

THE ALTERNATIVE

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Dear Reader,

This issue of the Newsletter may seem to have two different themes. The theme, however, is the connection between national and church reforms. The United States is undergoing a threat to its existence, not from an external enemy but from not having a workable form of government. The first essay, by Gabriel Moran, refers to two recent books by constitutional scholars who are frustrated by the country trying to follow the eighteenth-century Constitution. Both books seem to assume, perhaps too optimistically, that important institutions would survive the admission of the Constitution's inadequacy. The second essay, by Sanford Levinson agrees on the shortcomings of the Constitution and proposes some radical reforms. The United States has a legal tradition to guide it in a radical reform of its constitution.

The United States began by attempting to reject tradition. Ronald Reagan's favorite line was a quotation from Tom Paine's *Common Sense*: "We have it in our power to begin the world over again." Although that was not true in 1776 the country was in fact trying to work out a new form of government. When Reagan used the line two centuries later in was a bizarre claim. The trouble with trying to reject tradition is that it creates a tradition of being anti-traditional. That results in a group hanging on to some piece of the past that has supposedly been spared from historical evolution.

There are some lessons to be learned from the struggle of the Christian Church to maintain a continuity of its tradition throughout the historical changes of two thousand years. The Protestant Reformation radically criticized tradition but did not reject it. The Roman Catholic Church affirmed tradition but in an uncritical way that was eventually debilitating. Catholics needed historical criticism starting but not ending with the Bible. Protestants needed a more positive affirmation of tradition as the context for interpreting the Bible. The tragic split of the Christian Church began to be healed in the middle of the twentieth century. The Second Vatican Council could have been a first step of reform for the Catholic Church and the beginning of a worldwide ecumenical movement. The Catholic Church, however, failed to explore the richness of its own tradition and in some ways has aligned itself with the most reactionary part of Protestantism.

The third essay by Scott Appleby touches on what might have been if some great Catholic thinkers of a century ago had not been undermined or silenced. Despite some mistakes they were addressing the real problem of relating Catholic tradition and the modern world. The greatest of these writers in the English speaking world was John Henry Newman who is often claimed by the reactionary wing of the Catholic Church. Newman was a radical thinker who understood tradition in a way that "traditionalists" do not. He escaped condemnation because the people in the Vatican could not understand his English. He and several French and German writers were trying to show the rich possibilities of Catholic tradition. Their ostracizing postponed the badly needed reform of the Catholic Church for sixty years.

TWO CRISES OF FAITH

By Gabriel Moran

Two recent books by Constitutional scholars are indicative of the present state of the nation. Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (2012) and Louis Michael Seidman *On Constitutional Disobedience* (2013). Both books reject the country's dependence on the U.S. Constitution. These books are comparable to two Christian biblical scholars announcing that Christians should not base their lives on the New Testament.

The comparison to Christian belief is quite exact. In the United States, the Constitution (along with the Declaration of Independence) is treated as sacred scripture. Thousands of interpreters spend their lives trying to tease out the hidden nuances of the text. Nothing can be done by the government that is declared to be "un-Constitutional." The search is endless for what the authors of the founding documents *really* meant. Seidman said he has been teaching constitutional law for forty year and has suddenly discovered that trying to live in obedience to an eighteenth-century document makes no sense.

The two authors have made a dangerous admission. The United States has been held together by a fiction. If people stop believing, the country could unravel. The fictional basis of authority is that answers to today's questions are found in the Constitution of the United States and the Bill of Rights. This fundamentalism prevents the country from doing some sensible things to improve people's lives; it also gives support to some insane policies that destroy peoples' lives.

The Supreme Court in October had the power to decide whether the affordable health care act was constitutional. Eight justices voted as they were expected to vote when they peered into the text of the Constitution with their political biases. The ninth justice would decide whether millions of people could get health care coverage. Chief Justice Roberts, apparently worried that the Supreme Court was getting a bad reputation for its obstructionism, decided to save the law by his vote. He did, however, stick with his "conservative" colleagues who are still fighting Franklin Roosevelt's use of "interstate commerce" as the fiction to justify what had to be done by the government. Roberts was forced to invent a new fiction, that the mandate requiring health insurance coverage was a form of taxation. If Roberts actually believed his own argument he was one of the few people who did. But at least the Court did not obstruct doing something about the scandalous condition of health care in the United States.

On December 14, the country had its latest, but undoubtedly not its last, mass murder. The country went into its compassion mode lockdown. The television reporters rushed to Newtown, Connecticut for a great story. Who wouldn't pay attention to six year olds getting as many as eleven bullets pumped into them? The National Rifle Association was quiet for a few days instead of making its usual statement on such occasions that "this is a time for mourning not for political arguments." After a week the NRA head, Wayne LaPierre, came out from hiding with both barrels blazing. Instead of being even slightly apologetic or acknowledging the need to do *something*, the NRA unloaded their new mantra: The only way to stop a bad guy with a gun is by a good guy with a gun. The

statement drew ridicule in many quarters but LaPierre was cleverly applying the principle of U.S. foreign policy. We're always the good guy with a gun (actually lots of very big guns) who stops the bad guy with a gun (Hitler and everyone who is said to be a new Hitler).

If the only question is what the words in the second amendment mean, the gun lobby wins. There is little doubt that the authors of the amendment were saying that every man has a right (women and children not so clear) to possess a firearm. That was the only way to have a state militia that could protect the citizens against possible federal tyranny. An armed militia was the alternative to a standing army although in time an army somehow slipped through the text.

In the debates about guns that followed there were almost no deniers of "second amendment rights," despite paranoia on the right that they were being attacked. Ross Douthat wrote an outrageous column in the *Times* describing LaPierre and Mayor Michael Bloomberg as having the extreme views on the issue; Bloomberg may have made mistakes as mayor but keeping New York the safest big city in the country by his enforcing the control of guns is not one of them. People argued from a Supreme Court ruling in 2008 that the right to bear arms still allows for regulations and restrictions. A common comparison that was made in arguing for regulations was driving an automobile. The rejoinder was that carrying a gun is a right, driving a car is a privilege. In a fundamentalist world, that contrast of right and privilege may be relevant. But in a world of assault weapons, sanity suggests that the ability to kill as many people in the shortest time possible is the relevant point of comparison.

These two cases are not unusual in U.S. history. Both of the constitutional lawyers list examples of scandalous Court decisions in which some horrible practice was judged constitutional and other decisions in which the government was stymied because a needed action was ruled unconstitutional. Recent discussions of Abraham Lincoln have brought out his struggle with the constitutionality of freeing the slaves. Chief Justice Roger Taney in 1857 ruled that a slave named Dred Scott was not a citizen and had no rights; furthermore, Taney said, the government has no constitutional right to interfere with property (the ownership of human beings) in the territories. Lincoln said in the 1860 campaign that he had neither the desire nor the power to interfere in southern slavery. He was finally pushed to issue an emancipation proclamation based on the dubious claim of a temporary power that a president has during wartime as "commander in chief" (which in recent decades seems to have become a permanent feature of the U.S. presidency).

Throughout the twentieth century and into the twenty-first century the gap could only widen between what the U.S. Constitution allows and what has to be done for the health and welfare of the country and the rest of the world. But the open acknowledgment that the government is built on a fiction is a dangerous step. The two constitutional lawyers may not grasp how shaky a situation is created by no longer treating the text as if it were sacred scripture. They seem rather blasé in assuming that business can proceed as usual with some increased flexibility. That is not the way that fundamentalist systems work.

The country needs an alternative to fundamentalist legal theory but it probably won't come from constitutional specialists. It is too much to expect that people who study the Constitution would also know how to reform the country. The United States might learn from the struggles of the Christian religion to find a basis of authority more convincing than what an ancient text says. Asking biblical scholars to do that is burdening the wrong group. Protestant Christianity has struggled with the problem for at least a century and a half. The Roman Catholic Church is experiencing the problem in a telescoped fashion that began with the Second Vatican Council. When Martin Luther announced the principle of "sola scriptura," he assumed at the same time the continuance of church tradition. And in fact the Protestant Reformation and the Catholic Counter-reformation seemed to stabilize things. Not even skeptics were much inclined to attack the Bible.

The big change occurred in the nineteenth century when the Bible was attacked from all sides by historians, archeologists, anthropologists and other scientists. Instead of rethinking the relation between the Bible and the tradition in which it is embedded, the Christian churches split into two parts: fundamentalists who defend their version of the Bible and people who thought the Bible could be put on the back shelf and continue business as usual. The Catholics combined a fundamentalism of doctrines and a selective fundamentalism of the Bible. Fundamentalist Protestantism, which the intellectual class had declared dead in the 1920s, roared back in the 1970s and in partnership with constitutional fundamentalism exercises a powerful influence in the United States.

The Roman Catholic Church finally faced up to the fact that there was a huge gap which was separating it from dialogue with the rest of the world. The Second Vatican Council was a great first step in reform. The people who wrote the documents should not be faulted; they did about as well as they could from where they began. However, on the last day of the Council they should have burned the documents, gone home, and continued the reformation locally. Instead, the documents became part of the selective fundamentalism.

Catholics are told to accept a selection of texts from the Bible and past pronouncements of the pope and bishops as "God's revealed word." At the time of the Council there was praise of a "*sensus fidelium*," meaning that the whole community is the basis of church teaching. The pope recently said that there is no "sense of the faithful" unless it agrees with the bishops' teachings. The whole point of the doctrine was that the bishops might have to listen to the "faithful" to discover what "the church teaches." The U. S. bishops actually did that when they wrote their 1983 Letter on peace, thereby catching up to the church. However, they failed dismally to listen when it came to church teachings on sexual morality, an area that the bishops are ignorant of.

The main failing of Vatican II is found in its first document that received lavish praise. The document is usually referred to as "Revelation" but that is not what it is about. Its Latin title is *Dei Verbum* from its first words: "Hearing the Word of God." That opening phrase suggests what is to follow, namely, a sermon. "Word of God" is a treasured metaphor in Christianity but in a document on the basis of the Christian Church, the metaphors have to be examined not assumed. The initial version of the document was

written by the Vatican bureaucrats. It was a restatement of what the Catholic Church had said in the sixteenth century with a little dressing from the nineteenth. When that version was rejected as hopelessly inadequate, the job of rewrite was given to biblical scholars.

The result was beautiful and pious prose that avoided facing the crisis of authority that was about to tear apart the Catholic Church. The document is a fundamentalist restatement with more emphasis on the Bible; it is the kind of enlightened fundamentalism that biblical scholars can produce but it does not begin to explore how to connect a first century document and peoples' lives today. After the document's first chapter on "revelation itself"(which consists of statements from the Bible), the second chapter is on "the transmission of divine revelation." (which affirms that what God once said has been transmitted by a line of bishops to today's "faithful") and the rest is more comments on the Bible. The document encouraged bishops, including the pope, to continue acting just as they had, telling the faithful what God said a long time ago.

The fault was not with biblical scholars. The life and teaching of Jesus have never been more relevant. The gospels are great literature that deserve study. The three synoptic gospels continue to be a challenge today to persons and nations; the fourth gospel is a beautiful but dangerous document that should be treated carefully.

The Letters of Paul are still provocative of discussion even though they were addressed to one group at one time in one situation. Paul's views have moral weight even though some of his views are wrong, such as his advice on how to be a good slave. That teaching, in cahoots with the U.S Constitution, had disastrous results in U.S. history. Paul could not condemn homosexuality; he had no knowledge of it. But his "men committing shameless acts with men" is still used as a stick to beat up gay men. There is still resistance to admitting the Bible's shortcomings for delivering answers to today's moral questions.

Fifty years ago the Roman Catholic Church, inspired by Pope John XXIII and a small band of loyal believers, took the courageous step of trying to reform an unimaginably complex organization. There were some admirable set pieces of reform but they lacked a firm foundation. Protestant and Orthodox Christians were willing to give support to this venture. Even Jews saw the possibility of a new opening with revolutionary implications for one of the world's longest standing enmities. But five years after the Council ended, the movement came to a halt or went into reverse.

The result is that the Roman Catholic Church, instead of playing a vigorous ecumenical role, especially with Muslims, is turned in on itself and trying to cover up its collapsing structure. It is difficult to see how reform can happen but there are still some positive and helpful elements of the church and its tradition that cannot be counted out. The people who call themselves conservative are usually defending either sixteenth-century doctrines or nineteenth-century morality. They usually have little sense of church tradition. Fifty years ago, "liberal" meant escaping from an overbearing church structure; that is no more. People with a religious and historical sense who are involved in today's struggle against injustice will be the creators of something new even if it is unclear at present what it is and how they can get there.

REFORMING THE CONSTITUTION

By Sanford Levinson

Advocating the adoption of the new constitution drafted in Philadelphia, the authors of the Federalist Papers mocked the "imbecility" of the weak central government created by the Articles of Confederation. Nearly 225 years later, critics across the spectrum call the American political system dysfunctional even pathological. What they don't mention though is the role of the Constitution itself in generating the pathology.

A majority of Americans since World War II have registered opposition to the Electoral College. Nonetheless, we continue to have presidential elections in which "battleground states" dominate and the three largest states are largely ignored. Our vaunted system of checks and balances and separation of powers means that we rarely have anything that can truly be described as a government. Save for those rare instances when one party has hefty control over four branches - the House, the Senate, the White House, and the Supreme Court - gridlock threatens. Elections are increasingly meaningless, at least in terms of producing results commensurate with the challenges facing the country.

The worst single part of the Constitution is Article V, which has made our Constitution among the most difficult to amend of any in the world. The last significant change was the 22nd Amendment, added in 1951 to limit presidents to two terms. The near impossibility of amending the Constitution not only prevents reform, it makes discussion seem futile, generates a complacent denial that there is anything to be concerned about.

It was not always so. In the election of 1912 two presidents seriously questioned the adequacy of the Constitution. Theodore Roosevelt would have allowed Congress to override Supreme Court decisions invalidating federal laws. Woodrow Wilson basically supported a parliamentary system, and as president tried to act more as a Prime Minister than as an agent of Congress. The next few years saw the enactment of amendments establishing the legitimacy of the federal income tax, direct election of senators, Prohibition, and women's right to vote. No such debates happened in the presidential campaign of 2012.

What might radical reform mean?

We could allow each newly elected president to appoint 50 members of the House and 10 Senators, all to serve four year terms until the next presidential election. Presidents would be judged on actual practice instead of hollow rhetoric. We might allow deadlocks between the two branches of Congress to be broken by a supermajority of the House or of Congress voting as a whole. The state of Maine allows its citizenry to override legislation they deem objectionable. Might we not be better off to have a national referendum on "Obamacare" instead of allowing nine politically unaccountable judges to decide?

Even if we want to preserve judicial review of national legislation, something Justice Oliver Wendell Holmes, Jr. believed could be dispensed with, perhaps we should emulate North Dakota or Nebraska, which require supermajorities of their courts to invalidate state legislation. Why shouldn't the vote of, say, seven of the nine justices be required to

overturn national legislation? Consider the fact that nearly all states have rejected the model of judges nominated by the president and confirmed by the Senate. Most state judges are electorally accountable in some way and almost all retire at a given age. Many states have adopted commissions to limit the politicization of the appointment process.

What was truly admirable about the framers was their willingness to critique, indeed junk, the Articles of Confederation. One need not believe that the Constitution of 1787 should be discarded in quite the same way to accept that we are long overdue for a serious discussion about its role in creating the depressed (and depressing) state of American politics.

THE LOST CHANCE OF REFORM

By Scott Appleby

The issue at the turn of the twentieth century was the notion that Christian doctrine remained constant - substantively unaltered - despite the accidents of history and the evolution of human sensibility. Such a claim, central to official Roman Catholic teaching, was under attack on several fronts. The key book was the *Essence of Christianity* in which Adolf von Harnack maintained that the first Protestants had been right to decry the Catholic practice of augmenting the Scriptures with "man made" laws and doctrines. That popes had justified the proliferation of sacraments, doctrines and offices by invoking tradition exacerbated the problem of recovering the pristine message of Jesus.

To the rescue came Alfred Loisy. His 1902 rejoinder, *The Gospel and the Church* defended the authority of the church. His basic argument - that "we know Christ only by the tradition, across the tradition, and in the tradition" - refuted Harnack's claim that the sacraments and other Catholic "developments" arose from a particular time and place and were therefore "nonessential." The relationship between gospel and church, Loisy argued, is organic and irrevocable. History, far from being disposable, is the arena of God's ongoing work of redemption.

Harnack likened the gospel to a kernel of corn, and the traditions of the church to the dead husk surrounding it. The task of the historian must be to rip away the husk, revealing the precious kernel of apostolic truth. In contrast to Harnack's kernel-husk metaphor, Loisy offered the image of the acorn and the oak tree. Who, gazing at the magnificent oak, could isolate its "essence," the seed that gave it life and provided the blueprint of its growth? The vital principle pervades its entire being, just as the gospel pervades the multidimensional life of the church. History is the soil in which the seed of the gospel is planted; the church is the sprout which grows into the mighty oak. The organism survives only through adaptation to its environment. Harnack's cure for the "accretions" introduced by history would kill the patient.

Loisy's campaign to turn biblical and historical criticism to the service of the church resonated with other European Catholics and some progressives in the United States. They included George Tyrell, Friedrich von Hugel, and Maurice Blondel. In the United States a small group of progressive priests at St. Joseph's Seminary in Yonkers published a short-lived but remarkable journal, the *New York Review* (1905-08). Its first issue

featured an essay by Wilfrid Ward that compared Newman to Aquinas by way of suggesting that the former "shows us how the essential teachings of the Catholic tradition may be combined with due recognition of the claims of the positive sciences."

Ward and other contributors to the *New York Review* advanced the notion that God communicates divine truth to the human subject through the indwelling agency of the Holy Spirit. Individuals "were made more explicitly open to the divine through poetry, liturgy, and art than through rational investigation and speculation." Ward identified an immanentist strain in Newman's thought and celebrated it as the retrieval of an aspect of Catholic thought that had been suppressed by the "supernatural rationalism" of the Scholastic method. For two years the *New York Review* published articles on the "new apologetics," modern biblical criticism, recent trends in philosophy, and the implications of democracy for the religious life.

And then came the Vatican response. What the reformers considered a move to revitalize Catholic thought in response to the daunting challenges of modernity, Pope Pius X described as no less than "the synthesis of all heresies." The encyclical *Pascendi* in 1907 charged that the "method of vital immanence" was agnostic at heart and represented the "destruction not of the Catholic religion alone, but of all religion. Modernism is a well organized conspiracy of forces bent on fostering a pernicious revolution." A striking feature of *Pascendi* is its harsh rhetoric, its tone of personal denunciation, its exercise of apparently rash judgment. The Encyclical had teeth. Anyone holding an ecclesiastical office or a position in an institution of Catholic higher education who "in any way is found to be imbued with Modernism" was to be "excluded without compunction."

The papal fight against Modernism had begun with Pope Pius IX's notorious Syllabus of Errors in 1864. By the time Pius X was installed in 1903, the internal Catholic battle had been joined. At its heart was a struggle over authority - specifically, the exercise of institutional versus intellectual power in the church. Those who came to be condemned as Modernists challenged the "magisterium's" endorsement of a specific theological - philosophical school as *the* Catholic rejoinder to secular modernity, one that virtually excluded ancient, medieval and modern schools, as well as emerging systems such as pragmatism.

In their uncoordinated, inchoate, and sometimes fumbling experiments in alternate models of Catholic theology and philosophy, the Modernists anticipated a twentieth-century movement away from the neo-scholastic emphasis on God's absolute transcendence, on divine revelation as "objective" ("the deposit of faith") and wholly "extrinsic" to the needs or beliefs of the recipient, and accordingly on the absolute necessity of the "magisterium." In terms of ecclesial politics, the Modernists were initially naive. They taught that God revealed truth through the history and experience of ordinary people, not apart from it. "We know what the American spirit is in the political and social order," William Sullivan wrote. "Translate it into the religious order and you have Modernism at its best and purest." Knowledge, revelation, power, and authority: Modernists perceived and engaged this modern Catholic dynamic - and eventually were defeated by it.