

# THE SYMBIOSIS OF CONSTITUTIONALISM AND TECHNOLOGY

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Technology does not change the essential problems that constitutionalism<sup>1</sup> seeks to address because these problems are rooted in the enduring nature of man. Technological change, however, can transform man's environment. A different environment, in turn, may require substantially modified forms of constitutionalism even if the underlying objectives remain constant. As the great political philosopher Edmund Burke recognized, the key to sound structures of governance in every age and place is to understand the intersection of man's enduring nature with his particular circumstances.<sup>2</sup> Because technology increasingly shapes the circumstances of modern man, technology is becoming progressively more important to constitutionalism.

## I. THE ENDURING GOALS OF CONSTITUTIONALISM

Before examining how technology changes the forms of constitutionalism, it is essential to understand what in human nature creates the problems constitutionalism must try to solve. It is beyond the scope of this short essay to offer a complete description of the enduring goals of constitutionalism in light of the realities of human nature, but here is a thumbnail sketch.

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1. Constitutionalism here refers to the process by which man binds himself to a government based on basic principles that are not easily changed. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 281 (1990) (defining constitutionalism as "adherence to or government according to constitutional principles").

2. See EDMUND BURKE, EDMUND BURKE: SELECTED WRITINGS AND SPEECHES 61 (Peter J. Stanlis ed., 1963); BRUCE FROHNEN, *An Empire of Peoples: Burke, Government and National Character*, in THE ENDURING EDMUND BURKE: BICENTENNIAL ESSAYS 128, 129 (Ian Crowe ed., 1997); TOM FURNISS, EDMUND BURKE'S AESTHETIC IDEOLOGY: LANGUAGE, GENDER, AND POLITICAL ECONOMY IN REVOLUTION 222 (1993).

Humans, like many other animals that live in groups, have two modes of gaining resources, both backed by a set of instincts.<sup>3</sup> One mode is exchange, by which humans provide goods and services in return for other goods and services. The other is hierarchy, by which humans gain goods and services based on their position and status in the social order.

If exchange is the prevalent mode of acquiring resources in society, wealth increases because individuals gain incentives to create what others want.<sup>4</sup> If hierarchy is the prevalent mode of acquisition, wealth dissipates because individuals are afraid to create what others can take by virtue of their position in the social hierarchy. The latter mode also breeds conflict, because individuals gain incentives to fight for a better position in the pecking order.<sup>5</sup> In a world shaped by political hierarchy, it is natural for each citizen to regard his fellow citizens either as sources of wealth he can seize or as threats to commandeer his property.<sup>6</sup> Thus, the prospect of acquisition through hierarchy seems to sow suspicion and division among all citizens.

Accordingly, for moral as well as economic reasons, sound constitutive structures of government aim at promoting exchange and constraining hierarchy.<sup>7</sup> Achieving these goals is more complicated than it might seem, because a government that is powerful enough to protect both the right to exchange and the fruits of exchange is also powerful enough to take away property. In other words, although government can restrain bands of predators from oppressing liberty and taking away property, government itself as a band of humans is a potential predator that needs to be restrained.<sup>8</sup> As St. Augustine wrote, "Justice being taken away, then, what are

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3. I offer a more complete explanation in John O. McGinnis, *The Human Constitution and Constitutive Law: A Prolegomenon*, 8 J. CONTEMP. LEGAL ISSUES 211, 221-22 (1997). See also Mark F. Grady & Michael T. McGuire, *A Theory of the Origin of Natural Law*, 8 J. CONTEMP. LEGAL ISSUES 87, 87-89 (1997) (describing similar dual modes of acquiring resources in chimpanzees, our closest animal relative).

4. See Grady & McGuire, *supra* note 3, at 121-22, 128.

5. See McGinnis, *supra* note 3, at 235-36.

6. See John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 445 (1999).

7. My comments are limited to global multilateralism; I want to make clear that I am not speaking of the European Union or other multilateral agreements between regional neighbors.

8. See Barry Weingast, *The Economic Role of Political Institutions: Market Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 24-28 (1995).

kingdoms but great robberies?"<sup>9</sup>

Constitutionalism depends on technology because the structure of restraints on government most likely to produce justice varies with the technology of the time. This point is illustrated by how the most important original justice-producing structure of the Constitution—federalism—was dependent on the technology of its day.

## II. THE TECHNOLOGICAL UNDERPINNINGS OF FEDERALISM'S CREATION AND DECLINE

Federalism—the concept that encapsulates the doctrine of enumerated powers—was the Framers' most important contribution to solving the greatest dilemma of political theory.<sup>10</sup> Democracy does not dissolve the dilemma that a government powerful enough to protect liberty and property may be a government powerful enough to threaten liberty and property.<sup>11</sup> An elected ruling coalition may tax and regulate its members to their detriment. Taxation and regulation designed to redistribute opportunities and property from certain groups to others reduces incentives for productive activity and restricts the pursuit of happiness.

Federalism was the Framers' attempt at limiting government. The happy paradox of federalism is that two interlocking governments can lead to a more limited and yet effective government than a unitary state.<sup>12</sup> I have detailed elsewhere that the enumerated powers in the original Constitution constrained the federal government from threatening liberty and property by confining its domestic powers.<sup>13</sup> Although the States were thus repositories of enormous and potentially tyrannical powers, the free movement of goods and people guaranteed by the federal government restrained the States' ability to use their powers to oppress liberty or extract wealth from their citizens. Thus, the federal government was

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9. SAINT AUGUSTINE, *The City of God*, in THE CONFESSIONS, THE CITY OF GOD, ON CHRISTIAN DOCTRINE 129, 190 (Marcus Dods trans., 1977).

10. I discuss federalism at greater length in John O. McGinnis, *The Original Constitution and its Decline: A Public Choice Perspective*, 21 HARV. J.L. & PUB. POL'Y 195, 199 (1997).

11. See Weingast, *supra* note 8, at 24-28.

12. See McGinnis & Rappaport, *supra* note 6, at 385-86.

13. See McGinnis, *supra* note 10, at 198.

restrained by the Constitution, and the States were restrained by the jurisdictional competition that the federal government maintained by keeping open the avenues of trade and investment.<sup>14</sup>

The federalism created by the Framers crucially rests on the technology of its time. One of the most important ways that advances in technology transform the environment is by reducing transportation and information costs. Such reductions make possible new forms of constitutional structure. For instance, in the case of the formation of the United States, transportation costs had to drop in order to make trade among the States feasible.<sup>15</sup> The desire to realize the potential for wealth creation through trade was a driving force for a federal system with the power to prevent protectionism among the States.<sup>16</sup> The improved transportation that helped people move across state lines also facilitated jurisdictional competition among the States because citizens of a State that grew oppressive could more easily exit to another State or territory.

Moreover, the decline in information costs engendered by the printing press contributed to an environment suitable for federalism. The printing press circulated information among individuals in different States and thus permitted a continental republic to have a common politics that provided a national framework of governance for sustaining competition among the States. A reduction in information costs also intensified jurisdictional competition among the States as people with capital learned about better opportunities for deploying their funds outside their home jurisdiction.<sup>17</sup>

Because of the limits it placed on expropriation, economists today have explained that the federalist free trading system, made possible by technological advances, was at the heart of the steady growth of the United States, helping the country become an economic superpower by the beginning of the

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14. *See id.* at 203.

15. *See generally* Jurgen Basedow, *Common Carriers: Continuity and Disintegration in U.S. Transportation Law*, 13 *TRANSP. L.J.* 1, 2 (1983).

16. This agitation was a global phenomenon in the nineteenth century, as shown by the consolidations of Italy and Germany from small principalities. *See* Detlev F. Vagts, *State Succession: The Codifiers' View*, 33 *VA. J. INT'L L.* 275 (1993).

17. *See* Richard A. Epstein, *Exit Rights Under Federalism*, 55 *LAW & CONTEMP. PROBS.* 147 (1992).

twentieth century.<sup>18</sup> But the social dynamism that federalism helped sustain also helped fuel the technological change that carried with it the seeds of federalism's destruction. Michael Rappaport and I have discussed the collapse of constitutional federalism's doctrinal structure elsewhere, and I will not belabor that point here.<sup>19</sup> Instead, I want to outline the technological causes of federalism's fundamental decline. This analysis has unavoidable consequences for federalism's future because technological causes, unlike doctrinal rules, are not readily subject to reversal by courts or modification by constitutional amendment.

Technological change is, in my view, at the center of the story of federalism's decline, just as it was at the center of federalism's origins. A central difficulty for the constitutional federalism of the Framers was that the decline in transportation and information costs did not stop with the Constitution's birth but continued throughout the nineteenth and twentieth centuries. The drop in costs undermined the core attachments of citizens to their States—a necessary condition for federalism to resist dissolution by interest groups.<sup>20</sup>

For instance, the continuing decrease in transportation and information costs has created a mass culture that has substantially eroded the identity of individual States, undermining the distinctiveness that gives rise to loyalty. In a nation that is simultaneously both transient and knit together by mass communication, it is hard to imagine today what Robert E. Lee meant when he declined to assume the generalship of the Union armies on the grounds that he owed a greater allegiance to his State than his country.<sup>21</sup> It is difficult to feel strongly about states rights if you live in New Jersey and work in New York for a company with its corporate headquarters in Texas.

18. See Weingast, *supra* note 8, at 25-28.

19. See McGinnis & Rappaport, *supra* note 6, at 390-96.

20. See John O. McGinnis, *The Original Constitution and Our Origins*, 19 HARV. J.L. & PUB. POL'Y 251, 253 (1995). Interest groups attempt to erode the enumerated powers that restrain the federal government because rent-seeking is easier from a centralized state. See McGinnis, *supra* note 10, at 203. Citizens' allegiances to their states form a levy against such erosion because they give citizens a local rather than a national order of governance. See *id.* at 208.

21. See ALAN T. NOLAN, *LEE CONSIDERED: GENERAL ROBERT E. LEE AND CIVIL WAR HISTORY* 38-39 (1991).

I do not mean to suggest that students of society cannot apprehend intellectually the advantages of decentralized government in particular cases. There has been an intellectual reaction to the over-centralization authorized by the Supreme Court's evisceration of enumerated powers—a practice that has been apace for the last two decades. Partly for that reason, Congress has, for example, returned welfare policy largely back to the States and is considering other devolutions. But it should be noted that such devolutions are determined by the national legislature rather than claimed as rights by the States. If elite opinion changes, we can expect policymaking to be recentralized even where it has now been devolved. Many other areas of law have remained federal—social security and Medicare, for example, to name the two most important government programs in terms of dollars.

But constitutional federalism cannot be ad hoc federalism. Federalism draws firm lines that keep the government out of general social policies such as welfare and labor law. These firm lines are under constant threat because of the policy imperatives of the day, such as fighting a war on drugs, improving education, and achieving tort reform. Such issues stir great passions and generate calls for national action, regardless of the costs to federalism. Moreover, interest groups use crises to create the more centralized government that makes it easier for them to enact their special interest legislation. Federalism must speak to individuals' core attachments if it is to counterbalance these passions.

Some may counter that, despite these technological changes, the Supreme Court is reviving federalism and the enumerated powers. I argue elsewhere that the recent and much heralded federalism decisions are less significant than many claim, because they still permit Congress to exercise plenary power over economic regulation and to impose essentially unlimited conditions on the States as an incident to federal spending.<sup>22</sup> Thus, the Court has not fundamentally restored the enumerated powers that constrained the exactions of the federal government and sustained jurisdictional competition among the States. The technological changes eroding the

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22. See John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. (forthcoming 2002).

identity of state citizenship make me pessimistic about the likelihood of such a restoration.

### III. THE WORLD TRADE ORGANIZATION AS A CONSTITUTIVE STRUCTURE APPROPRIATE TO OUR TECHNOLOGICAL ENVIRONMENT

If constitutional federalism cannot be fully revived, we need to think of other structures more suited to the technology of our time that recapture the essence of federalism; they need to do so in a form that responds to the contemporary structure of information and transportation costs that technology has generated. In a recent article, *The World Trade Constitution*, Mark Movsesian and I have argued that the international trade regime administered by the World Trade Organization (WTO) replicates federalism.<sup>23</sup> Just as forcing state governments to compete for the capital and skills of a national citizenry imposes substantial limits on a state government's ability to expropriate, the emerging free trade regime performs the same essential function, tempering the enduring and inevitable avarice of the government and its rulers on a global scale.<sup>24</sup>

For instance, the free trade regime helped in dismantling inefficient regulations and government agencies.<sup>25</sup> Over the last decades the free trade regime has silently strengthened anti-regulatory interest groups because businesses in the global market place are acutely aware of regulations that disadvantage them and threaten to exit if they do not receive relief.<sup>26</sup>

International federalism is appropriate for our time because individuals still have the attachments to their nation-states to resist regulatory regimes being imposed by world government. Thus, an international federalism can plausibly be created because the World Trade Organization and other global economic organizations can police the conditions for regulatory competition among nation-states while citizens in those nation-states can be counted on to resist the expansion of regulatory

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23. See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 514-15 (2000).

24. See *id.*

25. See John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 916 (1996).

26. See *id.*

power in international institutions.<sup>27</sup> The citizen's attachment to his nation-state replaces the citizen's attachment to his state as the central constitutive underpinning of this new governmental system. The key to successful transformation is to match particular proposals for constitutional reform not only with the constellation of information and transportation costs of the age, but with the particular attachments that will sustain them.

In the long run, international federalism risks collapsing for much the same reason that constitutional federalism did. The very economic growth and technological advances that the world trade regime facilitates may work to create a mass world culture and a sense of global demos. In those circumstances, individuals may lose the attachment to their nation-states and become comfortable with global, centralized regulation. Given the differences among nations today, this transformation is unlikely to happen in our lifetimes, and by then the world trade regime will have paid substantial dividends in economic growth and limited government for generations.<sup>28</sup> Because of the inevitability of technological change that ultimately undermines constitutional structure, the prospect of a constitution's future decline is not a powerful argument against its establishment. If the likelihood of dissolution at some future time was a fatal objection, the United States Constitution should not have been ratified because the antifederalists correctly predicted that ultimately the federal government would cast off the constraints of the enumerated powers.<sup>29</sup> But, before that unhappy event, we enjoyed for many years the advantages of a constitutional structure that promoted exchange among citizens and limited the exactions of hierarchy, thus contributing to prosperity.

#### IV. OTHER CONSTITUTIONAL STRUCTURES NEEDED BY OUR TECHNOLOGICAL ERA

I will briefly suggest another attachment in our age that technological change may make more important as a

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27. See McGinnis & Movsesian, *supra* note 23, at 513-15.

28. See *id.* at 543-44.

29. See Brutus XI, NEW YORK J., Jan. 31, 1788, reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 516-17 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (arguing that federal elites would use flexible constitutional interpretation to consolidate power).

foundation upon which to build structures of constitutional restraint. Although international federalism may restrain governmental hierarchies in the economic sphere, other sources of competition must restrain the government in the sphere of social norms because, although capital can exit the jurisdiction of the nation-state, individuals have more difficulty leaving. Thus, we need a constitutional structure that will shelter loci, other than the States, for forging social norms. Such loci also will need to be rooted in actual attachments of citizens. The loci will need to be strong enough to resist the inevitable attempts by the state, often pushed by interest groups, to use its coercive power to encroach on competing power centers.<sup>30</sup>

In my view, religious attachments provide the most likely source of competition for norms generated by hierarchies—norms that are likely to reflect the self-interests of the leaders of hierarchies, rather than beneficial norms. Fortunately, in the United States, where a riptide of worship at the end of the last century has replaced the preceding century's long withdrawing wave of faith, religious attachments remain strong. Constitutionalism can build on such attachments as a counterbalance to the power of the state by, for example, assuring that the resources provided by the government for education are also made available to religious and other private schools; this will generate competition with the government at the time when it is most important—when the hearts and minds of students are open.<sup>31</sup>

#### V. PROBLEMS OF TECHNOLOGY FOR THE FUTURE OF CONSTITUTIONALISM

Overall, I am relatively optimistic about the ability of constitutionalism to adapt to new technology. But like any constitutionalist, I have particular worries about trends that could prove this optimism false. First, the pace of technological change is constantly increasing, and this raises questions about whether we have methods to adapt to constitutional change. Those who defend noninterpretatist methods of

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30. See generally McGinnis & Rappaport, *supra* note 6, at 378-82.

31. I discuss the manner in which the Constitution should be interpreted in this regard in John O. McGinnis, *The Enlightenment Case for Vouchers*, 2001 ANN. SURV. AM. L. (forthcoming).

constitutional interpretation have a solution: judges can simply make up a new constitution to keep in tune with the times.<sup>32</sup> Sometimes these people claim they are doing so to adapt to technological change, but in reality their proposed transformations often reflect a view of human nature that is different from the Framers' and, in my view, profoundly wrong.<sup>33</sup> We cannot trust judges to adapt the Constitution to technological change because they may be as interested in promoting their own set of values as in preserving the Constitution's values through translation of its structure.

In contrast to free floating interpretation, the constitutional amendment process represents a great advance for civilization by giving a precise mechanism for eliciting the social consensus that should be required to update the Constitution.<sup>34</sup> Because of the traditionally slow pace of constitutional change, we may, however, have to consider amending the amendment process itself so that its requirements are less stringent. Such an amended amendment process will make it easier for policy to deal with the fact that technological change is transforming the political environment faster than ever before.

Second, I worry that, although religion is still vital in America, advances in science and technology will so demystify the world that religion in the United States will become what it is in Western Europe: a quaint practice of largely superannuated people. Scientific discovery and technological progress seem to have been generally correlated with a decline in religious faith. Some conclude, like the scientist Laplace, that people no longer need any hypotheses other than secular ones.<sup>35</sup> Moreover, the greater ease and material comfort that

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32. See Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 46 WAYNE L. REV. 1305, 1308-10 (2000).

33. See John O. McGinnis, *The Inevitable Infidelities of Constitutional Translation: The Case of the New Deal*, 41 WM. & MARY L. REV. 177 *passim* (1999) (critiquing the translation thesis of Lawrence Lessig).

34. Michael Rappaport and I enlarge on this point in John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. (forthcoming 2002).

35. See Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 LAW & HIST. REV. 421, 445-46 (1999). It is said that when physicist Pierre Simon De Laplace offered his explanation for the structure of the physical universe Napoleon inquired on the place of God in his scheme. Laplace replied, "I have no need of this hypothesis." Kenneth L. Woodward, *How the Heavens Go*, NEWSWEEK, Jul. 20, 1998, at 52.

technology creates can also be deadening to religion.

The greatest political danger from the decline of religious attachment is the rise of unchecked secular utopianism.<sup>36</sup> This movement has proven the greatest enemy of the hardheaded constitutionalism needed for prosperity and political advancement. Because man seems to have a natural need for the transcendent that religion satisfies, religion provides an important bulwark against many destructive "isms." When God is dead, the state can more easily pass itself off as a repository for transcendental hopes, such as the establishment of equality of conditions among vastly diverse individuals. Unfortunately, the state, propelled as it is by self-seeking factions and ambitious leaders, cannot by its very nature achieve such goals but will use them instead as a cover for a set of exactions of its own.

Finally, if man begins to change basic elements of human nature through genetic engineering or cloning, adopting appropriate forms of constitutionalism would become more difficult. Constitutionalism depends on choosing the right structure at the intersection of man's nature and environment. The environment is always changing, but man's nature is fixed; that stability makes it easier to devise appropriate constitutional mechanisms. If both the environment and nature are transformed simultaneously, finding the appropriate mechanism of constitutionalism becomes much more problematic.

Let me end on a more optimistic note. At least for our lifetime, constitutionalism and freedom can be secured by adapting to our new circumstances through an understanding of how human nature intersects with our particular circumstances. Our society is continually transformed by the process of scientific and technological discovery. In the transformed society, structures such as federalism may be less effective in performing the tasks for which the Framers designed them. Thus, we must be creative constitutionalists ourselves if we are to preserve the original values of the Framers—a limited government that protects property and other rights that advance the progress of civilization. If we are

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36. See Horace M. Kallen, *Behind the Bertrand Russell Case*, in *THE BERTRAND RUSSELL CASE* 13, 36 (John Dewey & Horace M. Kallen eds., 1941).

open to the prospect of new structures that will better protect the Framers' unchanging values in a nation ever changing through technology, we will be able to use the technological progress that the Constitution itself sustains to renew our compact with liberty.