Cultural Restitution and the American Political Order: A Book Review Symposium

Coming Home: Reclaiming America's Conservative Soul, by Ted V. McAllister and Bruce P. Frohnen. *New York: Encounter Books, 2019. 164 pp. $23.99.*

A Constitution in Full: Recovering the Unwritten Foundation of American Liberty, by Peter Augustine Lawler and Richard M. Reinsch II. *Lawrence, KS: University Press of Kansas, 2019. 180 pp. $32.50.*

Of Constitutions, their Origins, and Purposes: Seeking Renewal in Times of Loss

Joseph S. Devaney
Abraham Baldwin Agricultural College

Discussion of America's written Constitution commonly focuses on originalism. During her Senate confirmation hearings Judge Amy Coney Barrett, when asked about her judicial philosophy, said originalism "means that I interpret the Constitution as a law, and that I interpret its text as text, and I understand it to have the meaning that it had at the time people ratified it. So that meaning doesn't change over time and it's not up to me to update it or infuse my own policy views into it."[1] Originalists contend that fidelity to the written Constitution requires that it be interpreted according to its original public meaning.

The contemporary originalist enterprise arose, in part, as a response to a series of Court decisions that moved beyond the constitutional text. What emerged from this legal regime was a much more powerful national government. These progressive Supreme Court decisions permitting the expansion of the federal government undermined the basic constitutional edifice and its com-

Joseph S. Devaney is Associate Professor in the School of Arts and Sciences at Abraham Baldwin Agricultural College.

[1] "AP Explains: Originalism, Barrett's Judicial Philosophy," *AP News*, October 13, 2020.

mitment to federalism, separation of powers, and limited government. This trend reached its apex in President Roosevelt's New Deal during which the Supreme Court gave unprecedented power to Congress and the executive branch bureaucracy.

With the growth in government power came the need to protect individual liberty. In *Federalist* No. 84, Publius argued that liberty is protected through a republican form of government in which sovereignty belongs to the people. Liberty is further protected through a system of federalism, separation of powers, and limited government. Yet, the new legal framework carved out zones of individual liberty and sought to limit the powers of government by judicial fiat. The Court interpreted the due process clause of the Fourteenth Amendment as a means of limiting the power of the state governments. The Supreme Court adopted a permissive view of liberty that includes the right of the autonomous individual to choose his or her own conception of the good life. This understanding of liberty is on full display in *Obergefell v. Hodges*, the 2015 decision that discovered a national right to same-sex marriage.

Although the written Constitution is the subject of originalist thought, in *A Constitution in Full: Recovering the Unwritten Foundation of American Liberty*, Peter Augustine Lawler and Richard M. Reinsch II appeal to the neglected nineteenth-century political thinker Orestes Brownson in explaining the importance of America's unwritten constitution. Lawler and Reinsch do not believe originalism or natural rights theory provides the historical and philosophical foundation necessary to sustain the written Constitution. They remind us that no written constitution is created *ex nihilo*. A written constitution emerges from and is governed by the tradition, experience, customs, and political culture of the people. For this reason, the unwritten constitution is more fundamental than the written Constitution. And it is this unwritten constitution that Lawler and Reinsch seek to sustain in the face of progressivism and a deficient account of the human person. For them, relational institutions—schools, families, and churches—comprising the unwritten constitution are the foundation of the written Constitution. Together, the written and unwritten constitutions constitute the American constitutional order, a constitution in full.

In C*oming Home: Reclaiming America's Conservative Soul*, Ted V. McAllister and Bruce P. Frohnen provide more than a thoughtful historical account of American conservatism and its challenges. McAllister and Frohnen seek nothing less than to reclaim America's "conservative soul." In doing so, they appeal to those pre-political institutions and traditions rooted in human nature itself, through which a self-governing people can pursue the good life. The authors argue that American conservatism originated in the English tradition, a tradition whose fundamental principles can be gleaned through the insight of historical experience. This historical empiricism

served as a guide as these principles were adapted to the unique circumstances prevailing in America. The debate between Federalists and Anti-Federalists over ratification was one instance in which the parties drew from history writ large in support of their respective positions. Yet, historical empiricism serves the more important purpose of grounding reality in the imperfect corner of the world in which we live. Especially important is the covenant tradition through which Americans decide for themselves to form associations for many purposes. Members of these associations freely choose to incur serious obligations in the pursuit of common purposes. The number of these associations attest to the resilience and diversity of the American people.

From this tradition emerged two interrelated traditions, liberalism and conservatism. While conservatism emphasized custom and tradition, liberalism emphasized individual consent. Both of these traditions were embodied in the U.S. Constitution itself with its many compromises. McAllister and Frohnen provide a nuanced account of these interlocking traditions and how different interpretations arose from a "common patrimony." As the Cold War loomed, conservatism was in the uncomfortable position of defending the American tradition at a time in which increased government power was necessary to combat communism.

McAllister and Frohnen's historical account is more than an interesting prologue. It places conservatism in historical context so that we can understand *why* natural associations promote republican self-government and shape the culture. The authors then discuss *how* natural associations – *e.g.*, the township, the natural family, and religious institutions — can be recovered. *Coming Home* provides more than a diagnosis. It provides a remedy.

Both Lawler and Reinsch, as well as McAllister and Frohnen, believe progressivism embraced principles inconsistent with, and even hostile to, the American tradition with its emphasis on federalism, separation of powers, limited government, and ordered liberty. Progressivism was prominent during the Wilson Administration and World War I. The imperial presidency was exposed when President Wilson imposed racial segregation on the federal government. During World War I, the Wilson Administration undermined the American commitment to limited government through wartime measures that expanded the powers of the national government and suppressed civil liberties such as freedom of speech.

Franklin Roosevelt's election inaugurated a new period of government expansion. Roosevelt considered America's founding principles to be antiquated. The nation was confronted with a set of problems arising from the Great Depression. Roosevelt believed the federal government was obliged to provide for the essential needs of the people through social welfare programs such as So-

cial Security and unemployment compensation. This view entailed the creation of positive rights, which the federal government was obligated to secure. These ends could not be achieved if the government were shackled by existing constitutional limitations. This New Deal required an expanded federal government with power lodged in a more powerful executive, which overshadowed Congress. This "plenary executive" was thought to embody the undifferentiated will of the people, in contrast to Congress, whose individual members represented the parochial interests of states and congressional districts. Congress delegated increasing authority to an executive branch bureaucracy staffed by experts in policymaking. These experts circumvented the democratic process in promulgating rules that had the force of law.

The Supreme Court's decision in *National Labor Relations Board v. Jones & Laughlin Steel Corporation* empowered Congress to regulate any activity that has a substantial effect on interstate commerce. This power reached its apex in *Wickard v. Filburn* in which the Supreme Court ruled that the Agricultural Adjustment Act applied to a farmer who produced wheat for home consumption. Although the Interstate Commerce Clause is commonly cited as a source of government power, McAllister and Frohnen identify an even more pernicious source of power in the taxing and spending clause. Article I, Section 8 of the Constitution gives Congress the power to tax and spend for the "common defense and general welfare" of the United States. The authors understand these words to be a limitation on the power of the national government: Congress could only exercise its enumerated powers in the service of the general welfare. Yet, in *Helvering v. Davis* the Supreme Court deferred to Congress' judgment about whether a legislative end serves the "general welfare." With Congress as a judge of its own authority, there is no effective check on its own power. Combined with the power to regulate interstate commerce, the national government more closely resembled Alexander Hamilton's proposal at the Philadelphia Convention, which gave Congress the authority to pass "all laws whatsoever." So long as Congress' judgment is not arbitrary, the power of the national government trumps the power of local and state governments under the Supremacy Clause. For McAllister and Frohnen, the significance of *Helvering* is that Congress, the president, and the executive branch bureaucracy need not rely on the cumbersome amendment process to enact progressive policies.

McAllister and Frohnen believe *Helvering* undermines two indispensable Anglo-American principles: first, that the power of government must be limited, and second, that the authority to confer power is vested in the people. These principles ensure the autonomy of self-governing communities through which people can pursue the good life. In their historical survey of American conservatism, McAllister

and Frohnen acknowledge the reasons why conservatives did not give sufficient attention to the expansion of government powers during World War II and the Cold War. But they argue that these conditions no longer prevail, and that the time has come to reclaim our cultural inheritance: self-governing communities, adaptable as circumstances dictate. Lawler and Reinsch believe that an alternative must be offered as progressivism recedes.

The expansion of power at the state and national levels of government made the need to protect liberty urgent. The original constitutional scheme called for separation of powers, checks and balances, and limited government as a means of protecting liberty. Yet, the Supreme Court had undermined these structural protections. As the Court moved away from structure, it turned to the Bill of Rights and the Fourteenth Amendment. The Court carved out "fundamental rights," which protected individual autonomy. The result was, in Randy Barnett's words, "islands of liberty rights in a sea of governmental powers."[2] As it selectively incorporated the Bill of Rights and interpreted the due process clause of the Fourteenth Amendment in the service of individual autonomy, the Court would come to view liberty in especially permissive terms. In *Griswold v. Connecticut*, the Court interpreted the Bill of Rights as protecting a right to privacy. Yet, the Court was careful to avoid relying on the discredited substantive due process doctrine of the *Lochner* era. When *Roe v. Wade* was decided, two major principles defined the new legal regime: The Court openly relied on the due process clause of the Fourteenth Amendment in protecting unenumerated rights, and the understanding of privacy changed from the right to insulate intimate matters from public scrutiny to the right of autonomous individuals to freely choose their own conception of the good life.[3] By the time the Court decided *Planned Parenthood v. Casey*, the meaning of liberty morphed into "the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life."[4]

Lawler and Reinsch argue that the rule of law is undermined when litigants can make myriad claims on the government based on a vacuous understanding of liberty. The structural limitations on governmental power themselves act to protect liberty. Lawler and Reinsch provide a sustained argument why the Supreme Court's focus on individual autonomy has undermined the American commitment to self-government. The authors argue that individual choices as ends-in-themselves cannot account for the indispensable role autonomous associations play in maintaining a republican form of government. A "jurisprudence of

[2] Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty,* Updated Edition (Princeton: Princeton University Press, 2004), 1.

[3] See Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge: Belknap, 1996).

[4] Planned Parenthood v. Casey, 505 U.S. 833, 851.

autonomy" liberates the individual from the responsibilities that come with republican self-government. This understanding of individual choices as ends-in-themselves cannot account for the role autonomous associations play in maintaining republicanism. Lawler and Reinsch are skeptical that "positivist" originalism alone can preserve the republican government created by the Constitution. Yet, they believe the due process clause should be interpreted according to its original meaning. According to Michael McConnell and Nathan Chapman, the due process clause prevents a legislature from exercising judicial or executive powers. The clause, however, does not prohibit a legislature from passing a prospective law of general applicability.[5] In this way, the due process clause serves a separation of powers function. Lawler and Reinsch do not believe originalism provides a philosophical defense of the written Constitution. They turn to its unwritten foundation.

Lawler and Reinsch turn to Orestes Brownson in explaining the importance of America's unwritten or "providential" constitution. In Brownson's view, there is the constitution of the nation (unwritten) and the constitution of the government (written). The constitution of the government originates in the constitution of the nation. The written Constitution was not created out of nothing. It is this unwritten constitution that informs the written Constitution. This unwritten constitution is "providential." That is, "no written constitution could emerge from nothing, but is necessarily dependent on various 'givens' that limit and direct what is possible for statesmen at any particular time."[6] Providential means to be guided by tradition, experience, political culture, and customs. The written Constitution relies on these "civilizational accomplishments" from which the constitutional order emerged. This order includes America's common law inheritance, experience with self-government, and religious pluralism. The unwritten constitution also limits the written Constitution by carving out space for relational institutions such as good schools, strong families, and judgmental religious institutions. The foundation of these institutions is the relational person who lives in community to work, love, and pray. Because these higher ends served by these relational institutions are inherent in human nature, they cannot be defined by law.

The belief in an unwritten constitution may make many originalists uncomfortable. Yet, the unwritten constitution is not completely unknown to American conservative thought. Russell Kirk spoke of an unwritten constitution which sustains the written Constitution. This

[5] Chapman, Nathan S. and McConnell, Michael W., "Due Process as Separation of Powers," February 14, 2012. *Yale Law Journal*, forthcoming, Stanford Public Law Working Paper No. 2005406.

[6] Peter Augustine Lawler and Richard M. Reinsch, *A Constitution in Full: Recovering the Unwritten Foundation of American Liberty* (Lawrence, Kansas: University Press of Kansas, 2019), 5.

unwritten constitution consists of, Kirk argued, "the body of institutions, customs, manners, conventions, and voluntary associations which may not even be mentioned in the formal constitution, but which nevertheless form the fabric of social reality and sustain the formal constitution."[7] The unwritten constitution is not to be confused with the "living Constitution." Living Constitutionalism is a judicial philosophy in which courts move beyond, even contrary to, the text of the Constitution to protect federally enforced unenumerated rights. The extra-constitutional authority, however, is not anchored in centuries of past experience but identified with "the will of the people" alive in the present.

McAllister and Frohnen contend that the natural associations making up the written Constitution need to be resuscitated in order to reclaim America's conservative soul. They provide more than a policy statement, however, for how institutions like the township, natural family, and religious institutions can be reclaimed, but also explicate the nature and purpose of such institutions. While McAllister and Frohnen speak of autonomous associations, Lawler and Reinsch speak of relational institutions.

McAllister and Frohnen cite Alexis de Tocqueville when discussing Americans' attachment to "township freedom" even above individual freedom. The character of a people committed to self-government is revealed when they give political freedom priority over individual freedom. It is in townships where the destiny of the community is shaped and more fundamental associations such as the family, church, and workplace thrive. In these intersecting associations, relationships are formed and the people share in a common life. McAllister and Frohnen are careful not to romanticize small town life. Yet, they understand that as townships were weakened by the national government, people became alienated and sought meaning in ersatz communities.

McAllister and Frohnen observe that there are two principal views about the nature of the family. One view sees the family as a thin association in which two people commit to each other for mutual support and the care for children. Another view sees the family as a natural association which is directed toward procreation and the propagation of the species. It is this latter view that McAllister and Frohnen adopt. The authors observe that we have forgotten the nature and purpose of the family. Especially important is the role of the family in maintaining republican self-government because it is the principal institution through which civic virtue is preserved.

McAllister and Frohnen believe we are "religious animals." In a community of faith, we look to answer life's most intimate and important questions about life and death. The authors make an important distinction. Faith may be a matter of per-

[7] Quoted in Allen Mendenhall, "Our Real Constitution—And What Happened to It," The Russell Kirk Center, July 11, 2020.

sonal belief. But religion is a community of creeds and practices that promote a way of life. The golden rule is not an abstract philosophical principle but a concrete principle instantiated in daily routine. The authors warn that the autonomous individual may be liberated from this seemingly oppressive association only to find himself lonely and alienated. He turns to ersatz community in the form of the state ideology.

Both Lawler and Reinsch as well as McAllister and Frohnen provide a diagnosis for the maladies plaguing our constitutional order: progressivism and individualism. Although there are disagreements at the margins, the authors agree on the importance of autonomous associations in maintaining republican self-government and constitutional order. Lawler and Reinsch's appeal to relational institutions tracks McAllister and Frohnen's defense of associational life. *Coming Home* is less than a political call to action than it is a plea to reclaim our own humanity. Human beings are not autonomous individuals but people embedded in overlapping communities with a past and a future. Although McAllister and Frohnen criticize government action that has undermined associational life and speak of the need for reform, they are really describing conservatism as way of life based on our own nature as human beings. A full account of originalism is beyond the scope of either book.

But we are left wondering about the role of the written Constitution. In this respect, an originalist interpretation of the Constitution makes room for the relational institutions defended in *A Constitution in Full* and *Coming Home*. The unwritten constitution emerges from the written Constitution, and the written Constitution protects relational institutions with its commitment to federalism. The Bill of Rights singles out for protection intermediate institutions such as juries, militias, and religious institutions. In this way the written and unwritten constitutions have a reciprocal relationship in which each reinforces the other. Preserving the written Constitution requires a judiciary committed to originalism. It is not clear that associational life can be sustained under the weight of the constitutional settlement following the New Deal. Relying on an unelected judiciary does not provide much reassurance.