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The U.S. Constitution: Too Old to be Attractive?

The obvious thesis of this article is to demonstrate that our own Constitution is "terse and old" and "its influence is waning."

Although I am certainly unworthy to be cast in the role of defender of the Constitution, as one who holds that document sacred, I feel compelled to offer what defense, however weak, I can compose. As Cicero once said, "To say that I was chosen in order to guarantee that [the Constitution] should have the best possible defense would not be the truth. I was chosen in order to ensure that it have any defense at all."

With that frank peroration, I shall list the claims made by the author of the piece in the *Times* and then append my answers thereto.

First, the Constitution of the United States is "terse and old."

Both adjectives are apt descriptions of our founding document. The Constitution drafted by the Philadelphia Convention in 1787 is remarkable for its economy of language. In seven brief — some may even say terse — articles, a central government was formed by 13 sovereign republics.

James Madison, a man so influential in that convention that he came to be called "The Father of the Constitution," pored for months over the recorded history of republics and confederacies of the near and distant past to discover the ailments that ultimately destroyed every one of them, in order that he and his fellow delegates might inoculate their own body politic from those same maladies.

Appreciate the mind of James Madison and one will likewise appreciate the composition of the Constitution. The brevity that is the soul of the Constitution is not for the sake of wit but for the sake of avoiding the trap of vagueness that is laid by verbosity (see, for example, the National Defense Authorization Act). The parsimony of the Constitution is by design, and it was designed to prevent the wresting of the clauses of that document by those determined to create an all-powerful Leviathan from the clay of limited government.

Of course, history has proven that even provisions as terse as those of which our Constitution is composed may be twisted into such forms as may be (and have been) wielded by depots as tools of their tyranny. For example, the Commerce Clause.

This is the opposition's leading scorer, and on fourth and long, they call this veteran off the bench, and time and time again he pulls off a stunning victory. Since the earliest scrimmages in the battle of absolutism versus individual liberty, the advocates of the federal nanny state have pointed to the Commerce Clause as authority for their various expansions of the national government: the Patriot Act and the National Defense Authorization Act, to cite but two examples.

Article I, Section 8 of the Constitution grants Congress the authority to "regulate commerce with foreign nations, and among the several states." The fact that Congress passed and President Obama signed the Patient Protection and Affordable Care Act into law demonstrates that neither the legislative

nor executive branch of the national government is bothered by constitutional restrictions on their power.

For nearly 80 years, the Commerce Clause has been wrested by a national government determined to appear to justify its unlawful behavior by donning a cloak of constitutionality.

As for being old, the plea is once again, "guilty." The Constitution itself is over 200 years old, but the principles of good government upon which it is built are of ancient origin. Remarkably, rather than inspire their scorn (as it did for the *New York Times* and Justice Ginsberg), it is the very antiquity of these concepts that gave our Founders hope for their perpetuation in the central government of the American republic that they were creating.

Evidence of this respect and reliance upon timeless elements of lasting governments is found by even a cursory glance at the index of the *Federalist Papers*. The names of Roman and Greek historians and heroes appear repeatedly in that inestimable work of American political philosophy.

Among these were Herodotus ("human behavior [is] the prime determinant of history"); Thucydides (democracy is simply mob rule and was the ruin of Athens); Polybius (history showed that governments were cyclical and the solution to breaking the cycle was mixed government); Cicero ("natural law is derived from nature and stamped in invisible characters upon our very frame"); Sallust (corruption and the love of wealth destroyed Rome); and Livy (the past is prologue to the future and one must study history to know what models to follow and what traps to avoid).

From these volumes of ancient history the Founders learned that those who would live freely must be vigilant in resisting the internal and incremental encroachment of tyranny. They must be zealous guardians, ready to sound the alarm and call their fellow citizens to arms when even in the distance they regard the approach of any force, friend or foe, that through ambition or avarice, whether one man or a congress, would seek to pull down the pillars of self-determination and free government.

Are these lessons too old to be valuable to 21st-century Americans?

Next, the author of this survey published in the *New York Times* sets forth the empirical evidence of the Constitution's lack of international appeal.

> In 1987, on the Constitution's bicentennial, *Time* magazine calculated that "of the 170 countries that exist today, more than 160 have written charters modeled directly or indirectly on the U.S. version."
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> A quarter-century later, the picture looks very different. "The U.S. Constitution appears to be losing its appeal as a model for constitutional drafters elsewhere," according to a new study by David S. Law of Washington University in St. Louis and Mila Versteeg of the University of Virginia.

There are, as the article, records, several possible reasons. First, I must declare the Constitution guilty of being universally applicable to all the countries of the world. Again, I submit the words of James Madison in furtherance of this argument.

In *Federalist* no. 39, Madison writes in defense of the republican form of government "reported by the convention." In very clear terms he asserts that "no other form would be reconcilable with the genius of the people of America." Madison (as Publius) then goes on to recite the similarities and differences between the American experiment and the "constitutions of different States [countries]."

The implication is clear: While the constitution of Holland may work well for that country, and the

constitution of Poland may be excellently suited to govern the Poles, neither charter would thrive if transplanted into something other than its native soil.

This realization is anathema to the call from the Left and the Right for America to "export democracy" to the rest of the world. The "distinctive character" of the Constitution of the United States makes it superbly suitable for our nation, but in our admiration of the extraordinary structure erected by our Founding Fathers, evident in the fact that it is "the oldest written national constitution still in force anywhere in the world," we must admit the fact that it isn't suited for everyone. That admission doesn't make its drafting any less miraculous, it simply accedes that the miracle must meet the challenge, and every people faces its own set of unique circumstances.

Finally, there is the charge that the Constitution "guarantees relatively few rights" as compared to more recent attempts to write national charters.

To this charge, again, I plead that the Constitution is guilty. The Constitution is not meant to guarantee rights, strictly speaking. It is a brief enumeration of a very few and narrowly defined powers to a central government. The rights of man are of Divine provenance and can only be altered by that Authority, not by parliaments, kings, congresses, or presidents. Our own Declaration of Independence makes that point in a most eloquent manner: "All men are created equal, that they are endowed by their Creator with certain unalienable rights."

Alexander Hamilton addressed the dearth of a bill of rights in the Constitution as ratified. Hamilton argued that a bill of rights is

> not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?

And:

"it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power."

Have we not been witnesses of a wanton and frequent demonstration of that propensity on the part of our elected leaders?

The defense rests.