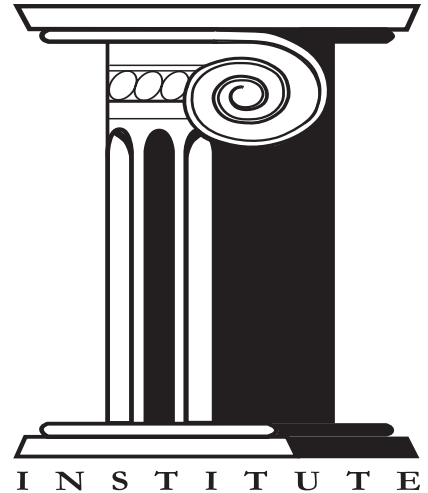


LIMITS



On Power and the Use of Coercion

The Laws of Human Nature

by Bruce Thornton

The sudden death of Supreme Court Justice Antonin Scalia has reminded us of the great divide in opinion over how the Constitution should be interpreted. Scalia was the most influential and consequential adherent of “originalism” or “textualism.” In *Planned Parenthood vs. Casey* (1992), he succinctly defined this approach: “Texts and traditions are facts to study, not convictions to demonstrate about.” Since the Constitution is a written text, a judge has the obligation to discern “the plain, original meaning of the constitutional text,” as he said later in *NLRB vs. Canning* (2014). The alternative is to substitute “freewheeling interpretations” that serve politics and ideology rather than the Constitution’s precepts and principles and the traditional understanding of its words.

“The Constitution,” Scalia said in a speech in 2012, “is not a living organism. It’s a legal document, and it says what it says and doesn’t say what it doesn’t say.”

Scalia was a foe of the idea of the “living Constitution,” as his phrase “living organism” shows. Progressive President Woodrow Wilson was one of the first to espouse the view Scalia rejects. The Founders’ Constitution, with its balance of powers, Wilson said, was a “variety of mechanics” founded on the “law of gravitation.” But a government is a “living thing” that falls under “the theory of organic life” and so is “modified by its environment, necessitated by its tasks, [and] shaped to its functions by the sheer pressure of life.” Thus, according to the influential progressive writer Herbert Croly, to better govern and improve

the nation, the people had to discard the “strong, almost dominant tendency to regard the existing Constitution with superstitious awe, and to shrink with horror from modifying it even in the smallest degree.” The assumption is that the Founders could never have anticipated the novel technological and social changes in America that had rendered the Constitution an anachronism.

That same assumption underlies much “living Constitution” jurisprudence today. Changing social mores have led Supreme Court justices to tease out of the Constitution “rights” it never mentions. In *Griswold vs. Connecticut* (1965), Justice William O. Douglas discovered a right to privacy in the Constitution’s “emanations” and “penumbras,” and in *Casey vs. Planned Parenthood* (1992),

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Anthony Kennedy found "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Subsequent decisions on issues like abortion and same-sex marriage have followed the same imperative to "plug the gaps," as Judge Richard Posner has put it, left in the Constitution by changes in technology and progress in social habits, values, and beliefs.

This conflict between how the Constitution should be interpreted, however, is the result of a deeper, more ancient clash of ideas — how we understand human nature. Are core human attributes — particularly the destructive appetites and passions — permanent aspects of the human condition? Or is human nature "plastic" and able to be improved once environmental obstacles like poverty or ignorance are removed, and after better political, economic, and social institutions are created?

For millennia, the pessimistic understanding of human nature prevailed. The Greek historian Thucydides expressed this foundational assumption that made his monitory history of the Peloponnesian War "a possession for all time." The horrors of civil war and revolution throughout the Greek world, Thucydides wrote, were "such as have occurred and always will occur as long as the nature of mankind remains the same." Similarly, the tragic hero of Greek drama was typically a man of achievement and talents who is undone by a

"tragic flaw" arising from the passions that all humans possess. Christianity, of course, assumed that man was a "fallen" creature incapable of redemption without the divine intercession of Jesus Christ. The dominant belief in the Western tradition, then, was that "all men are bad and that they will use their malignity of mind every time they have the opportunity," as Machiavelli wrote.

Most of the Founders accepted this tragic view of human nature derived from both their Classical and Christian heritages. They particularly feared political power, which was of "an encroaching nature," as James Madison said, for "a fondness of power is implanted in most men," according to Alexander Hamilton.

Moreover, human passions and appetites seek in power a means for their gratification and expression, and no improvement in knowledge can alone control them: "Neither Philosophy, nor Religion, nor Morality, nor Wisdom, nor Interest," John Adams wrote to Thomas Jefferson, "will ever govern nations or Parties, against their vanity, their Pride, their Resentment, or Revenge, or their Avarice, or Ambition. Nothing but Force and Power and Strength can restrain them." For all his Enlightenment inclinations, Jefferson agreed: "Mankind soon learn to make interested uses of every right and power which they possess, or may assume."

If, as Adams said, "Those

passions are the same in all men, under all forms of simple government, and when unchecked, produce the same effects of fraud, violence, and cruelty,” then democracy, oligarchy, or monarchy will each lead to the aggrandizement and concentration of power that destroys political freedom and sows civil discord.

The solution was, in Madison’s description, the Constitution’s “division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments [state and federal], and then the portion allotted to each, subdivided among distinct and separate departments . . . The different governments will control each other; at the same time that each will be controlled by itself.” This separation and balance of powers would ensure that dangerous concentrations of power would be more difficult, if not impossible.

The Progressive movement of the late nineteenth century rejected this ancient wisdom. Just as technological changes were beginning to improve human life, a new scientific understanding of human behavior emerged, and one of its chief tenets was that human nature could be improved under the right circumstances. Traditional wisdom, customs, and religious beliefs were now anachronisms, unsuited to the brave new world coming into

being.

In 1914, Progressive journalist Walter Lippmann articulated a new alliance between social science and the administrative state: “We can no longer treat life as something that has trickled down to us. We have to deal with it deliberately, devise its social organization, alter its tools, formulate its method, educate and control it. In endless ways we put intention where custom has reigned. We break up routines, make decisions, choose our ends, select means.” And this centralized control is made possible since “the great triumph of modern psychology is the growing capacity for penetrating to the desires that govern our thoughts.”

The Progressives’ program of improving human nature, however, required a centralized federal government comprising multiple agencies and bureaus staffed by experts versed in the latest social and economic sciences and techniques. Thus was born the administrative state whose purpose is “intelligent social engineering,” as Progressive economist and race “scientist” Edward A. Ross put it. Yet such a federal government is contrary to the Constitution’s limited government and separation of powers. As we have seen over the last century, federal executive agencies have not only expanded in number, size, and scope, but have also increasingly aggrandized Executive, Legislative, and Judicial powers without direct

accountability to citizens. These agencies make the specific laws and rules from general legislation, enforce them, and adjudicate disputes over regulations—a concentration of powers James Madison called “the very definition of tyranny.”

Finally, the assumption that the possession of “scientific” knowledge makes government technocrats more virtuous and less prone to corruption by power than other people is a challenge to the Founders’ belief in universal human depravity and the “encroaching” nature of power. In their traditional view of human nature, no elite, whether of birth, wealth, or knowledge, can be trusted with concentrated power given its tendency to corrupt those who possess it.

Today we seem to have forgotten that wisdom and allowed various elites — whether electorally unaccountable bureaucrats in federal agencies, or Supreme Court Justices with tenure for life interpreting a “living Constitution” — to usurp the law-making power the Constitution reserved for Congress. The cost is the weakening of political freedom and self-government that was the Founders’ greatest fear.

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What's New at PII?

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