Thomas Jefferson who were in Europe and John Jay attending to foreign policy, the Federal Convention gathered the greater share of political thinkers available to the young country.

The debates reflected the plethora of historical allusions, philosophic arguments, British legal precedents, and Christian theology that animated political discussions during the Revolutionary period. Most delegates were familiar with the natural-law essays of Enlightenment thinkers, the common-law writings of English jurists, and the contents of Scripture. Whether trinitarian, unitarian, or deist, they all affirmed a moral order established by a transcendent deity. Even the most devout Christian believers, in typical eighteenth-century fashion, felt little tension in blending classical antiquity, Enlightenment rationality, and empiricism with Christian theology, a synthesis that would unravel in the following century. Confident that men, like nature, answered to the precepts of universal laws, these founders sought to discern what John Adams had earlier termed "the divine science of politics."

At the same time the framers were realists about both the task to be achieved and human nature itself. Two centuries of colonial politics coupled with two decades of state making provided ample experience on which to draw. They were committed to the possible, not the ideal. Men were accountable moral agents whose baser side must be checked. Somehow, the tendency toward self-centeredness needed counterbalancing. Thus, unrestricted power and authority could not be lodged in one social group, department of government, or region. Interests must be balanced by competing interests. Yet to these designers of the nation, politics was not irretrievably egoistic and individualistic. There was need for community, covenant, and civic virtue; a virile and forceful federal government would prove an antidote to instability within and among the states and to demeaning treatment from governments abroad. In this sense the Constitution writers should be termed nascent nationalists in a society still characterized by extensive localism.

The salient features of the Federal Convention's recommendations are well known. The national government, like the respective state governments, was to draw its powers directly from the citizens, a con-

cept that became known as dual federalism or divided sovereignty. "We the people" assigned distinct functions to national and state levels and in turn were directly responsible to both spheres of authority. Good republicans that they were, the framers labored hard to erect a mechanism of representation that would be workable yet avoid the rashness of direct, unicameral majoritarianism. Also, any scheme of representation had to reflect the uneven distribution of persons and property in the populace at large yet allow for state interests to be heard. A two-house legislature, the House of Representatives and the Senate, provided the answer. Balance and prudence would be built into the law-making process. Finally, the separation of functions among executive, judicial, and legislative branches avoided unchecked, arbitrary power flowing from any one sector of governance.

The Constitution framers wrote in general concepts, leaving later interpreters to work out the specific applications. This ensured longevity by permitting future generations to debate and apply its principles in changing circumstances. Almost immediately a continuing dialogue began over the nature of national policy the fundamental law would support. Within these debates the Constitution proved expansive. A broadening electorate and the rise of parties rapidly set aside the writers' original elitist priorities in favor of democratic participation. Energized by the ideals of the Declaration of Independence, females and minorities eventually and belatedly joined the body politic. The empowerment of the "necessary and proper" clause in legislation, coupled with court decisions and executive precedents, undergirded the emergence of a national government able to meet its responsibilities. Along the way, especially after the thirteenth, fourteenth, and fifteenth amendments, the Constitution and Bill of Rights gradually became the avenue for gaining civil liberties against local injustices. Never fully attained, the quest for human rights and equality before the law continue as ideals to be realized. Also, Christianity and the churches came to flourish under the First Amendment promise that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

In retrospect the Constitution was a venture in republicanism unprecedented in history for its scale of operation and breadth of vision. Nowhere previously had the social contract brought together such diverse peoples and local sovereignties into a national whole. It truly is a gift from the founding generation to our own. Thoughtful observers recognize that parliamentary governments have their particular advan-

tages, and inefficient anachronisms are surely evident in the 1787 document. Yet it remains difficult to envision a more apt framework of fundamental law fitting the two-hundred-year saga of the United States of America.

The essays in this book center on three themes: the impact of the constitutional form of government on the early republic; the American Constitution in comparison to other nations' constitutions; the implications of constitutional thinking for life in the twentieth century.

David Maas's essay begins the book with a study of the context of ideology—localism versus nationalism—which must be understood in light of religious dialogue in the eighteenth century. Richard Pointer's work, also on the ideology of the founding generation, builds on current scholarship (notably that of Forrest McDonald) regarding the heritage of Lockean thinking. The founders were unafraid of truth because of their largely unspoken conviction about the nature of social truth and about what a free people could, or would, do with that truth. Richard Clossman sees the connection between the republican ideology of virtue and the Protestant idea of social righteousness.

The next group of essays compares the American Constitution with other constitutions, specifically the parliamentary systems of Canada, West Germany, and South Africa. Here is one of the most significantly Christian contributions of this book. Christians are firstly citizens of the kingdom of God, and only secondarily citizens of nation-states. American Christians can learn more about themselves and their form of society and law when compared with other constitutional experiences. Paul Marshall begins this section with a critique of American progressivist assumptions in respect of conservative Canadian thinking. Richard Pierard centers his work on the relationship of church and state in the American and West German constitutions. Johan van der Vyver, in a theoretically demanding essay, contrasts the nature of law and social obligation in the United States and the Republic of South Africa.

In the final section, Kathryn Pulley and Ronald Wells discuss some twentieth-century concerns. Pulley describes the pluralist intentions of the founders and the way in which pluralism places strains on social cohesion in our time. Wells, in the final essay of the book, reviews the pattern of thought and behavior that lies behind the Constitution, and then discusses the paradoxical erosion of community in America in respect of America's greatest quality—liberty. He discusses whether or not it

is possible to recover the mind of republican virtue, the world we have lost.

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The Philosophical and Theological Roots of the Religious Clause in the Constitution

David E. Maas

America had already begun to drift toward “unbelief” by 1787. So concluded a prominent contemporary scholar after comparing the text of the Declaration of Independence with the text of the Constitution.¹ The Declaration acknowledges God the “Creator” as author of our liberties, appeals to the “Supreme Judge of the World” for justice, and trusts in the protection of “divine Providence.”² Furthermore, its text reflected basic Christian values.³ But the federal Constitution does not contain even so much as a deistic reference to God. The Constitution’s sole religious reference, one that might be interpreted as even antireligious, appears in Article 6, Clause 3: federal and state officials “shall be bound by Oath or Affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.”⁴

Since the minutes of the Constitutional Convention were first published in 1819, over three decades later, most contemporaries based their evaluations solely on the text of the Constitution. For example, in 1788 a Connecticut citizen condemned the framers for following secular rather than spiritual wisdom, lamenting that their Constitution wore “marks of art, ambiguity, and the properties of worldly wisdom.” He was certain it was drawn not from the “wisdom which is from above,” but from “natural, or worldly wisdom.” Moreover, he concluded, it must have been drafted by godless men for “surely neglect of God, breach of solemn covenants, do not indicate purity of heart or life.”⁵

Should a contemporary right-wing pastor preach a thundering sermon against the decline of Christian America from 1776 to 1787? A title like “The Drift to Secularism” may make a powerful message, but would be misleading if based solely on a comparison of the two texts. Use of the Constitution as litmus paper to indicate unbelief or secularism seems problematical for several reasons. First, the Constitution, apart from other documents, neither proves nor disproves secularism.⁶

Second, Thomas Jefferson, the leading American proponent of the Enlightenment, wrote the more religiously phrased Declaration of Independence. He was in France when the Constitutional Convention met and so had little ideological impact on the Constitution. Third, deists such as Jefferson write wishfully about a future enlightened age.⁷ Finally, an interpretation based on silence, or upon a single clause, violates the principle of context. The framers met in Philadelphia not to chart the religious course of four million Americans but to draft a political document.

In this chapter I will attempt a systematic examination of Article Six's prohibition of religious oaths within the context of the framers' earlier experiences, namely the colonial days, the Revolution, the formulation of state constitutions, and legislative debates at the Constitutional Convention. Scholars from Henry Baxter Adams to Frederick Jackson Turner have often sought an illusive thread to hold together the rich tapestry of American history. No doubt, all such helpful integrative attempts are guilty of oversimplification. Nevertheless, the tension between localism and nationalism, or regionalism and centralism, contextualizes much of American history from colonial times down to the Civil War. The prescience of the framers allowed them to devise a government based on both nationalism and regionalism. *Localism*

We enter the labyrinth of the framers' world, not blindly, nor plucking single Constitutional clauses out of context, but guided by the creative tensions of localism versus nationalism. Then, although our exploration involves circumvolutions, turning through colonial history, the American Revolution, early state constitutions, and finally into the Constitutional Convention, we will emerge with a new paradigm. The Constitution's prohibition on religious oaths was a sugar-coated pill for localists, who at the convention lost to the nationalists.

From the first charter to Virginia in 1606 to the last charter to Georgia in 1732, England faced a problem of authority. How could England maintain effective political and economic control over British America some three thousand miles away? At first, England's efforts at centralism were restricted to ineffective clauses in the early charters. Until the 1660s, the crown let local assemblies have a large measure of self-government. Following the Restoration, England increased its control by refusing to establish any more charter colonies; henceforth, England only created proprietary or royal colonies. Then in 1685 came the Dominion of New England, an abortive and short-lived unification under one royal governor of all the governments north of Pennsylvania. These

colonies, after three years of no representative government and taxes by executive decree, revolted during the Glorious Revolution of 1688. After the accession of William and Mary, the crown restored local power to colonial legislatures. There were occasional efforts by the Board of Trade, especially under the leadership of the Earl of Halifax, but America fed well on British neglect. The primary reminder of the colonies' subordination to British authority were the symbolic oaths—oaths that the framers would also later replicate in the Constitution to achieve loyalty to a national government.

Since the Middle Ages land owners took oaths of "fealty," similar to an "oath of allegiance" to their lord. After 1066, every English male over twelve took an oath of allegiance to the king.⁸ Because the 1688 Glorious Revolution established Protestant dominance over the Roman Catholic religion, additional oaths were required. All English officeholders took the oath of adjuration, promising to support the king and the Revolution against "the descendants of the late pretender."⁹ English males also took a third oath, the oath of supremacy, which renounced the pope's authority.¹⁰ These oaths were appointed by statute "for better securing the government"¹¹ Finally, all officers, civil and military, had to take the Test, an oath denying transubstantiation, and within six months of taking office, partake of the Lord's Supper, following Anglican forms.¹²

England insisted that the colonists incorporate these civil and religious oaths into colonial charters and practices. Connecticut, by its charter of 1662, required the freemen of the colony to take the oath of allegiance and the oath of fidelity.¹³ As soon as the British captured New York from the Dutch, the people had to take an oath of allegiance to the crown.¹⁴ No Virginian in the eighteenth century became a justice or militia officer without taking all the oaths in open court. Periodically, each local Virginia court reconstituted itself by the junior justice administering all the oaths to the senior justice, who would then swear in the rest of the court.¹⁵ Such extensive oath taking symbolically reminded the colonists of their subordination to the crown.

Turning our attention to the American Revolution, it is important to understand that nationalism versus localism lay at its epicenter. Bernard Bailyn, the foremost historian of the American Revolution, argues that all the revolutionary "agitation was to confine the use of power; to protect the population against the threat of unrestrained coercion."¹⁶ Colonial leaders such as John Adams, Thomas Jefferson, and Alexander Hamilton read the works of English Commonwealth writers