

RECLAIMING OUR CONSTITUTIONAL HERITAGE

Ted V. McAllister

By the People: Rebuilding Liberty Without Permission

By Charles Murray

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Charles Murray has written a handbook for the rebellion of the self-governing. In the American context, this makes *By the People* a critique of revolution, the advancement of which requires rebellion in the service of tradition. Understanding rebellion as a requirement for conservation in the modern age is necessary not only to a proper understanding of the Founding but also to grasp the position in which American conservatives now find themselves.

My characterization is not one that Murray would endorse fully, but it raises the possibility of what I believe is a necessary condition for the success of the rebellion—finding the firm ground of agreement between libertarians and conservatives. To this end Murray labels his perspective “Madisonian,” which suggests not only the centrality of the Constitution in this analysis but also the heart of Madisonian constitutionalism, limited government.

Ted V. McAllister holds the Edward L. Gaylord Chair of Public Policy at Pepperdine University and is the author of *Revolt against Modernity*.

Before we examine the common ground found in Murray’s book, we ought to clarify the biggest difference between his libertarian interpretation of America and the conservative understanding. Murray refers to “the American project,” which he explains began “with the founding” and was a “project” to “demonstrate that human beings can be left free as individuals, families and communities to live their lives as they see fit as long as they accord the same freedom to everyone else.”

Here we have an interpretation of the American Founding in which a small group of men “broke with history” in order to test the libertarian hypothesis. This is not only simplistic history; it is wrong in a fundamental way. Governing innovations were plentiful in the period from 1776 to 1789, but they were of the sort that emerged from two facts. First, the break with England necessitated new institutions and arrangements to replace the governing structures that rested on the sovereignty of the Crown. Second, diverse social orders and competing nodes of authority (mainly from the states) required that any national government would be the

product of great compromise. There could be no “project” in the way that Murray uses the word, because no group had the power to impose a single vision on the new nation.

We can be thankful that America was not founded as a project (which is to say on an ideology), since the roots of the American order are deep, solid, and principled, and they provided the Founders with the English habit of relying on experience to guide innovation. Each of the key principled themes in the U.S. Constitution has a long pedigree: the idea of a limited government; the consent of the people; a “balanced” government that checks powers within; and the importance of citizen participation. These, along with the English common law tradition (the significance of which is hard to exaggerate), were long part of the English heritage in both practice and thought.

The awesome responsibility of establishing a new government from deliberation, compromise, and choice did not make the Founders giddy with Promethean dreams. They were astonishingly sober-minded. They confronted a reality that required a creative effort out of necessity and the choices they made in the context of that necessity almost invariably suggested a wish to preserve. The so-called American Revolution was a rebellion to preserve and reinstitute long-established liberties and to develop a system of governance that put those liberties on a more secure foundation. We might even think of the “Revolution” as a rebellion that prevented or postponed a revolution.

Why does it matter whether one sees in the Founding a “project” or a creative effort at preservation? The Founding-as-project interpretation encourages people to think of the Founders as innovators who, as elites, established a new system based on reason, which highlights the most abstract side of our heritage. For conservatives, the tendency to rely

heavily on reason and to defend American principles in the most abstract ways not only distorts the historical record but encourages a neglect for the role of experience and, most of all, the importance of heritage, which is to say a cultural inheritance.

In some ways the distinction here is between two groups of people who want to “take their country back.” The libertarians think of their “country” as a set of universal principles put in place at the Founding, whereas conservatives think of the country as an organic social, cultural, and political order that reflects ancient principles as shaped out of American conditions and experiences. Or to put this more precisely, Murray assumes that self-rule is natural (a discovery of what we might call the Anglo-American Enlightenment), while conservatives understand that American self-rule is a specific historical creation—fragile and not easily exportable.

The libertarian interpretation is unsupported as a scholarly proposition, but it is much more powerful as an animating myth. And conservatives—true, thoughtful conservatives—ought to pay close attention to the power of myths. The enormous emotional and spiritual energy of our time—energy produced by myriad forms of alienation and feelings of being dispossessed of a heritage—will find direction when the American people hear a compelling story of us. Conservatives have good reasons for lending support to those who can tell the story of the American project so long as the effects of believing that narrative support institutions and structural conditions that sustain the habits and prejudices of a self-ruling people. Murray’s book does that.

The subtitle of *By the People* is “Rebuilding Liberty Without Permission.” This is a handbook rather than a treatise. It includes an assessment of the problems as we face them today; an accessible and usable history

of the Progressive takeover of the federal government; a short and very helpful survey of the transformation in constitutional interpretation; and a focused, limited, but hopeful program of rebellion (as I used the word at the outset). All this is useful context for those already feeling alienated as a way of giving an account for their alienation.

The U.S. Constitution stands at the center of Murray's usable myth and at the heart of the Progressive "project," and so the battle for the recovery of liberty necessarily flows from a defense of constitutionalism. Constitutionalism, as I'm using it here, means that the document limits even more than it empowers. The authority for a government to act comes from specific provisions made by the people through the Constitution, and the extent or breadth of that authority to act ought only be changed by the people, through constitutional means.

Murray cannot truly object to amendments, since they are all consistent with constitutionalism. He concentrates not on Progressive governments or the Progressive amendments, but rather on the rejection of the very idea of constitutionalism beginning in 1937 with *Helvering v. Davis*. A series of Supreme Court decisions over the next several years altered the power of the federal government dramatically without recourse to constitutional means—which is to say an extra-constitutional attack on the American tradition and institutions of self-rule. By interpreting the "general welfare" phrase found in Article I, Section 8 to mean that Congress has the power to make a wide variety of laws so long as they serve the general welfare, the court largely undermined the long-standing interpretation of the phrase to suggest a limitation of congressional reach in line with the enumerated powers.

The court also unleashed the regulatory power of the federal government, effectively

encouraging a largely autonomous bureaucracy. The most important growth of the regulatory state took place during the Nixon administration, when general welfare regulations (like occupational safety or clean air) gave regulatory agencies enormous discretion to impose regulations on any business based on criteria determined by the bureaucracy itself. The distance between Congress, which passes the enabling legislation, and the specific policies imposed by the bureaucracy was important for the creation of what Murray calls a "lawless legal system."

The near autonomy of the regulatory agencies (including administrative courts outside the normal judicial system) gave members of Congress both deniability for abuses in the system and the opportunity to serve as influence peddlers for large businesses that need Congressional advocacy as much as members of Congress need political donations.

This cozy relationship facilitated a regulatory system favoring large corporations that can influence final policy decision, while alienating small and nearly powerless businesses that lack access to those who can influence the process. The myriad and often contradictory policies flowing from countless agencies gave agents from those agencies enormous discretionary power to enforce selectively those regulations. Small businesses lack not only the wherewithal to keep up with regulations but also the resources to hire counsel to defend themselves in the administrative courts system. They are victims of a lawless administrative system while being cut out of the political process that ought to provide redress.

And this leads Murray to his most depressing claim: the system is so designed as to be beyond the reach of the normal political process. Taking over Congress or the presidency, for instance, can do little more than effect marginal reforms.

Murray couches this depressing conclusion (which I find persuasive) in the context of a “propitious moment”—a moment well suited to rebellion but not revolution (again, using my words, not his). The federal government has lost legitimacy in the eyes of a self-governing people. The proper response is civil disobedience. The centerpiece of this disobedience is what he calls “the Madison Fund,” a private, well-funded counterweight to the power of the federal government. This fund would defend (and thus empower others to disobey) those businesses that resist the capricious and lawless regulatory system. The government has enormous reach but very limited resources. Widespread refusal to comply with the dictates of absurd regulations or false charges from regulatory agencies would both make the cost of administration too high and bring to public attention through many well-funded lawsuits the actual tyranny of the regulatory state.

Clogging the courts with lawsuits that expose both the frivolity of most regulations and the capricious rule of unelected bureaucrats would compel the courts to reverse decisions that disconnected the discretionary power of the administrative agencies from Congress. This would not only make it nearly impossible for the agencies to pass so many regulations but also require that those regulations be subject to political scrutiny of the broader electorate.

These proposals for action—rather more modest than I would suggest—Murray places in a very hopeful context. The “project” was made possible, in part, by the deep diversity of the “quotidian culture” of the era. Pluralism in religious beliefs, family structure, economic conditions, cultural forms, and political ideas fostered an environment conducive to robust local liberties. A consensus at the national level on policies that concern everyday living was impossible, making the

intellectual commitment to the American project also a practical necessity.

Here Murray draws from one of the most brilliant works of history in recent memory, David Hackett Fischer’s mammoth *Albion’s Seed*. Murray uses Fischer’s detailed description of the diversity of living practices to suggest a larger historical argument about the rise and wane of a national, more homogenized culture as a causal element in the rise of the administrative state and, therefore, its current vulnerability. The changing demographics since the 1960s are creating a pluralism that produces the condition for a renewal of the “project” of giving to states and localities the power and responsibility to govern themselves.

Murray’s argument about the salutary effect of our current and growing national diversity is one I wish to believe in more than I do. Pluralism is necessary for a nation as large as the United States to be committed to a large measure of local rule. High levels of local governance suggest the possibility of Tocqueville’s claim about “township freedom”—the liberty of towns, cities, and states to govern themselves as they see fit. But one has to wonder about the nature or composition of a nation’s pluralism when thinking about the prospects of improving the liberty of localities to govern themselves. One thing does seem clear: the cultural sorting that is making blue states bluer and red states crimson is also making national agendas harder to sustain. I will take that as good news.

Rebellion in service of a project (Murray’s proposal) is a useful but inadequate beginning place for rebellion in the service of an inherited culture of ordered liberty. The latter requires a more robust account of that heritage that brings with it a clear explanation of why humans need an inheritance and why revolution betrays a most human need to be part of a story worth remembering. †