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## Is It Constitutional?

By Richard W. Rahn

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Which section of the U.S. Constitution gives the federal government the power to bail out banks? If you don't know, it could be because no constitutional authority exists for such an action. It is all too common for both Congress and the executive branch to ignore that the Constitution limits what they can and cannot do.

The United States is not a parliamentary democracy; it is a constitutional federal republic, giving basic rights to the people and limiting the powers of government. America's Founding Fathers understood that simple majoritarian democracy could trample the rights of minorities and could lead to tyranny. One of the major reasons for the relative success of the American republic is the difficulty of making significant changes in the government structure and policies. Many find this frustrating, but it allows momentary passions to cool and a more deliberative process to take place. As a result, fewer mistakes are made, in contrast to many parliamentary democracies. Because it was more difficult to put socialist schemes in place in the U.S., such as the nationalization of major industries, the people observed the failure of such programs in parliamentary countries, which diminished the enthusiasm for doing it in America.



A number of constitutional scholars, including former New Jersey Supreme Court Judge Andrew P. Napolitano and Robert A. Levy (who spearheaded the recent successful suit to overturn Washington, D.C.'s unconstitutional ban on gun ownership), have argued that the bank bailout scheme is unconstitutional. In a recent article in the Legal Times, Robert Levy stated: "The federal government has no constitutional authority to spend taxpayers' money to buy distressed assets, much less to take an ownership position in private financial institutions. And Congress has no constitutional authority to delegate nearly

plenary legislative power to the Treasury secretary, an executive branch official." (This violates the separation of powers provisions of the Constitution.)

The following is likely to happen: The immediate financial crisis will wane. The problems in the bank bailout scheme will become increasingly apparent, and the politicians who put in it place will engage in their characteristic finger-pointing and denial. The scheme will be the subject of much litigation, some of it over time reaching the higher courts and likely even the Supreme Court. Provisions of the bailout legislation and actions by the Treasury will be ruled unconstitutional. After all of this comes to pass, most government shares in the banks will have been sold, making much of the issue moot, but Congress and the executive branch will be on notice that such actions in the future are impermissible, and the American Republic will carry on. (Pessimists may disagree with this optimistic scenario, but history shows that most often the government swings back from gross excesses.)

The Constitution has been abused by many presidents and Congresses over the centuries (perhaps, beginning with the Alien and Sedition Act of 1798, which was soon repealed). The original Constitution, even though the work of an enlightened collective genius, was flawed, most notably by the allowance of slavery, which was corrected by the 13th, 14th and 15th amendments.

There have always been political pressures on the courts to read nonexistent things into the Constitution. After President Franklin Roosevelt attempted to pack the Court to obtain approval for his "New Deal" excesses, the Court did allow much of the new regulation and reinterpreted the commerce clause far beyond the original text. This abuse of the commerce clause over the last 75 years is the source of many of today's economic problems.

In recent years, as the court's makeup has changed, there has been a slow drift back toward interpreting the Constitution on the basis of the original text and/or what appears to be original intent. Those who are unhappy with this direction, rather than following proper procedures to amend the Constitution, now argue that judges should be appointed who will interpret the Constitution in light of "today's circumstances" and their own preferences for outcomes. Advocates of the "living constitution" frequently advocate the addition of "active rights," such as the right to a home, free medical care, etc., as contrasted with "passive rights," such as freedom of speech, religion, press, assembly, the right to bear arms, etc.

"Active rights" force one person to provide for, or subsidize, another person, unlike "passive rights" which do not diminish another's liberty. If you think the "government" should pay for your medical insurance, you are advocating that some other person should pay your bills. Think about someone you personally know (rather than the collective "rich") who has become at least moderately wealthy by working hard and being innovative, providing goods, services and jobs desired by fellow citizens. Then ask yourself, "What moral right do I have to claim a portion of that productive person's income?" The farther the nation goes down this slippery slope, the more "takers" and

fewer "providers" there will be, and, at the end, all will share in the poverty of "active rights."

America's founding fathers clearly understood the dangers of "active rights," which is why they kept them out of the Constitution. The American Republic can correct the occasional abuse of the Constitution, such as the bank bailout legislation, but it may not survive the wholesale ignoring of the original text by allowing judges to suddenly create "active rights." The next time some politician proposes a scheme to "help the people," look at the text of the Constitution (which is more clearly written and shorter than many magazine articles). If you cannot find the constitutional power for the proposal, consider its long term consequences - and, in most cases, I think you will conclude it is a bad idea.

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