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The Constitution's Political Deficit

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The Constitution's Political Deficit

Robin West

Professor Levinson has wisely called for an extended conversation regarding the possibility and desirability of a new Constitutional Convention, which might be called so as to correct some of the more glaring failings of our current governing document. Chief among those, in his view, are a handful of doctrines that belie our commitment to democratic self-government, such as the two-senators-per-state makeup of the United States Senate and the Electoral College. Perhaps these provisions once had some rhyme or reason to them, but, as Levinson suggests, it is not at all clear that they do now. They assure that our legislative branch will not be even remotely representative, and that the Executive branch will likewise, at least on occasion, fail to represent the will of the people. This democratic deficit ought to cause us concern. We should at least have the luxury of debating the point.

Thus, I think Levinson's claim is essentially right, and I would like to make two friendly amendments to his proposal. There is, indeed, a worrisome democratic deficit in our own constitutional scheme. I suggest, however, that there are two additional problems with our constitutional practices, besides those Levinson has flagged for revision, that also impact detrimentally our democratic commitments. Echoing Levinson's framework, I would call the first of these two additional problems a "political deficit," and the second a "legal deficit." Our current dilemma exists not only because our written Constitution clearly tilts against representative democracy in the way Levinson decrives. Our constitutional practices also tilt against politics, democratic or otherwise, and the ordinary law - legislation - that is its product. These political and legal deficits also deserve our critical attention.

I. The "Political Deficit"

Current constitutional practices (not the text itself) tilt against politics by virtue of a phenomenon I have elsewhere called the "legal question doctrine." By the "legal question doctrine," I mean a threefold conflation of moral and political questions about the nature of good governance into constitutional questions, constitutional questions into legal questions, and ultimately, legal questions into adjudicative questions for courts. Moral and political questions about the nature of good governance thus become questions for courts, rather than questions for legislators or concerned citizens.

To elaborate very briefly, the logic of that conflation is as follows: under our current liberal constitutional arrangements, constitutional scholars, lawyers and justices quite routinely, even habitually, regard the most pressing moral and political problems facing our polity as "constitutional" questions. Thus, whether and
when a state *ought* to criminalize abortion or hate speech, or control the flow of guns on the street, or integrate schools, or allow gay couples to marry, or allow the executive to suspend the writ of habeas corpus; or whether the state, with our tax dollars, *ought* to provide for health care, child care, housing, or food for needy citizens who cannot amass the dollars to purchase them in unregulated markets; or, for that matter, whether citizens in more populous states *ought* to enjoy equal representation in the United States Senate - all of these, and hundreds of questions like them, are clearly moral questions about good governance. But, precisely by virtue of the fact that they are moral questions about how we ought to govern ourselves, they are therefore regarded by our community of constitutional scholars, lawyers, and judges as constitutional questions. Whether a state *should* criminalize abortion, then, is eclipsed by a different question: whether it would be constitutional for a state to do so. Likewise, discussion about whether we should criminalize hate speech or whether we should re-write our marriage laws to allow marriage by gay couples become matters of whether the constitution so mandates, rather than what a morally decent state ought to do. Whether we should control the flow of guns on our streets becomes a question of whether the state may constitutionally do so, and whether the state should provide welfare rights becomes a matter of whether or not the constitution so requires, or, secondarily, permits. And so forth.

Second: these constitutional questions, precisely because they are constitutional, become, by virtue of the "legal" status of the United States Constitution, questions of "law." A "constitutional question" is a "legal" question - not a political or moral question about governance. So, questions regarding whether or not a state might constitutionally criminalize abortion, hate speech, and so forth, or whether a state might be constitutionally required to provide for welfare or gun control, become, by virtue of this second transformation, questions about the content and meaning of our law. Third and finally, given the legacy of legal realism, these legal questions in turn become questions about what courts will and will not do: what they understand the law to be and how they will likely decide the question, should it be presented them. Thus, by this three-fold conflation, questions that on first framing were moral or political questions about governance - Should states criminalize this, that or the other? Do states have obligations to the needy? Should executives have a certain sort of power? - become purely legal questions about court decisions. Political questions become, through constitutionalism, questions about judicial behavior.

I have argued elsewhere that this is very bad for the content of our constitutional law, but what I want to urge here is that the "legal question doctrine" thus understood also occasions a serious "political deficit." Real moral inquiry into the nature of good governance happens in courts of law, rather than in political fora. Politics, as Aristotle envisioned, should consist of ethical reasoning among equal human beings about how to govern themselves. Understood as such, politics, practiced well, is the highest, most ennobling, most serious form of practical human reasoning that exists. But over the course of the last century, in an almost uninterrupted trajectory, we have delegated this serious, moral, ennobling work of political activity among and between political equals to the courts. And what has been the consequence? We have a library full of a hundred years of judicial reasoning, argument, and deliberation - some ennobling, some of it awfully pompous, and some just embarrassing - on the meaning of liberty, equality, democracy, and so forth. Meanwhile, Congress, a political branch, withers not so much from corruption, as from disuse. The Court *reasons*, ideally and occasionally, in an Aristotelian spirit: with its eye on liberty and equality, among equals, at least on the Court. The Congress, by contrast, merely *acts* - motivated by whimsy or by passion, for good reasons, bad reasons, or no reasons. This allocation of labor -- the Court engages in ennobling moral reasoning about good government and therefore in the philosophical and moral arts of politics, while the Congress does nothing but act, on the basis of its own or constituent "preferences" - occasions what I am calling the "political deficit." The "legal question doctrine" transforms political questions about the nature of good governance into legal questions. The work remaining for the political branch? Horse trading at best. True politics has been given over to courts.

II. The "Legal Deficit"

Although this might initially seem paradoxical, the combination of what Levinson calls the "democratic deficit" and what I am calling the "political deficit" inherent in U.S. constitutional law and practice lends
aid, from time to time in our history, to profoundly lawless, asocial and destructive impulses. By so denigrating the law-maker, we denigrate her product, which is ordinary law. Thus, the "legal deficit." Of course, our constitutional text and practice have, on a handful of important occasions, given "constitutional" comfort to a highly principled natural law. In such cases, text and practice have been a friend and ally to moral and righteous civil disobedience against unjust majoritarian inclinations, as expressed in morally noxious and politically destructive legislative action. Less remarked upon, however, is that our constitutional practice has also given constitutional comfort to the anti-legalist instincts of a very different and what might be called "hyper-individualist" strand of anti-legalism: a frontier-conquering, gun-wielding, tax-protesting, border-protecting, conception of liberty, which seeks, with constitutional help, to free the individual of all obligations to the social compact, neighbors, states, and even families, much less to the very "beloved community" of which Dr. King so eloquently spoke. Likewise, these days our anti-legalistic and anti-legislative constitutional practices give aid to the President, who seeks constitutional blessing for his instinct to be freed from ties not only under the domestic law that seeks to constrain his reach, but under international laws, treaties, conventions, and covenants that might do so as well. The constitutional and, hence, anti-legalist obligations and entitlements of such a commander-in-chief might well "trump" in his own mind and in his office the petty duties of fidelity to ordinary law.

We ought to view both phenomena as dangerous. Hyper-individualism can morph into a narcissistic and costly recklessness, just as a militarist executive unleashed from legal bonds, as well as other sorts of bonds that strengthen and recognize our shared humanity, might imperil the planet. A constitutional practice that preaches relentless suspicion of ordinary, voted-upon law, that persistently sees in politics the worst in us, and sees in a document that protects us against our ordinary politics the best of us, winds up casting a pall of potential illegitimacy over the legislative product. Constitutionalism preaches distrust of both majoritarian politics and of its product, ordinary law. This effect of Constitutionalism is what I'm referring to as the "legal deficit."

The political and legal deficits are at the heart, not the periphery, of our Constitutional practices. Together they create a tension with our democratic commitments that goes beyond the Constitution's mandated composition of the Senate and the machinations of the Electoral College. In fact, the political and legal deficits that are at the core of our constitutional practices might be best understood as the deep currents that legitimate the more explicit democratic deficit in the constitutional text that Levinson rightly decries. But whether or not that is right, the twin deficits I have described do other harm as well. Those deficits compromise our political, and hence our communitarian, lives. They make it difficult for us to regard our ordinary politics as ennobling. As an historical project, they make almost impossible what would be difficult in any event, namely, the attempt to democratize Aristotle's elite vision of the art of politics as ethical governance among civic equals. They make us distrust and disavow our political selves, all in the name of a higher law, and they make us disown the legal product - the ordinary law - that is and should be the prized result of our political conversations. True political engagement and struggle, and the law that might come from it, is one of the greatest achievements of communal life among civic equals. The political and legal deficits at the heart of constitutionalism compromise not only our democratic commitments, but our communal life.

What to do about all of this? A Constitutional Convention of the sort Sanford Levinson envisions may well address this. I would urge us to consider, if we are imagining reconstructed constitutitons, both a constitutional text and a set of constitutional practices, that are far more respectful of politics and law than those we have inherited. But such a convention, whether or not it is ever feasible (and whether it would yield such a product), is surely a long way off. In the meantime, there may be other ways of skinning this particular constitutional cat.

First, and as a growing number of popular constitutionalists are now arguing, our Constitution has, in the past, been changed by all sorts of political, social, and even individual means, not just amendment, judicial interpretation, or full-blown conventions. The Constitution does not, need it still be said, speak with one voice. We are a multitude, and the Constitution has many authors. There is, I believe, a largely
unacknowledged and dangerously anti-communalist, anti-legalist, and anti-political river of meaning that runs through it, which I have tried to articulate above. But there are other streams and byways of meaning. Non-judicial and decidedly non-dominant voices in our constitutional history have at times pointed us in the direction of constitutional meanings that have urged a broader, more inclusive, and more egalitarian politics, not an untrustworthy one that is at best constrained by wiser courts.

Second, a number of discarded and disused clauses in the actual text - the Privileges or Immunities Clause\textsuperscript{10} and the Citizenship Clause\textsuperscript{11} are the clearest examples - seemingly direct us toward engaged Aristotelian politics, not away from it. These clauses impose political duties on sovereigns and fiduciary responsibilities on all of us to protect and respect our co-citizens, rather than just enumerating rights for each of us as individuals.\textsuperscript{12} We might already possess a relatively forgotten constitution of political action, of civic obligation, and of state responsibility which exists alongside the constitution of individual rights, minimal governance, and divided powers to which the courts and commentators have given so much voice over so much of the last century. We could study our political constitution; we could magnify its message; we could interpret its clauses. More to the point, though, we could act on it.

How? At a minimum, progressive law professors, lawyers, judges, students, and scholars might seek to inform, enhance, and imbue our politics, rather than our law, with the progressive and egalitarian constitutional visions of equality, liberty, and citizenship that we have so meticulously articulated within the judicial branch. We could demand of our political representatives at all levels that they possess wisdom, demonstrate reason, and keep their collective eye on the prize of liberty, equality, and citizenship. We have, to date, expected these traits almost exclusively of our judges. I would like to see law professors and students start a conversation not only about having a constitutional convention, but also about the much more immediate objective of staffing congressional offices, no less than judicial chambers, with the best and most idealistic of our law schools’ graduates. Whether or not that comes to pass, we might at least think about what the Constitution we have actually says to our representatives about the nature of the power we give them, and what they should do with it, rather than focus so exclusively on what our current or idealized Constitution might say, through the oracular view of judges, regarding what they must not do.

Were we to do so, we might conclude that a little more of the stuff of utterly ordinary, politically generated, lets-put-it-to-a-vote law, and a little less of the very high-minded constitutionalism that constricts it, might be both fully in line with unexplored constitutional aspirations and visions and, more importantly, a very good thing in itself. Ordinary but decent political struggle - organizing, politicking, debating, compromising, voting, legislating, and then respecting the product - might hold the key to taming our current, anti-communitarian, destructive approach. Perhaps we need a convention of the sort Levinson suggests, if we are ever to have a Constitution committed to the creation of both a more ennobling as well as more representative politics. If so, I believe we should join Sandy Levinson in his call to at least begin a conversation about the need to have a convention. A Constitution that would underscore, rather than undercut, the nobility and centrality of politics and law to democracy would be a more worthy one.

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\textsuperscript{1} Sanford Levinson, The Democratic Deficit in America, HARV. L. & POL’Y REV. (Online) (Dec. 4, 2006), http://www.hlpronline.com/2006/06/levinson_01.html.

\textsuperscript{2} Id.


\textsuperscript{4} U.S. CONST. art. VI, cl. 2 (the Supremacy Clause).

\textsuperscript{5} See, e.g., Robin West, Katrina, the Constitution and the Legal Question Doctrine, supra note 3.

\textsuperscript{6} For a classic description of this phenomenon, see Ronald Dworkin, On Civil Disobedience, in TAKING RIGHTS SERIOUSLY (Ronald Dworkin ed., 2005).

8 See, e.g., Deborah N. Pearlstein, *Saying What the Law Is*, 1 HARV. L. & POL’Y REV. (Online) (Nov 6, 2006), http://www.hlpronline.com/2006/07/pearlstein_01.htm. Of course, the President does seek such constitutional blessing from his own circle of advisors.


10 U.S. CONST. amend. XIV, § 1.

11 Id.
