

# RECOVERING THE WISDOM OF THE CONSTITUTION

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The plunge in Americans' confidence in their government over the last few decades is one of those social facts so large that it must have many causes.<sup>1</sup> Surely one of them is that our government so often seems to have grown unwieldy, ineffective, and unaccountable.

Joint federal-state programs grow seemingly inexorably, unable to be reformed no matter how disappointing their results. The federal government inserts itself into every nook and cranny of American life, with no decision too local, or trivial, to escape its attention. Federal courts micromanage institutions—schools, prisons—and make policy judgments traditionally confined to legislatures on issue after issue. Companies face multiple and sometimes conflicting regulators in an atmosphere of pervasive uncertainty. Presidential orders revise laws without a vote of Congress. Agencies combine judicial, legislative, and executive powers while staying far removed from the control of voters.

The result of all of this is nothing so coherent as socialism, as constitutional scholar Michael Greve has remarked: Socialism implies a plan.<sup>2</sup> Instead

much of government becomes a series of shakedowns, special-interest deals, and programs that continue from inertia. This type of government can weaken the economy and civil society, but it cannot reach the lofty ambitions politicians set for it. And it is a far cry from the limited, deliberative government of divided powers that the Founders envisioned.

Take, for expensive example, the growth of Medicaid, a program that has repeatedly brought about fiscal crises for state governments without yielding much in the way of health benefits for its poor recipients. Medicaid allows state governments, within limits, to add people and services to the program, with the federal government picking up at least half the cost. In good times state officials can offer their voters two or more dollars of benefits for a dollar of taxes. In lean years the program is hard to pare back because state officials have to take away two or more dollars of benefits to save a dollar.

So the program expands: States exploit one another's taxpayers, who end up paying for more spending than they would if either the federal government or the states had full responsibility for

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funding and running the program. And federal and state officials blame each other for the frustrating results. We get more government, and worse government.

There can be no going back to the “original Constitution,” as some conservatives carelessly say, and we should not want to do that: the Reconstruction Amendments added to the document’s excellence and remedied its defects, and we should honor them. Nor should we insist on returning to the policies of some year of the distant past. Our Constitution would not deserve much respect if it were so impractical as to prevent government from adapting to changing circumstances. But we can avoid these mistakes while still appreciating the considerable wisdom in the Founders’ design, and particularly in the structural limits it placed on governmental power. Recovering that wisdom is no mere exercise in nostalgia, but would yield practical benefits.

The political culture of recent decades has encouraged us to look to the courts to effect that recovery. Conservatives have invested a lot of hope in the courts: in the idea that appointing the right justices and making the right legal arguments will reset our constitutional trajectory. They are right, to a point: The federal courts have an important

role in defending constitutional norms. The Supreme Court was right, for example, to set an outer limit to federal power by holding that Congress cannot simply make it illegal to refuse to purchase health insurance.

The task of recovery is too large to be plausibly entrusted in its entirety to the courts. They cannot set right all that is awry with contemporary government. They cannot do that for reasons of politics, of prudence, of institutional capacity, and of judicial restraint. The courts, for example, rightly treat the balance of power between the executive and legislative branches on matters of war and peace as a political question. Because our political culture thinks of the courts as the arbiters of all things constitutional, unfortunately, it tends to treat any governmental practice that the courts have left in place as constitutionally legitimate.

The rise of the Tea Party movement has in recent years begun to counteract this tendency. That movement is in part a revival of popular interest in constitutionalism. Instead of treating the Constitution as the property of lawyers and judges, it proposes that legislators, and even citizen-activists, have an independent duty to evaluate the constitutionality of legislation. Moved by this senti-

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ment, the U.S. House of Representatives now requires legislation to identify its constitutional basis.

The Tea Party has also implicitly resisted the modern tendency to treat the rights protections spelled out in the Constitution's amendments, rather than the structural provisions in its main body, as the most important element of our constitutional system. The individual mandate to buy health insurance ran into trouble not because it violated some specific prohibition in the Bill of Rights, but because it could not be justified as "necessary and proper" to execute the Article I powers of Congress.<sup>3</sup> We can infer from the few and limited instances in which the Constitution authorizes Congress to commandeer individuals that such commandeering outside those contexts is presumptively improper.

The constitutionalist turn in conservative politics is so new—and politics so busy and distracting an enterprise—that its philosophical and practical implications remain to be worked through. A few of those implications, however, are clear enough.

*This constitutionalism should be political rather than legal.* Constitutional advocacy in the courts is tightly bound up with Supreme Court precedents. The Court gives those precedents great weight because of concerns about both legal stability and institutional authority. A legislative argument about the Constitution need not be constrained to the same degree. A conscientious legislator will give precedents some weight, certainly: He will want to take into account the likelihood that a bill he is considering supporting will be struck down by the courts; he should have a healthy regard

for stability; and he should be willing to be persuaded by the Supreme Court's analysis of a constitutional question.<sup>4</sup>

He may from time to time, however, decide that the Court has gotten it wrong. He may decide, for example, to oppose a bill that he expects the courts would uphold, on the ground that it does not accord with his own understanding of the Constitution. Many conservative legislators have taken exactly this tack with respect to gun regulations: For decades they called some of these regulations unconstitutional, even before the Supreme Court finally concluded that the Second Amendment does indeed protect an individual right.<sup>5</sup>

The conscientious legislator may even act on constitutional reasons that he does not wish to move the courts. Let's say a legislator were considering a health-care bill along the lines of Obamacare, but a version that lacked a specific objectionable provision such as the individual mandate. The legislator might oppose it because he thought it too expensive, or unlikely to work, or other reasons of that nature. He might also, though, oppose it for exceeding the legitimate powers of the federal government.

The argument would be that the Constitution establishes a presumption against federal activity that can be defeated only by strong considerations. The federal government is defined as one of limited powers, and the Tenth Amendment reiterates that the states and the people retain all others. To judge a proposal for a federal program against the Constitution will therefore require answering such questions as whether the states and the people could serve the purpose of that program

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without federal involvement. In some cases it may be that federal overreach is so gross that the courts should step in. In other cases, though, the question will turn on quintessentially legislative determinations: Is the law necessary? Are its means well proportioned to its ends? Are there better ways of achieving those ends?

*Political constitutionalism therefore involves a less restrictive form of reasoning than legal constitutionalism does.* The constitutionalist legislator, or citizen, will not always need to find a clearly articulable rule to decide that this proposal goes too far while that one is appropriate as a constitutional matter—the sort of legal rule we would want the courts to apply in striking down legislation. He will be able to draw on a wider range of considerations than the justices: He might, for example, decide that our hypothetical health-care law would warp the national character by making the federal government’s decisions too important to citizens’ health.

*A political constitutionalism should be practical and incrementalist rather than apocalyptic.* In rejecting a judicial monopoly on constitutional interpretation, the constitutionalist also gives up the fantasy that any particular institutional arrangement can guarantee perfect fidelity to the Constitution. If he sees laws and programs that do not fit with our constitutional commands and ideals, he will not vainly demand that they

all be abolished straightaway. Instead he will move patiently and intelligently to bring government closer to its proper bounds. If he finds himself unable to abolish a program he thinks a poor fit for our constitutional order, he will try to reform it to render it less obnoxious or destructive.

*A political constitutionalism should be coalition-minded rather than dogmatic.* Different conservatives will reach different judgments about particular laws and programs. Some conservatives will take a more Jeffersonian view, some a more Hamiltonian one, about the proper scope of the federal government. Other disagreements will concern what is achievable in the near term, and how to go about achieving it. Conservatives should not treat the existence of these disagreements as a scandal. Conservatism should be home to everyone who takes seriously the task of strengthening the constitutional structure of a limited, accountable government that serves rather than masters civil society.

*A political constitutionalism must seek to appeal to the public.* It must do this in two senses. First, it must involve the public in constitutional deliberation. It is a deep public commitment to the Constitution, more than any institutional arrangement, that is its chief guarantor. We had a more modest federal government for most of our history for many reasons, but it may be safely said that a political culture skeptical of federal

power was a more important factor than the exertions of the Supreme Court.

At key moments political leaders have made arguments to rally the people to the defense of our founding ideals. Abraham Lincoln explained that the logic of the Constitution and Declaration of Independence was incompatible with slavery. Closer to our own day, Ronald Reagan revived the language of constitutionalism, referring to the Founders more than his six predecessors combined. In our time, conservatives have to make the case to the public that our constitutional structure has eroded, that its erosion has baleful effects, and that we can do something about it.

Part of making that case is drawing out the constitutional dimension of everyday policy disputes. The REINS Act, requiring Congress to vote on major regulations before they can take effect, is not just a way to promote economic growth, although it is that; it is a way of reviving the separation of powers. Replacing much of Medicaid with tax credits that enable beneficiaries to join the regular health-insurance market is sound health policy, but also sound federalism policy. Reforming Medicare so that it no longer attempts to set prices throughout the medical sector is a way to make American health care less expensive and more efficient, but it is also a step toward the modest federal role envisioned by the constitutional design.

Conservatives should not see the making of public arguments about the Constitution as a last resort to deploy only when institutional safeguards have failed. No less an authority on the purpose of the Constitution than James Madison suggested that such argument would be one of the chief means of making it effectual. Speaking in favor of the Bill of Rights, Madison conceded that “[i]t may be thought all paper barriers against the power of the community are too weak to be worthy of attention.” His answer to that objection: “[Y]et, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one mean to control the majority from those acts to which they might be otherwise inclined.”<sup>6</sup>

Confronted by presidential lawlessness, some conservatives are tempted to throw up their hands. They conclude there does not seem to be much conservatives can do about it besides such extreme, and for that reason impractical, measures as impeachment. But there is something we can do about it: We can make the case that the president must be bound by the laws and that executive dereliction of duty is a threat to national well-being. By making such arguments, we could try to reestablish a political norm by raising the cost of violations of it and increasing the odds that future presidents will feel bound by it.

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The second sense in which political constitutionalism must appeal to the public is that it must make itself attractive. Our constitutional order was worth adopting, and remains worth preserving, because it protects our liberty and promotes the general welfare. That's what the Founders had to demonstrate, and what we must demonstrate anew. We have to show that our most vexing problems need not be entrusted to the care of a distant elite of micromanagers, but can instead be addressed (sometimes even solved) by free markets and self-government.

We have to show that we can have wider access to health care, an affordable safety net, opportunities to learn, and the like, without granting ever more power to government. Sometimes we will be able to make progress by ending ill-considered government policies,

sometimes by replacing them with ones more respectful of human nature, economic incentives, federalism, and individual rights. A constitutionalist orientation is not enough to make this showing possible: A detailed understanding of particular policy controversies will also be necessary, and so will political judgment. That orientation should, however, be the starting point for political reflection and choice.

In America, what conservatism chiefly means is the conservation of our political inheritance from the Founders. That task is no simple or passive one. It entails protecting it from external attack and internal corrosion, interpreting it anew for each generation, and adapting it to meet ever-changing circumstances. The point is not to keep the Constitution in tune with the times; it is to keep the times in tune with the Constitution.<sup>7</sup>



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# SOURCES

## The Problem: The anxieties and worries of Middle America PETER WEHNER

1. Allstate/*National Journal* Heartland Monitor Poll XVI, conducted April 5–9, 2013.
2. James Carville and Stan Greenberg, *It's the Middle Class, Stupid* (New York: Plume, 2012), 34.
3. “Being In the Middle Class Means Worrying About Falling Behind,” *National Journal*, April 25, 2013.
4. Pew Research Center, “The Middle Class: Key Data Points from Pew Research,” January 27, 2014.
5. Eduardo Porter, “America’s Sinking Middle Class.” *New York Times*, September 18, 2013, B1.
6. Carville and Greenberg, 49.
7. Jim Tankersley, “Economic mobility hasn’t changed in a half-century in America, economists declare.” *Washington Post*, January 22, 2014, A1.
8. It is worth noting the party and ideological self-identification of these respondents: Thirty-four percent identified themselves as Democrat, 25 percent Republican, and 35 percent independent, but 39 percent said they were conservative, 22 percent liberal, and 35 percent moderate.

## The Solution: A conservative governing vision to restore America's promise YUVAL LEVIN

1. So, for instance, Paul Krugman can write: “Start with the proposition that there is a legitimate left-right divide in U.S. politics, built around a real issue: how extensive should we make our social safety net, and (hence) how much do we need to raise in taxes? This is ultimately a values issue, with no right answer.” Like many on the Left, he takes the essential question of our politics to be exactly how much of the Left’s agenda should be adopted. (“The Closing of the Conservative Mind,” *New York Times*, May 25, 2013, <http://krugman.blogs.nytimes.com/2013/05/25/the-closing-of-the-conservative-mind/>.)
2. As former representative Barney Frank put it at the Democratic National Convention in 2012, “There are things that a civilized society needs that we can only do when we do them together, and when we do them together that’s called government.” Similarly, in his second inaugural address, in 2013, President Obama sought to depict individual action as the only alternative to government action, saying: “No single person can train all the math and science teachers we’ll need to equip our children for the future, or build the roads and networks and research labs that will bring new jobs and businesses to our shores. Now, more than ever, we must do these things together, as one nation and one people.”
3. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, Clinton Rossiter, ed. (New York: Signet Classics, 2003), 378.
4. Friedrich Hayek, *The Constitution of Liberty* in *Collected Works of F.A Hayek Edition*, Vol. 17 (Chicago: University of Chicago Press, 2011), 53.

## Health-care reform to lower costs and improve access and quality JAMES C. CAPRETTA

1. See Ricardo Alonso-Zaldivar and Dennis Junius, “Poll: Obama Health Law Fails to Gain Support,” *Associated Press*, March 28, 2014, and David Nather, “The Obamacare Enthusiasm Gap,” *Politico*, March 31, 2014.
2. “The Budget and Economic Outlook: 2014 to 2024,” Congressional Budget Office, February 2014, 117–27.
3. Congressional Budget Office, “Insurance Coverage Provisions of the Affordable Care Act—CBO’s February 2014 Baseline,” February 2014.

- “Adolescent Premarital Childbearing: Do Economic Incentives Matter?” *Journal of Labor Economics* 13 (1995): 177–200.
18. Adam Carasso and C. Eugene Steuerle, “The Hefty Penalty on Marriage Facing Many Households with Children,” *Marriage and Child Wellbeing* 15 (2005): 157–175.
  19. Avner Ahituv and Robert Lerman, “How Do Marital Status, Work Effort, And Wage Rates Interact?” *Demography* 44 (2007): 623–647; Liana Sayer et al., “She Left, He Left: How Employment and Satisfaction Affect Men’s and Women’s Decisions to Leave Marriages,” *American Journal of Sociology* 116 (2011): 1982–2018.
  20. Andrew J. Cherlin, “Between Poor and Prosperous: Do the Family Patterns of Moderately-Educated Americans Deserve a Closer Look?” in Marcia Carlson and Paula England (eds.), *Social Class and Changing Families in an Unequal America* (Stanford: Stanford University Press, 2011): 68–84.
  21. Adam Carasso and C. Eugene Steuerle, “The Hefty Penalty on Marriage Facing Many Households with Children,” *Marriage and Child Wellbeing* 15 (2005): 157–175; Melissa S. Kearney and Lesley J. Turner, “Giving Secondary Earners a Tax Break: A Proposal to Help Low- and Middle-Income Families,” Discussion Paper 2013-07 (Washington, DC: The Hamilton Project, Brookings Institution, 2013).
  22. Carasso and Steuerle, 2005.
  23. “The President’s Marriage Agenda for the Forgotten Sixty Percent,” in *The State of Our Unions: Marriage in America 2012* (Charlottesville, VA: National Marriage Project and Institute for American Values, 2012).
  24. Benjamin Scafidi, “The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and All Fifty States” (New York: Institute for American Values and Georgia Family Council, 2008).
  25. Carasso and Steuerle, 2005; Aaron S. Yelowitz, “Will Extending Medicaid to Two-Parent Families Encourage Marriage?” *Journal of Human Resources* 33 (1998): 833–65.
  26. Robert Stein, “Taxes and the Family,” *National Affairs* 2 (2010): 35–48.
  27. See, for example, Edward P. St. John and Michael David Parsons, *Public Funding of Higher Education: Changing Contexts and New Rationales* (Baltimore: Johns Hopkins University Press, 2004).
  28. Robert Lerman, “Can Expanding Apprenticeship Strengthen American Families?” (Charlottesville, VA: Institute for Family Studies, 2013).
  29. James J. Kemple and Cynthia Willner, “Career Academies: Long-Term Impacts on Work, Education, and Transitions to Adulthood” (New York: MDRC, 2008).
  30. Lerman, 2013.
  31. Ron Haskins and Isabel Sawhill, *Creating an Opportunity Society* (Washington: Brookings Institution, 2009): 229–30.
  32. Ibid.
  33. Kristin A. Moore et al., “Marriage from a Child’s Perspective: How Does Family Structure Affect Children, and What Can We Do about It?” *Child Trends*, June 2002.

### Restoring America's promise by recovering the wisdom of the Constitution RAMESH PONNURU

1. In 1972, 70 percent of Americans told Gallup they had a “great deal” or “fair amount” of “trust and confidence in the federal government when it comes to handling domestic problems”; in 2013, 42 percent did; <http://www.gallup.com/poll/5392/trust-government.aspx> (accessed March 27, 2014).
2. <http://www.aei.org/article/politics-and-public-opinion/judicial/constitutional/bad-business-a-review-of-the-supreme-courts-term/> (accessed March 27, 2014).
3. The Constitution, Article I, Section 1, Clause 8: “The Congress shall have Power ... to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”
4. This was James Madison’s view. See his letter to C. J. Ingersoll of June 25, 1831.
5. The Constitution, Amendment II: “A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed”; *District of Columbia v. Heller* (2008).
6. <http://www.let.rug.nl/usa/documents/1786-1800/madison-speech-proposing-the-bill-of-rights-june-8-1789.php> (accessed March 27, 2014).
7. The oft-cited phrase originates with constitutional scholar Walter Berns.

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