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THE BILL OF RIGHTS: THE CONSTITUTION'S BUILT-IN, MANDATORY MANUAL OF CONSTITUTIONAL INTERPRETATION

NOTE: This article was first published in S.W.A.T. Magazine, where I write a monthly column called *Enemy at the Gate* which is dedicated to the Bill of Rights - and that means all of it. The publisher and editor of S.W.A.T. are committed patriots (and no, S.W.A.T. Magazine is not just for police. Its readership also includes military and non-military average folks). They have given their consent to my republishing this article online. I think it presents some foundational principles we should always keep in mind. Feel free to pass it on to others if you like, but be sure to give proper credit to S.W.A.T. Magazine.

By

Stewart Rhodes

So great was the Founding generation's distrust of powerful national governments that, when they rebelled against the Crown, they created a loose league of sovereign States under the Articles of Confederation. And even when some of the leading men of the time pushed for a national government with more power, the people would never have consented to such a leviathan as we now see, de-facto, in Washington D.C. They had just thrown off a government that claimed a power to legislate over them in all matters whatsoever and were not about to replace it with another.

Instead, what they consented to by ratifying the Constitution of 1787 was a dual sovereignty system, granting the new national government only certain, enumerated, and limited powers, with no general police power (a general law-making power to pass laws for the health, safety, and welfare of the people). Only the States had such a general power, which they retained, as the debates over ratification make clear:

> The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce …The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberty, and property of the people; and the internal order, improvement and prosperity of the State. - James Madison, Federalist 45

Despite such reassurances, the Constitution would never have been ratified without the promise of a Bill of Rights, which the ratifying conventions of several States insisted on because they still feared misconstruction and usurpation of powers never granted.

The Federalists argued that no Bill of Rights was needed since the federal government lacked the power to infringe on any of the people's rights and listing certain rights and protections could dangerously lead to the inference that the government otherwise had powers not granted, and to the inference that the people's rights were somehow limited to those listed.

Fortunately, the people did not buy those arguments (imagine where we'd be now, without a Bill of Rights!) but they did address those "concerns" in their proposed amendments, to be doubly-damn sure the Constitution would not be misinterpreted as the Federalists warned. Thus the Bill of Rights itself tells us how we must interpret the Constitution.

First, the Preamble to the Bill of Rights clearly states that its purpose was to prevent misconstruction:

> THE Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added …. (emphasis

added).

As discussed last time, some of those "declaratory and restrictive clauses" are written protections for certain preexisting rights of the people (such as the right to bear arms) and guarantees of ancient procedural protections, such as jury trial. But two others give commands on interpretation "to prevent misconstruction":

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. – Ninth Amendment.
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. – Tenth Amendment. (emphasis added)

These are no mere suggestions. The Ninth Amendment uses the command language "shall not" and is as much a command as "the right of the people to keep and bear arms shall not be infringed." It also speaks of the enumeration (the listing) in the Constitution of certain rights, not the "creation by the Constitution of certain rights."

This is no accident. As noted previously, the Bill of Rights does not create rights, but merely provides protection for rights that already exist.

And no, the Tenth Amendment is not merely a "truism." It is a vital command on interpretation, just like the Ninth. The People meant it to have teeth.

There you go. The Constitution's built-in manual for constitutional interpretation:

1. You shall not interpret the Constitution as creating rights, and you shall not interpret it as meaning that the people have only those rights listed. We the people have natural rights, and those rights go far beyond those explicitly protected by the Bill of Rights.
2. The national government does not have a general police power to legislate on anything it wants (despite the modern lies of the Supreme Court regarding the Commerce Clause to the contrary). It is a government of particular, enumerated powers, and you shall construe its powers narrowly, as the people intended. There are other powers, which we the people have not granted, and we reserve all of those other powers to our sovereign State governments, or to ourselves.

From all of this, St. George Tucker, in his 1803 commentaries on the Constitution, derived the principle that all of the Constitution's rights protecting provisions should be read very broadly, while the power granting provisions should be read very narrowly. Tucker was correct, but you don't need to be a legal scholar to figure it out.
The people who ratified the Constitution did not leave the vital question of its interpretation open to be manipulated by some smart-alecky modern law professor out for tenure and a book deal, or by some future federal judge playing God – they gave us their commands for how it shall and "shall not be construed."

And it is their understanding and intent that matters, not the preferences of the Nine Nazgul on the Court. Any "interpretive methods" that are contrary to those commands are not only inaccurate, but are themselves violations of the Constitution. Think about that the next time you hear some smooth talking lawyer, judge, professor, or politician prattling on about his own pet "modality" of constitutional interpretation. Look past the smoke and mirrors, and ask yourself if what you are hearing squares with the commands of the Ninth and Tenth Amendments.

When you use the powerful interpretive lenses the Bill of Rights provides, you will see "Them" for what they are, and you will no longer be fooled.

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