

# What Really Protects Liberty?

The COVID-19 pandemic has demonstrated, as if we needed another demonstration, that little stands between the government and our liberty. Champions of individual freedom have been properly disturbed by how much power governments at all levels have seized since the pandemic hit in 2020.

To make matters worse, officeholders and public-health officials object when the judicial branch occasionally overturns their power grabs because judges are said to be unqualified to rule on “medical” matters. So, if judges furnish constitutional and other legal grounds against power grabs, we’re supposed to ignore them because they in fact are issuing medical opinions for which they are not qualified. That’s pretty inventive reasoning, but unfortunately it is in the service of tyranny and serfdom.

Some judges have made good, that is, power-limiting, decisions during the pandemic, though they might well have gone the other way. (See John Hasnas’s “The Myth of the Rule of Law.”) It’s only a slight exaggeration to say the judicial process is a coin toss.

When judges get it right, the devout constitutionalists among us cheer: “The system works!” But what about all the times the rulings went the other way? Where does that leave the constitutionalists? They will say that the problem isn’t with the Constitution; it’s with the judges. But considering that the Constitution doesn’t interpret itself, who were they expecting to interpret it? Robots that have been correctly programmed? Who would do the programming? Even people within the competing schools of constitutional interpretation don’t agree on everything.

Since it’s people all the way down and the process is internal, not external to society, don’t the constitutionalists have a wee problem?

James Madison called the Bill of Rights, which he wrote, a “parchment barrier.” But he couldn’t have really meant that because parchment is a poor material for making the heavy-duty, barrier liberty requires due to the predatory nature of politicians. The only real barriers in this regard are the people themselves — people, that is, who refuse to give, carry out, or obey unjust orders. Paradoxically, orders require consent, and that can be withheld. (Think of the scene in *Monty Python’s Life of Brian* in which Brian tells a prison guard that he doesn’t have to follow orders and the guard replies, “I like orders.”)

Strictly speaking, constitutions and statutes cannot compel unjust conduct or compliance. They are merely words. When governors ordered “non-essential” businesses and schools to shut down and people to stay home in 2020, those politicians didn’t point guns at anyone. People obeyed, but I suspect that only a few did so lest they be punished. If someone had

disobeyed, armed agents of the state might have been dispatched, but why did *they* obey orders? No gun was held to their heads. They might have been fired and others put in their place, but no one would have been subjected to force.

So all these state agents acted to suppress liberty freely. They followed orders. Why? Because they believed it was proper to do so. Most of the public believed it too. So they were unlikely to interfere.

Why do all these people behave as they do? They do it because of their moral-political values, which they've absorbed since childhood. They believe deep down that the state — which is just a large gang of people — is mystically endowed with a moral authority that permits them to do things that the rest of us must never do. In other words, the people, who always outnumber their rulers, subjugate themselves. (See Etienne de la Boetie's classic, *The Discourse on Voluntary Servitude*.)

This means that the *real* constitution in any society is not necessarily and usually is not the written one. The real constitution is reflected in most people's day-to-day actions, attitudes, and de facto institutions. It may conform to or conflict with the written constitution. As Roderick Long writes, "what matters is a nation's 'constitution' in the original sense of the actual institutions, practices, and incentive structures that are in place." (See "Market Anarchism as Constitutionalism.")

The upshot is that if people's values are not consistently pro-liberty, it won't matter in the long run much what the Constitution "says," and if they are pro-liberty, then it won't matter whether there is a written constitution — or a state for that matter. In this respect, the debate between libertarians over whether the state is either necessary or proper starts to look rather different. Stateless societies would have constitutions too. As Long puts it:

Anarchy thus represents the extension, not the negation, of constitutionalism. Instead of thinking of anarchy as a situation in which government has been squeezed down to nothingness, it might be more helpful – at least for minarchists – to think of anarchy as a situation in which government has been extended to include everybody. This is what Gustave de Molinari, the founder of market anarchism, meant when he wrote, in 1884: "The future thus belongs neither to the absorption of society by the State, as the communists and collectivists suppose, nor to the suppression of the State, as the [non-market] anarchists and nihilists dream, but to the diffusion of the State within society."...

Anarchy is the completion, not the negation, of the rule of law.

But didn't Madison give us liberty-protecting checks and balances? Not really. What he actually bequeathed was a simulacrum of what a fully freedom-based system would provide. While he hyped his Constitution as featuring a separation of powers (and a context

in which ambition would neutralize ambition), he overlooked the likelihood that the branches and special interests may discover that collusion against the people is more profitable than competition among themselves.

In contrast, as Long points out,

Far from eschewing checks and balances market anarchists take market competition, with its associated incentives, to instantiate a checks-and-balances system, and to do so far more reliably than could a governmental system.... Separation of powers, like federalism and elective democracy, merely simulates market competition, within a fundamentally monopolistic context.

These insights are valid regardless of the content of a given written constitution, although libertarian and conservative constitutionalists' love affair with the U.S. Constitution is curious. As the Anti-federalists pointed out when the Constitution was first proposed, the taxing power, absent from the Articles of Confederation, is virtually unlimited and the necessary-and-proper clause is downright scary. Then there's that power to regulate trade, the commerce clause! It also was absent from the Articles of Confederation. (Not that I would have been satisfied with that document. But the comparison is illuminating.)

I won't mention the executive branch's royal power over military and foreign policy. Its consequences have been too terrifyingly obvious to need elaboration here.

And let's not forget the Constitution's implied powers. I know, I know: the Constitution *has* no implied powers. The national government may only exercise powers expressly delegated. Right? Sorry. As Madison himself said during the debate over the proposed Tenth Amendment, "it was impossible to confine a government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the constitution descended to recount every minutiae." Ouch!

Of course, no article about the Constitution would be complete without quoting Lysander Spooner's irrefutable "The Constitution of No Authority," published in 1870, a time much beloved by constitutionalists:

But whether the Constitution really be one thing, or another, this much is certain—that it has either authorized such a government as we have had, or has been powerless to prevent it. In either case, it is unfit to exist

What's to stop a return of all the restrictions if COVID-19 rears its ugly head or when the next pandemic comes long? Not the Constitution. Constitutions are security blankets, and like all security blankets, they distract from real danger: the unspoken values people hold that are inimical to liberty. Only education and persuasion can instill pro-liberty values.

(Read more about these matters in my book *America's Counter-Revolution: The Constitution Revisited*.)