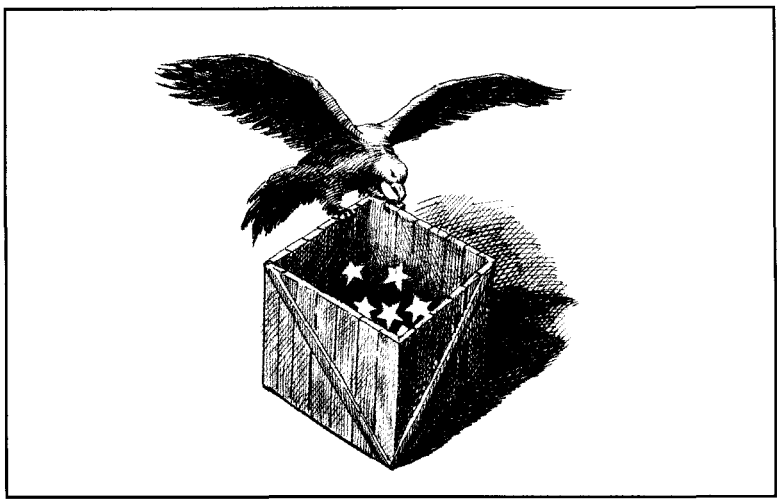
Restore the Constitution!

Free Association and Public Morality

by Joseph Sobran



Anatol Woolf

In recent years, American politics has been preoccupied with moral questions, or what are now called "social issues": sexual immorality, sodomy, abortion, pornography, and recreational drugs. Some conservatives want the federal government to play a role in opposing these evils. Many libertarians, on the other hand, want the government, state and federal alike, to treat them as matters of indifference. Most liberals seem to want the government to promote them because they believe that these activities are not evils but "rights."

Liberals have a habit of reading their agenda into the Constitution. As Daniel Lazare observed in the October 1999 issue of *Harper's*, Americans tend to regard the Constitution as a "sacred text"—a secular Scripture—that contains the answer to every problem. Since liberals favor gun control, for example, they assume that the Constitution must favor it as well.

What about the Second Amendment? Most liberals argue that the Second Amendment only recognizes the right of states to keep militias, not the right of individuals to own firearms. But Lazare argues that recent scholarship is conclusive: "the right of the people to keep and bear arms" was integral to the Founding Fathers' philosophy of republican government. In the *Federalist*, for example, Alexander Hamilton and James Madison envision various situations when the people might have to mount armed resistance to tyrannical government, state or federal.

Lazare thinks this is a pity; he considers the Framers' philosophy archaic. But he is the rare liberal who admits that the Constitution is not, after all, infinitely malleable, and that it is a stumbling block to his own desires. His solution is to abandon it.

The Framers' philosophy is anything but archaic. It can be argued with, but it deserves respect. In particular, the Framers agreed on one basic principle of liberty: the division and dispersion of power. They defined tyranny as the concentration of power in a few hands, or in a monarch or a single body of men.

So they delegated a few specific powers to the federal government, most of which are listed in Article I, Section 8. All other powers remained with the states and the people. Under the Constitution, it would be theoretically possible for New York to adopt socialism, for California to adopt *laissez-faire* capitalism, and for Iowa to be a theocracy. The Constitution does very little to prevent tyranny at the state and local level.

In their own sphere, the states were sovereign. When three states ratified the Constitution on the condition that they retained the right to secede, nobody objected. So the other ten states, by accepting those ratification acts as valid, recognized the right of secession. Like gun ownership, secession was a form of self-defense.

As Madison states in *Federalist* 45, the powers delegated to the federal government are "few and defined." They include the powers to tax, to coin money, to punish counterfeiters, to grant copyrights and patents, to raise an army and a navy, and very few others. The powers remaining with the states, as Madison puts it, are "numerous and indefinite."

When the Philadelphia Convention assembled in 1787, Hamilton and Madison both favored a strong central government with the power to overrule state governments and veto state laws. Madison told George Washington that such a provision was "absolutely necessary" to any new constitution. This would have reduced the states to the level of very large counties: mere subdivisions of a centralized monolith, totally subordinate to a sovereign central government which would not have been truly "federal," but, in the language of the time, "consolidated."

The proposal was quickly shot down; the states refused to surrender their sovereignty. When Hamilton and Madison wrote the *Federalist* to promote ratification, they had to accept this as a fact of life, and they dutifully assured their New York readers

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that the Constitution would prevent consolidation.

For most of the founding generation, "consolidation" was a devil term. The ratification debate swirled around not only the powers expressly delegated to the federal government by the Constitution, but also the fear that even those few powers would give the government such a toehold that it could usurp other powers and eventually become tyrannical. If they could see us now, the Antifederalists would feel vindicated in their dark premonitions of total centralization.

Jefferson warned that the federal government must never be allowed to become the authoritative interpreter of the Constitution because it would construe its own powers broadly and the rights and powers of the people and the states narrowly, eventually achieving the consolidation most Americans dreaded (which is *exactly* what happened). The inaugural addresses of the presidents before Lincoln are full of assurances that Congress would not be allowed to usurp powers not granted by the Constitution; the presidential veto would, in effect, enforce the Tenth Amendment. All this has been largely forgotten by today's conservatives, who are woefully ignorant of our constitutional heritage.

The great crisis of the Constitution arrived with the Civil War. Abraham Lincoln quickly revealed that he took the Constitution lightly; within a few weeks of taking office, he arrested Maryland legislators who recognized the right of secession, ensuring that the remaining lawmakers would vote his way. He also sent federal troops to Maryland to guarantee his desired result in the next election. By these acts, we may judge Lincoln's real regard for "government of the people, by the people, and for the people." (The Gettysburg Address carefully avoids reference to "the consent of the governed.")

As everyone knows, Lincoln suspended the privilege of the writ of *habeas corpus*, but few are aware that, when Chief Justice Roger Taney ruled that this was a usurpation of a power given to Congress, Lincoln not only defied the ruling but issued an order for Taney's arrest. For some reason, the order was never served; maybe Lincoln realized that arresting the chief justice arbitrarily would appear a mighty odd way of "preserving the Constitution."

Garry Wills has written that the Gettysburg Address was a "swindle"; Lincoln falsified the meaning of both the war and the Constitution. Wills calls that swindle "benign," much as other liberals have praised Franklin Roosevelt for mendaciously drawing the country into World War II; Lincoln and Roosevelt were both avid consolidators of power as well as able swindlers.

The long-term result of the Civil War was to make the federal government an irresistible force. The states were crushed—not only the Southern states, but, finally, the power of all the states to withstand federal tyranny.

For some time, constitutional forms were observed. The three postwar amendments were adopted to keep up appearances, although the Southern states were forced to ratify the 14th Amendment at the point of a bayonet. The principle that the federal government's powers could be increased *only* by amendment was still honored, after a fashion.

Over the next half century, the process of consolidation continued. For a while it was achieved by further amendments, which authorized a federal income tax, transformed the U.S. Senate, and imposed Prohibition. These amendments vastly increased federal power over the states and individual citizens.

Of these, the 18th Amendment is the most interesting. It authorized Prohibition—the first attempt by the federal government to regulate personal morality. It was a failure, and it was repealed; the power to ban the sale of liquor reverted to the states and localities.

Meanwhile, Congress and the federal judiciary were construing the Commerce Clause with unprecedented breadth. When Franklin Roosevelt's appointees finally prevailed in the Supreme Court, they found that the Tenth Amendment was a mere "truism," of no effect. According to FDR's Court, an Ohio farmer who raised grain on his own land to feed his livestock was subject to congressional legislation because his practice, if widely adopted, might have a "substantial effect on interstate commerce."

By this absurdly loose standard, nearly anything can be adjudged "interstate commerce" and regulated by the federal government. If the Commerce Clause imparted such comprehensive power to the central government, slavery and liquor could have been outlawed by simple acts of Congress, without the bother of amendments! Roosevelt's Court dishonestly used a few words in the Constitution to destroy the careful balance of powers the Framers had established. The Tenth Amendment and the philosophy it encapsulated were dead. It was no longer necessary to amend the Constitution to increase federal power; the beast was out of the cage, and it devoured at will.

It still devours. Today, Congress seldom bothers to offer constitutional justifications for its acts; it merely does as it pleases, usurping countless powers never delegated to it. We no longer even speak the language of the Framers; most Americans have no idea what the words "sovereign," "delegate," "usurpation," and "consolidation" mean. Our ancestors have become strangers to us.

At the same time, the federal judiciary has ceased to be a check on Congress, preferring to strip the states of their reserved powers under the fraudulent principle of "incorporation." This is usually done by invoking a few phrases from the First, Fifth, and Fourteenth Amendments, which are construed with sweeping latitude: "establishment of religion," "freedom of speech," "privileges and immunities," "due process of law," "equal protection of the laws."

So the states keep discovering that their traditionally reserved powers are deemed unconstitutional, while congressional usurpations of power pass muster with the courts. Instead of *preventing* consolidation, as Hamilton promised, the Supreme Court has become an aggressive *agent* of consolidation. The original plan has been inverted and trivialized. We are told that the Constitution means precisely the opposite of what everyone used to understand it to mean.

Constitutional jurisprudence has become intellectually shameful. It might be called the jurisprudence of free association. Instead of viewing the Constitution as a whole, the justices typically write essays on what the phrase "freedom of speech" or "equal protection" or "cruel and unusual punishment" reminds them of—often something nobody ever thought of before. Consider the surprising implications that the liberal federal courts have found in the First Amendment: Pornography turns out to be protected from state and local legislation; public-school prayer is forbidden; and communist teachers are sheltered. In New York City, the First Amendment is invoked to preserve public funding of an odious art exhibit.

In 1973, the Supreme Court produced its most ravenous progeny in *Roe* v. *Wade*, which cited not the text of the Consti-

tution but its alleged "penumbras" and "emanations" to rule that state laws limiting abortion were unconstitutional. (The Court has never found "penumbras" or "emanations" in, say, the Second Amendment, or any other clause that might limit federal power. It plays the Constitution like an accordion, expanding its favorite clauses and squeezing out the inconvenient parts.) Few scholars deny that the reasoning of Justice Harry Blackmun's majority opinion, with its lofty mumbling about the Ninth and Fourteenth Amendments, was shoddy; it was simply a rambling justification for imputing a current item of the liberal agenda to the Constitution. But it achieved the desired result.

The ruling outraged millions, yet nobody did anything about it. No calls for the impeachment of the justices for usurping the powers of the states issued from the Congress, the media, the people, or the churches. The Court acted in the secure knowledge that the states were not only helpless but supinely passive against federal usurpation of their authority.

If the states had retained the right of secession, the Court would never have dared to issue such grossly arbitrary rulings for fear of provoking a dissolution of the Union. But thanks to the Civil War and the centralization it unleashed, no state even contemplated withdrawing from the federation. Consolidation was now complete.

Given a Court determined to impose a liberal agenda by constant usurpation, how are the states supposed to defend their reserved powers? The question is never asked; the problem is hardly recognized.

Except for the deceased 18th Amendment, the federal government has never possessed any constitutional power to enforce morality as such. But, largely through the courts, it has used the Constitution to advance its pet views. The first duty of laws and courts is to rule impartially; we are entitled to be suspicious of the integrity of judges who keep finding their own trendy agendas mandated by so old a document.

Yet this has become the norm. When Justices Blackmun and William Brennan died, both were eulogized for the very thing that should have discredited them: their eagerness to use the Constitution as a pretext for their special interests and pet causes. They were not impartial; they hardly pretended to be. Justice Blackmun saw himself as a legal oracle; near the end of his career, he grandly announced his opposition to capital punishment, despite the plain text of the Constitution. One may oppose capital punishment on many grounds, as I do; but one cannot honestly affirm that the Constitution forbids it. But Blackmun never let that stop him: He even boasted that *Roe* v. *Wade* was "the most liberal ruling in many years"—as if that were a justification!

Justice Brennan, more cunning than Blackmun, praised the Constitution precisely for its malleability. He called it "a sparkling oration on the dignity of man," dismissing concerns of original or inherent or even logical meaning. This was a spectacular case of judicial free association. The Constitution is not an oration; it says nothing about "the dignity of man," or any such high-flown matter. It merely lists the powers of the federal government and distributes them among the three branches. Brennan actually acknowledged that he did not consider the Ninth and Tenth Amendments part of the Bill of Rights. He did, however, have a special fondness for the 14th.

Today, the federal government is very much in the morality business. It has taken a wrecking ball to America's traditional Christian heritage, but is trying to replace that with its own peculiar morality on smoking, gun ownership, sodomy, and abortion. Bill Clinton may seem an unlikely spiritual leader, but he embraces the role eagerly, citing the same Bible that taught him that some forms of extramarital sex are not—or perhaps "do not rise to the level of"—adultery.

America could never have been de-Christianized without the centralization of power. If the federal courts and Congress had been confined to their "few and defined" constitutional powers, Christian culture would have survived at the grassroots level. But federal usurpation has proved a far worse evil than the most pessimistic Antifederalists could have predicted. The federal government has become systematically anti-Christian while claiming to espouse religious neutrality.

C.S. Lewis observed that the modern world makes religion a purely private matter, while shrinking the area of privacy. He was writing in England, but he perfectly summed up our own experience. The "separation of church and state" turns out to mean that, as the state expands, the church must recede.

The federal government has neither the power nor the duty to enforce traditional morality. But it does have a duty to respect it, and to leave it alone. Instead, it has claimed the authority to contravene and undermine it. President Clinton regards approval of sodomy and abortion as a civic duty. This is the liberal version of George Will's "statecraft as soulcraft."

Throughout history, even bloody tyrants have rarely aspired to change the traditional morality of their subjects, however immoral their personal conduct. The totalitarian ambition of changing the moral fabric of an entire nation had to await the 20th century. The modern state seeks to produce a certain type of deracinated man, fit for, and submissive to, arbitrary rule.

Conservatives should adopt a simple agenda of their own: restoring the Constitution. This is a large task, but it would save us endless labor if we could force the federal government to produce its credentials for every law it passes. Yet, faced with new federal laws and programs, few conservatives dare to pose the question: Where do you get the power to do that? Instead, they have learned to live, however grudgingly, with the liberal interpretation, thereby allowing their enemies to rewrite the ground rules of politics at whim and ensuring their own defeat. Conservatives have failed to insist on an alternative interpretation, so most Americans assume that the liberal version is the only one available.

The principle of American federalism is simple: Whatever the federal government is not positively *authorized* to do, it is *forbidden* to do. This is absolutely clear from the text of the Constitution, from the ratification debates, from the early commentaries of jurists and presidents, and even, in a way, from the pettifoggery to which Lincoln and FDR were driven in their evasions of constitutional limits. We need not worry about the relative weight and merits of social and economic issues. Confine the federal government to its allotted powers, and such things will take care of themselves.

Can the Constitution be restored to its full rigor? The status quo has proved acceptable to Democrats and Republicans, to liberals and conservatives—notably neoconservatives—all of whom have found their own uses for limitless, centralized power. Both sides are sworn to preserve unconstitutional entitlement programs (beginning with Social Security and Medicare), and countless voters would put their government checks ahead of the Constitution. For now, alas, the U.S. Constitution poses no serious threat to our form of government. c

Speaking the Naked Truth

Stripping the Bill of Rights

by Philip Jenkins

Anatol Wosjf

Connoisseurs of the odd byways of law rarely find rich materials in the U.S. Supreme Court, where the deliberations usually proceed with dignity and common sense. For truly asinine judicial misbehavior, we normally have to look at state courts. Yet this past March, the Supreme Court had before it a case that delighted the late-night comedians and launched a few thousand bad puns. Specifically, in the case of *City of Erie* v. *Pap's A.M.*, This Honorable Court determined that directing the exotic dancers of one Pennsylvania community to wear g-strings and pasties did not violate the First Amendment of the Constitution.

At first glance, it is easy to trivialize a case that seems to belong to the lighter side of American judicial history: There is something gloriously inappropriate about such staid figures as David Souter and Sandra Day O'Connor chatting knowingly about the art of ecdysiasm. But the case does raise serious questions about the nature of First Amendment law, particularly how far that clause can or should be adapted to changing social circumstances. We currently face severe challenges to our freedom of speech rights, especially in the realm of electronic communications. Those of us who have never set foot inside "adult-entertainment" establishments may yet regret the *Erie* decision and others of its ilk.

What happened in the case was straightforward, although the logic underlying it was anything but. An establishment called Kandyland specialized in nude dancing, a fact that reportedly attracted a bad crowd to the area, creating what was allegedly a "conducive atmosphere to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects." These developments provoked local authorities to impose minimum-clothing requirements. The ordinances were alternately dismissed and upheld by a series of higher courts, until a divided U.S. Supreme Court eventually ruled in favor of the city. In essence, the Court decided that nude dancing was indeed expressive conduct under the Constitution, but it was only "within the outer ambit" of speech as determined by the First Amendment; hence, local authorities could take reasonable measures to restrict it, with the goal of suppressing "secondary effects," such as crime and other abuses; yet the specific restrictions would have little or no effect on crime and other abuses, and would not promote the public good; but we are going to uphold the restrictions anyway.

So the Court is banning what it regards as a constitutionally protected form of expression, even though it believes that the ban will not do any good. Are we clear on that? The decision itself might be correct, but the logic is deeply flawed.

Why this decision is troubling may not be obvious to the many non-lawyers who read the First Amendment literally, finding references to "speech" but not to other forms of communication, overt or implied—and certainly not to nude dancing. According to this view, original intent means that we should protect speech, whether spoken or written, but generations of judicial activism have led to this concept being stretched to include nude dancing. That is misleading. The amendment itself uses the words "freedom of speech and of the press," but it is a very small leap to read those words as "speech, and the obvious means by which we express our meaning as if in speech." Writing and printing are simply examples of analogies to speech. Some forms of communication are less "obvious means" than others, and the courts have been slower to recognize them, but extensions of speech they certainly are. Imagine that, during the murderous NATO airstrikes on Yugoslavia last year, I had stood silently outside the White House, carrying a

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