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Restoring the Constitution

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In this 2012 article, Professor James Ceaser reminds readers that political constitutionalism must complement legalistic constitutionalism if government expansion is to be reined in. Courts are not able to discipline government by themselves. It ultimately falls to statesmen and parties acting in the political realm, and by political means, to defend the limited government our Constitution outlines.

A widespread sentiment today, especially among conservatives, holds that if America could just get back to the Constitution, the nation would go a long way to resolving its greatest challenges. This sentiment has produced celebrations of our Constitution at Tea Party rallies, the printing and distribution of tens of thousands of handsome pocket versions, and a solemn reading of the entire document in the House of Representatives last year.

Such displays of enthusiasm are heartening, but they are no substitute for hard analysis. If the Constitution is being offered as the solution, it is necessary to specify what the problem is and how a revival of constitutionalism would help to fix it.

America's future well-being is threatened today by a federal government characterized by a stunning lack of discipline, as it piles up debt at an unsustainable rate. The symbol of this pathology in the public mind is Greece, a nation that has spent itself into bankruptcy without apparent shame or regret. By coincidence, the authors of The Federalist also pointed to the example of Greece, classical Greece in their case, to illustrate the greatest challenge to popular government in their day: majority faction. By this James Madison meant the enactment of policies, usually encouraged by demagogic leaders, that threaten "the rights of other citizens, or...the permanent and aggregate interests of the community."

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Although our Greek problem may look different on the surface, it is in reality a version of the same thing. A majority from one generation is dispossessing the generation to come. Political leaders try to hide this fact by calling new spending programs "investments," but fewer and fewer citizens are fooled by such obvious sophistry. Thomas Jefferson best expressed the injustice and irresponsibility of intergenerational factionalism: "suppose that...[a previous] generation had said to the money lenders...give us money that we may eat, drink, and be merry in our day;... Would the present generation be obliged to apply the produce of the earth and of their labour to replace their dissipations?"

SOLVING THE RIDDLE

If undisciplined government is the problem, in what way can the Constitution help? Taking this question to the oracle at Delphi, the answer might be: in one sense not very much, but in another sense quite a lot. Distinguishing the two is the key to solving the riddle.

The first sense—legalistic constitutionalism—understands the Constitution as a set of rules that can decide policies or cases; these rules are of a sort that can offer definitive answers and that could be employed and enforced by courts. The second sense—political constitutionalism—understands the Constitution as a document that fixes certain ends of government activity, delineates a structure and arrangement of powers, and encourages a certain tone to the operation of the institutions. By this understanding, it falls mostly to political actors making political decisions to protect and promote constitutional goals.

Both senses of constitutionalism are important, and they can often work together in defense of the Constitution. But when it comes to addressing undisciplined government, legalistic constitutionalism by itself is inadequate and often even counterproductive. Political constitutionalism must assume the principal role in any campaign for a constitutional revival. Here, however, the nation faces what may be its greatest challenge: as a concept or idea, political constitutionalism has all but slipped from our grasp. The dominant understanding today is shaped by the legalistic view, which has become the nation's "epistemological" default option. Until the meaning of political constitutionalism can be recovered, calls for a return to the Constitution will be to little avail.

The two labels—legalistic and political—suggest something about the character of the two approaches. Legalistic constitutionalism refers to formulas and rules. It makes one think immediately of lawyers and judges spinning elaborate constitutional doctrines and devising multi-pronged "tests." Like ancient Egyptian priests, these legal experts speak an occult jargon that few citizens can grasp. Political constitutionalism, by contrast, is premised on the view that much, even most, of what determines whether the Constitution is being respected stems from the accumulation of ordinary policies on issues ranging from education to energy and to the environment. The real work of defending the Constitution accordingly falls to statesmen and parties acting in the political realm and by political means; they must embrace positive programs to protect the Constitution that go well beyond anything that courts could determine.

Understanding the concept of political constitutionalism has been made even more difficult in recent years because of a new doctrine embraced by numerous law professors—always law professors!—labeled "popular constitutionalism." This muddled idea adopts roughly the same understanding of constitutionalism as the legalistic view, only it invites the public, not judges, to make many of the legal decisions. It is a doctrine directed against courts and judicial review. Though some conservatives have swallowed this bait, popular constitutionalism has been championed mostly by liberals, who fashioned it during the Bush years in the anticipation of a possible conservative majority on the Supreme Court.

Political constitutionalism is a different thing altogether from popular constitutionalism. Political constitutionalism is distinguished from legalistic constitu-

tionalism (and popular constitutionalism) not chiefly on the grounds of who is doing the talking but on the grounds of what kind of instrument the Constitution is. Conservatives today need to take their bearings from political constitutionalism. They need to get past their own obsession that the sum and substance of serious constitutional thinking consists in the assault on the principle of judicial review or activism. Judges and courts may well need to be held to greater account, but this issue is a minor sideshow to the main event of recapturing the proper meaning of constitutionalism.

CONSTITUTIONALITY AND POLITICAL JUDGMENTS

Two examples from contemporary politics illustrate how legalistic constitutionalism falls short of dealing with our current problem. During the Republican nomination campaign this year, Texas Governor Rick Perry, then the front-runner, was pressed in the debates about previous comments he had made questioning the constitutionality of social security. Perry was being asked to follow out legalistic logic and say that social security should be declared unconstitutional and eliminated. Sensing the political risk, Perry backed off and disclaimed interest in engaging in that worst of conservative sins, "a nice intellectual conversation." All the air seemed to be let out of the constitutional balloon: how was the Constitution the great solution if it was to be dismissed at the first encounter of political difficulty?

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It understandably took the governor some time to begin to explain what he had in mind, although even then, with his rhetorical limitations, the argument remained muddled. As someone running for the presidency, not for Chief Justice of the Supreme Court, Perry struggled to convey that his main task was political—to set the nation in a direction that would restore constitutional balance between the levels of government. It made sense therefore to challenge a way of thinking about the Constitution that grew up during the New Deal era, according to which the federal government was understood to possess plenary power to legislate and administer affairs in virtually any matter of domestic policy. With the acceptance of this view, it is no surprise that the federal government came to operate without discipline. To have completed an explanation on these lines, Perry would have had to make clear that the job of a political leader acting to defend the Constitution is not to undo every past obligation that has been voted into law, but to chart a course from where we are now. The Constitution is a guide to political action, not a punishment pact.

Another example of the risks entailed by legalistic constitutionalism is found in the lawsuit currently pending against the Orwellian-named Patient Protection and Affordable Care Act, better known as Obamacare. The main legal challenge is to the individual mandate, which requires Americans not otherwise insured to purchase health insurance, with a financial penalty assessed for failure to comply. The suit charges that the federal government has no power under the Commerce Clause to impose such a penalty. Legal analysts are largely in agreement that this challenge could likely have been avoided if the law had designated the penalty as a tax. For political reasons its supporters never did so, although now the Obama Administration is claiming that it can be considered—just for legal purposes, of course—a tax.

Commentators on both sides have begun to speak of a "landmark case" that will define federal power. Here we see all the limitations of legalistic constitutionalism. Does it not seem odd that the "great" constitutional question focuses on an avoidable point, while the main substantive matter—whether the federal government could tax individuals in this way, or, even more importantly, whether the federal government can take full control of this area of economic and social activity—need never have raised a serious constitutional issue? Doesn't this way of looking at matters trivialize the Constitution, as if it were concerned more with procedural rules than with broad ends?

The point here is not to criticize questioning the legal basis of the individual mandate, which surely is an important matter. It is instead to remind Americans that this legal aspect of the policy is just one dimension of constitutionalism. If the legal question alone is thought to determine constitutionality (which is the dominant way of thinking), and if the Court holds the law to be constitutional, no space is left afterwards for questioning the constitutionality on the basis of another, larger criterion. With so many people now having bought into a legalistic understanding of constitutionalism as the criterion of constitutionality, conservatism would have suffered a devastating blow: everything liberal would be constitutional.

It is counted a distinct rhetorical advantage these days to boast that one is not a lawyer. A gift of this magnitude would be a terrible thing to waste. So I am tempted to conclude, speaking as a mere professor of political science, that an examination of Commerce Clause cases over the years suggests that, at the end of the day, this may be one of those areas in which no effective or sensible legalistic rule can ever be devised to settle the constitutional boundary. It may be further asked, in fact, if the entire domain of determining enumerated powers can ever be settled by a legal rule. Americans today need to free themselves from the monopoly of legalistic constitutional thought; they need to recapture the view that constitutionality often can only be decided by political judgments.

RECOVERING POLITICAL CONSTITUTIONALISM

To judge by the views of many of our younger citizens, the dominion of legalistic constitutionalism has become nearly absolute. Or so I conclude from surveying the undergraduates who enroll in my introductory American Government course at the University of Virginia. Their mental map of constitutionalism has three features: (1) the Constitution's meaning is made known through legal rules decided mostly by the Supreme Court; (2) the Supreme Court's decisions are final and definitive (unless or until they are replaced by another decision); and (3) the most important constitutional matters revolve around individual rights. Assign students today a case about gay marriage, abortion, or prayer in the schools—where someone claims a right to have been violated—and they feel comfortably at home in Constitutionland.

The most important implication of the Students' Constitution is found not in what it affirms, but in what it excludes. Today's students assume that if a matter is not or cannot be brought into a court, then it is not a constitutional matter. They distinguish between a constitutional realm, which is legalistic, and a political realm, which encompasses everything else, ranging from subsidies of pork bellies to efforts to protect states' prerogatives. The category of promoting constitutional objectives through political means does not exist. From this way of thinking follows the further notion, utterly antithetical to political constitutionalism, that what the Supreme Court does not declare to be unconstitutional is constitutional.

In an earlier era, I surmise that the Students' Constitution would have considered expressions of constitutionalism not only in court decisions but also in the positions of political officeholders and in the programs of political parties. Students would have expected key constitutional questions to be debated by the parties and within the Congress before being "decided" in statutes and policies. Such debates would of course have had a legalistic element to them—the Constitution is, after all, the supreme law of the land—but the arguments would often connect a legal position to a political program designed to sustain a broad constitutional objective.

Political constitutionalism consists of the public presentation of views of what is (or is not) constitutional policy, not just in a legal sense, but in a way that looks to the goals the Constitution was meant to promote and the kind of government it was designed to create. Political constitutionalism was once a concept widely understood. Virtually no one before the 1960s would ever have thought that courts should—or could—be tasked with resolving all, or even most,

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constitutional issues. Very few would have thought that the Constitution was exclusively or primarily a matter for determination by legal experts operating in a judicial setting. Instead, most would have expected something as fundamental as the Constitution to be defended by political means in a political context. Political constitutionalism, a concept that had no name because it was so much a part of the nation's thinking, would have been seen as the main "instrument," aided by judicial interpretation, separation of powers, and federalism, in maintaining the Constitution.

It is important to distinguish political constitutionalism from other kinds of political programs or ideologies. Political constitutionalism covers only part of the political landscape, the part touched and guarded by the Constitution; it does not seek to stretch its authority beyond its domain. The Constitution by design leaves most policy decisions to the discretion of governing officials. It does not, for example, dictate what kind of foreign policy to follow—internationalist or isolationist, assertive or pacifist; nor does it prescribe a specific economic policy, whether Keynesian or monetarist. Political constitutionalism is not laissez-faire, Hayekian, liberal, or conservative. These political schools all contain premises about politics that do not derive from the Constitution. Each school can pursue its aims, up to a point, under the Constitution. A true constitutionalist may therefore be a certain kind of liberal or conservative, but only a liberal or conservative within the boundaries and jurisdiction fixed by the Constitution. Those who begin from ideology and pretend that the Constitution requires their preferred policy goals are not engaged in elaborating a genuine program of political constitutionalism. They are committing constitutional fraud.

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Some of the properties of political constitutionalism are best understood by drawing contrasts with the parallel characteristics of legal constitutionalism.

(1) Political constitutionalism has a different understanding of "decision" than that found in legal constitutionalism. A decision by a court, ideally at any rate, is a principled legal ruling, offered as authoritative or final. A decision in the arena of political constitutionalism, by contrast, is an outcome determined by the existing array of political forces, at least insofar as the contending parties have offered constitutional arguments. What other meaning could "decision" have? The fact that something was once decided one way does not preclude a matter being reopened later and decided differently. A frequent claim of liberals today—that the New Deal and subsequent precedents settled that the federal government has full power to regulate everything in the national interest—is nothing more than a partisan debating point. Something that was "settled" at one point may become unsettled at another. A precedent established in response to one great crisis, e.g., the Depression, can be challenged in light of a new crisis, e.g., the Debt.

(2) Political constitutionalism rests on a different standard of judgment from legalistic constitutionalism. Legalistic constitutionalism seeks to decide by a rule; political constitutionalism eyes conditions and overall results. Proportion and quantity therefore count more than fidelity to a formula. On a judgment, for example, about the constitutional division of powers between federal government and the states, the legalist might ask if a law, passed under the authority of the Commerce Clause, is in accord with a legal formula for regulating commerce, or if a law, passed under the tax and spending powers, meets some test that guards state choice in exchange for receiving (or not being denied) certain funds. Political constitutionalism, by contrast, demands consideration of other questions: Has the net sum of all the laws and regulations on the books produced a result in which state governments have lost their will or capacity to act with the degree of autonomy and vigor that the Constitution envisaged? Can states today be so easily coerced or browbeaten—are they so dependent on federal largesse—that they have lost the degree of autonomy that the Constitution intended for them? Have systems of sharing powers between the federal government and states reached

a point that the design of the Constitution is now in jeopardy?

It follows that the two approaches have a different understanding of a solution. Political constitutionalism is less concerned with checking the box for a particular method than in securing a net result over a longer time period. It will consider the direction in which we should now be moving, e.g., more or less autonomy for state governments, rather than fidelity to a prevailing rule. The corollary to this point is that political constitutionalism allows for common sense, whereas common sense is often beside the point in legalistic reasoning. Courts do what courts do. They often cannot reach behind the law to the general policy. As long as a law meets a certain threshold, it passes legal muster. Political constitutionalism goes to the broader policy. In instances, for example, of laws passed under the Commerce Clause, political constitutionalism will focus on whether the purpose of the policy is in fact to facilitate commerce among the states, or whether instead the real aim is to exercise a plenary national police power to regulate conduct or mores. The error in these examples is not with legalistic reasoning, which has a proper and important role to play. It is in thinking that legalistic reasoning is the sole and definitive form of constitutional thought. This misconception is what holds Americans in intellectual bondage and threatens a directive role for the Constitution.

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(3) Political constitutionalism has a different standard of consistency than legalistic constitutionalism. Under legal constitutionalism, something is either constitutional or it is not, according to a rule. If A is allowed and B is analogous to A, then B must be allowed. If a court cannot square two situations according to an existing rule, but wishes to have them squared, it will look for a new rule. Political constitutionalism is concerned with promoting a goal, not with achieving perfect consistency. It is the direction that counts most. Just because A was done (wrongly) in the past is no reason why B, which is also wrong, should be done today. Two wrongs do not make a right. And though the first wrong, for many reasons, cannot or should not be undone, the second wrong should not be allowed to proceed.

Political constitutionalism puts up with a good deal of inconsistency because this is the way the political world works. Liberalism did not win its war for Big Government in one fell swoop under the auspices of the open declaration of the legal rule that the federal government has a plenary economic and welfare police power. The same is likely to apply in the second war, now underway, to place limits on the federal government. The big changes of government power are often decided inch by inch in the course of many battles on different fronts. The only question is whether the commanding officers are in sufficient possession of their wits to appreciate the real character of constitutional warfare. Only then can they develop a sound strategy based on reflection and choice.

THE LIBERAL TROJAN HORSE

Understanding the formal properties of political constitutionalism is a necessary first step in reviving the concept. But it can only be restored if it is put to work in the form of an actual program, which means that there are likely to be competing programs that are offered. Political constitutionalism is often partisan, as is evident from examining the positions of the political parties for much of the 19th century. Each party had its own interpretation of the Constitution which it pressed openly and vigorously. Only in our times has political constitutionalism died out or been turned into the deceptive exercise of hiding a party's real intent.

What would be added to our politics today by the articulation of a program of political constitutionalism? No one can say for sure, since the result will depend on what is proposed. It is a near certainty, however, that bringing the Constitution back into our politics would operate, relative to where we are today, to promote the principle of limits on government. It is hard to imagine reading the Constitution in any other way. Indeed, for just this reason proponents of

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Big Government over the past century have preferred for the most part to operate without the Constitution, usually disguising or obfuscating this fact.

Conservatives today have shown the greatest interest in restoring the Constitution. But they face major obstacles of their own in developing a credible program of political constitutionalism. Many conservatives need to resist the temptation to "ideologize" the Constitution by imagining that their political theory is not just permitted under it, but dictated by it. It cannot be forgotten that the Constitution was instituted to replace the Articles of Confederation in order to allow for the exercise of broad powers in certain areas. How such powers are to be used is left to the winners of elections, who are entitled to promote their ideas of good government within the boundaries of the supreme law. If conservatives believe that some of these powers are being exercised in an undisciplined way, it is for a conservative party to make this case. The Constitution cannot do all the work that a party must do on its own. To think otherwise, and to hold that courts could enforce most conservative doctrines, amounts to legalistic thinking with a vengeance.

Conservatives should have little difficulty, however, in articulating a compelling program that includes an emphasis on the limitation of federal powers and on a proper understanding of the character of constitutional rights. As for the first point, wherever the exact line of federal authority begins or ends, conservatives should be able to convincingly show that federal authority in many areas has gone too far. Providing greater power to the states would not only redress a constitutional imbalance, it would set a strong precedent for restraint, teaching the lesson of limitation. As for the conception of rights, conservatives must reject, as a matter of constitutional standing, the liberal wish list of social and economic rights that has been proclaimed since the 1940s. As defined in a recent manifesto, signed by many intellectuals, "the great principle of liberalism" is "that every citizen is entitled by right to the elementary means to a good life...[which includes] rights to housing, affordable health care, equal opportunity for employment, and fair wages, as well as...a sustainable environment for ourselves and future generations." The various items on this list may or may not be sound objectives of social policy, but none represents an explicit constitutional right that requires federal action annulling or canceling structural limitations on governmental powers. The explicit constitutional rights are limited in number and derive from an understanding of natural rights, not the new kind of rights that liberals have sought to import into the Constitution. Only by insisting on this point and rethinking the kind and level of benefits that are in line with what the nation can afford will it be possible to resolve the pathology of undisciplined government.

There is an obvious reason why liberals have sought to erase the concept of political constitutionalism from our collective memory. It is that the actual Constitution stands as an impediment to liberal political theory and political ambition. Ask liberals what they want from government and they will readily admit to the following two propositions: (1) that the federal government should possess any power that the majority believes operates for the public good; and (2) that the public good is promoted by enacting a set of new economic and social rights said to be fundamental to human beings in a modern society. Whether this theory of government is good or bad, it is not constitutional, a point that Progressives themselves originally emphasized at the beginning of the 20th century. The leading Progressive thinkers at that time launched an open assault on the Constitution, arguing that the powers given to the national government were inadequate to meet the needs of a modern society and that the structural division of authority among our institutions made effective administration impossible. (If anything, Progressive theorists probably exaggerated the constitutional impediments to federal power, preferring to make the Constitution look like a far more laissez-faire document than it was, in order to discredit it.) The Progressives favored a "living constitution,"

which in their account was said to be wholly at odds with the actual Constitution.

This open attack on the Constitution failed to win the support of the American people. Grasping this error, the liberal heirs of the Progressives changed tactics, replacing frankness with stealth. Instead of opposing the living constitution to the actual Constitution, they decided to bring the living constitution, like a Trojan Horse, inside the Constitution. At first the doctrine of the living constitution was interpreted to mean that the Supreme Court should step aside and allow the political branches of the federal government to do their will; later, with a transformation of legal philosophy to embrace progressive ideas and a more friendly Court, the doctrine was conveniently amended to allow judges to enact parts of the living constitution that legislatures were too timid to pass. Finally, to assuage the misgivings of some who fretted about the intellectual integrity of a process of judicial interpretation that counseled ignoring the actual text of the Constitution, liberals announced that none of this mattered anyhow. The Constitution, they declared, could be effectively altered by what the public decided in a critical election: the people spoke in 1936 against the written Constitution, settling this issue for all time.

These arguments of distortion and evasion worked for a generation. Ignoring our Constitution became our constitution. Now that we face a new crisis created by undisciplined government, the moment is ripe for a revival of political constitutionalism. Without it, we shall soon be a constitutional people in name only. ■

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