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From Parchment to Dust: The Case for Constitutional Skepticism
(Introduction)

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The Skeptic’s Constitution

Introduction

Why should one be a constitutional skeptic? Consider the following facts:

* In four out of the last five presidential elections, a candidate became President even though a majority of voters chose someone else. In two of these elections, the loser received more votes than the winner. Virtually all the money and attention in presidential elections is devoted to a tiny number of “swing states” that determine the outcome.

* By 2040, 30% of the population of the United States will control a majority of the United States Senate.

* Nine individuals, appointed for life and responsible to no one, regularly make crucial and unreviewable decisions about matters like the structure of healthcare in the United States, the nature of marriage, and the powers of the federal government and the states.

* Former California Governor Arnold Schwarzenegger and former Michigan Governor Jennifer Granholm might have become serious presidential candidates, but for a senseless, centuries old constitutional provision requiring that the President be a “natural born” citizen.

* All the justices on the Supreme Court insist that they are neutral and apolitical public servants who do no more than follow “the law” as it is written. Yet, they are nominated by a process drenched in raw partisanship, and their votes regularly align with the partisan views of the people who appoint them.

* Republican Presidents have appointed fourteen of the last eighteen justices to the Supreme Court even though they won the popular vote in only six of the last thirteen elections. The last Chief Justice appointed by a Democratic President was Fred Vinson, whose brief and undistinguished career
ended more than sixty years ago. Before that, one has to go back to Edward White, who fought on the Confederate side in the Civil War. (Even White was nominated for Chief Justice by a Republican, but his initial appointment to the Court was by a Democrat).

* The future of gun control in the United States turns on the Supreme Court’s guess as to what people in the eighteenth century who knew nothing of assault weapons, modern police forces, or mass shootings meant by “the right to bear arms.”

* The Constitution protects the right of people who want to make movies catering to individuals who get sexual pleasure out of witnessing the sadistic crushing of innocent animals. Yet it does nothing to protect the rights of all of us to a world that is not ravaged by global warming.

* Huge popular majorities favor measures like more effective gun regulation, limitations on campaign spending, and rebuilding of our national infrastructure, yet because of the political structures that the Framers imposed on us, we are unable to enact measures accomplishing these objectives.

* Customs of accommodation and constraint that keep our government functioning are rapidly eroding. For example, politicians now threaten a catastrophic default on the national debt to get their way, will not commit to respecting the results of elections, and refuse to compromise with their political opponents even when compromise is in the interests of both sides. But the Constitution does nothing to prevent this erosion, and all sides of political debate use constitutional rhetoric to bludgeon their political opponents.

These facts, and many more like them, should make any sensible person skeptical about our Constitution and about the role it plays in modern political culture. And yet, constitutional skeptics almost never get a fair hearing. Instead, our politics is saturated by reverence for an ancient and anachronistic document, written by people many of whom owned other human beings, and never endorsed by a majority of the inhabitants of our country. Liberals and conservatives, Democrats and
Republicans, congressmen and Supreme Court justices, all insist on their own, partisan versions of constitutional obedience while our political culture collapses, crucial public needs go unmet, and the ties that bind us together as a country fray.

We need to understand that conventional constitutionalism is irrational and wrong. It attaches religious significance to a decidedly secular and deeply flawed document. It is standing in the way of saving our country. It has got to stop.

The first step in stopping it is coming to a greater understanding of what constitutional skepticism is all about. It is useful at the beginning to disaggregate the claims of constitutional skeptics; they are skeptical about more than one thing.

- At the specific level, they are skeptical about many individual provisions in the United States Constitution – provisions that entrench unjust, anachronistic, undemocratic, and unworkable requirements, practices and limitations on our polity.
- Also at the specific level, they are skeptical about many individual decisions made by the United States Supreme Court – decisions that purport to interpret the Constitution but that in fact impose contestable and sometimes downright evil idiosyncratic judicial judgments on the rest of us.
- On a more general level, they are skeptical of the proposition that our country’s fate should be determined by a deeply entrenched, essentially unamendable document written centuries ago in a very different country by people who held views radically different from those of contemporary Americans and who had no notion of our modern circumstances.
- Similarly, they are skeptical more generally about the role that a group of unelected, often partisan judges play in our polity. Contrary to conventional opinion, over its
history, the Supreme Court has been populated by lawyers who on average are of decidedly ordinary intelligence and ability, who have gained their seat through political or personal connections, and who have produced whose work product has been marked by arrogant misjudgments that have done serious harm to our country.

- More generally still, constitutional skeptics worry about constitution worship and court worship – the uniquely American reverence for the Constitution and for the Supreme Court and the way in which this reverence obstructs sensible debate about important national issues.

- On the broadest level, skeptics worry about the way that the Constitution encourages Americans to formulate ordinary political disputes in terms of “rights” that are absolute and nonnegotiable. The tendency exacerbates political tension and obstructs authentic dialogue that actually has the potential to persuade participants. It is driving the country toward irreparable fissure.

In this book, I elaborate on all these complaints. I defend the proposition that, taken together, they form a coherent and unified skeptical stance toward conventional American constitutionalism. Of course, the reader might prefer to consider them individually. She might be persuaded as to some of my claims but not others. If that is so, I will claim a (partial) victory.

To be clear, though, there is one skeptical claim that I will not be making in this book. My argument should not be read as an attack on constitutions or constitutionalism in all times and places. At the beginning, constitutions may be necessary to get a polity off the ground. Constitutions may, at least for a time, resolve otherwise intractable disputes. The drafting of a constitution can be an act of national liberation and promote national solidarity. At one time, our Constitution may have served all these functions. But for us, that time was a long time ago. I am writing about how the American
constitution functions in our own time and place. I will leave to others who know more about it the debate about how other constitutions function in other societies.

Even with this caveat, I have no doubt that defending constitutional skepticism is an uphill fight. In our cultural and intellectual tradition, skeptics often get a bad rap. Skeptics are said to be doubters, cynics, and mindless destroyers. Pervasive skepticism can blind us to moral truths, block us from meaningful commitments, and paralyze us in the face of evil. And there is a well-known logical problem with skepticism: Don’t pervasive skeptics have to be skeptical of their own skeptical stance?

These are important criticisms, but they oversimplify what the constitutional skeptic really thinks. Part of the problem is caused by confusing constitutional skepticism with global skepticism. A global skeptic, as I am using the term, is skeptical of all moral and political judgments. She believes that one moral claim—say that the state should not interfere with acts of marital intimacy—is no stronger or weaker than another moral claim—say that the state should not interfere with the release of pollutants into the atmosphere.

There is no necessary connection between global skepticism and the kind of constitutional skepticism that I defend in this book. In fact, as I will argue below, many global skeptics have been conventional constitutionalists. They have defended American constitutionalism just because, they believe, the constitution provides a way to resolve disputes without resort to problematic moral and political claims. Conversely, if one scratches the surface of a constitutional skeptic, one usually finds a disappointed idealist. Constitutional skepticism entails a doubt about whether things are working as they should. That doubt, in turn, must be generated by a comparison to an ideal of how things ought to work. In other words, constitutional skepticism is almost always rooted in some sort of normative judgment.
In the case of constitutional skeptics, the normativity often takes the form of a vision of substantive social justice -- a conception of what people deserve and what is necessary for human flourishing. Constitutional skepticism begins by noticing the gap between this substantive view of how things ought to be and the reality of how they are.

Of course, the gap might be the product of no more than the limits on what people acting in good faith can accomplish. Perhaps, for all our failures, we are doing the best that we can. But constitutional skeptics don’t just notice that a gap exists; they are also angry about it. That anger, in turn, leads to another counterintuitive fact about constitutional skeptics: They tend toward optimism. Anger would have no target if one believed with the seventeenth century philosopher Gottfried Leibniz that things are the best that they could possibly be. Constitutional skeptics think that things could be different. Skeptics are doubters, alright, but what they doubt are the excuses and circumlocutions that obscure the possibilities for change.

Constitutional skeptics therefore insist on a clear-eyed view of the world. They are persistent puncturers of pretension. They are noticers of unchallenged received wisdom, cant, and hypocrisy. Constitutional skeptics try to look at the world afresh, to imagine other possibilities. They have little patience for defenses of the status quo that obscure what is really going on.

There is an obvious risk of contradiction in this stance. Why isn’t a skeptical idealist skeptical of her own ideals? The constitutional skeptic’s response is that there is indeed a contradiction, but it is a useful one. The contradiction means that a thoroughgoing skeptic will not be happy even if the reforms he favors are somehow put into place. Constitutional skeptics are perpetual malcontents, and skepticism is a continuing project without an endpoint.

This emotional predisposition can make constitutional skeptics really annoying. Dealing with a skeptic can drive you crazy. How can I satisfy this person? When will the ceaseless carping stop? Yet
the skeptic’s response is, in its own way, attractive. Skeptics are driven by millennial hopes that are always just out of reach. If the millennium is too far removed, it generates cynical resignation rather than hope. If the millennium has already arrived, it produces smug satisfaction rather than striving. Only a millennium in the middle distance provides the motivation for effective political action. It follows that the skeptic’s twin enemies are pessimistic acceptance of inevitable evil and smug embrace of an imagined utopia.

I’m ready to concede that we wouldn’t want a world populated only by constitutional skeptics. I’m also ready to insist that our current world has too few of them. There is way too prevalent an assumption that our existing institutions are pretty good, or at least the best that anyone could expect. That assumption is enforced by willful blindness about how these institutions actually function and a lack of imagination about how they might function. Constitutional skepticism is an antidote to all that.

This defense of constitutional skepticism is part of my project, but it is not the whole project. This book is not just about constitutional skepticism; it is also about the skeptic’s constitution. At least at first, the book’s title seems to embody an oxymoron. How can a skeptic have a constitution? Constitutions are about commitment, faith, and obligation. Skeptics value flexibility, doubt, and freedom. Don’t consistent skeptics have to be skeptical about constitutions?

The paradox might be resolved by focusing on different sorts of constitutions. A constitutional skeptic might be skeptical about some constitutions but not others. It turns out that even if one is not generally skeptical of constitutions, there are good reasons to be skeptical about our Constitution.

According to the conventional account, over two centuries ago, wise and foresighted men gathered in Philadelphia to write a document that to this day constitutes us as a nation. The document that they produced guarantees liberty and equality for all. It is the glue that holds us together – a set of common commitments that transcend political disagreement.
The constitutional skeptic will have none of this. She knows that at its very inception, many Americans saw the Constitution as embodying a counter-revolution, reestablishing the aristocratic government that the revolutionaries had overthrown only a few years earlier. No women, no people of color, and few people who did not own property participated in its ratification. It is doubtful at best that a majority of those who were permitted to participate actually favored ratification. Proponents of the Constitution managed to force the country to make a binary choice between the new Constitution and the failed Articles of Confederation. Modern scholars believe that a majority favored either outright rejection of the Constitution or a new convention to write a very different document.

In any event, the constitutional skeptic reminds us, no one alive today had any role in the ratification process or agreed to be bound by these rules. Even as amended, the Constitution to this day mandates a system of government that is wildly out of touch with what the country has become. We are stuck with a document that is both the oldest extant constitution in the world and, perhaps, the most difficult to amend. Written for a different time and place, it is out of sync with the country that it supposedly constitutes.

And it is not what it seems to be. Instead of creating a government that speaks for “we the people,” as its preamble promises, it entrenches a system that is undemocratic. Instead of providing “for the common defence and general welfare,” it divides us by class and systematically privileges some citizens over others. Instead of leading us toward “a more perfect union” it promotes hypocrisy and dishonesty and encourages zero sum and explosive disputes that threaten to drive us apart.

A fair answer to all this criticism is the response that skeptics face always and everywhere: OK, I get it. But tearing down isn’t the same thing as building up. If you are going to tear down, then don’t you have an obligation to provide some positive alternative to replace what you have destroyed?
I take this criticism seriously. Taking it seriously means not ignoring the oxymoron problem mentioned above: what kind of substantive constitution could a skeptic possibly endorse? To do that, in turn, we need to address fundamental questions about what constitutes a just and stable political community.

Oddly, this focus has the potential to turn the tables on constitutionalists. As I’ve already argued, many conventional constitutionalists are the most committed skeptics. They are the ones who doubt the ability of citizens to engage in untrammelled and mature deliberation and debate. It is actually constitutionalists who believe in “situational ethics” and want us to subordinate our sense of right and wrong. It is constitutionalists who are frightened of reasonable disagreement. By committing themselves to blind obedience to decisions made by others years ago, they reveal their deep skepticism about the capacity of contemporary Americans for self-rule.

None of this is to deny that communities need mechanisms to prevent disagreement from spinning out of control. The constitutional skeptic therefore has an obligation to set fourth and defend the skeptic’s constitution. What does such a constitution look like? In this book, I argue that a constitution need not be a set of ancient and formally entrenched rules. Nations can, instead, constitute themselves with a set of practices, customs, and mutually observed inhibitions and restraints. What is necessary is a willingness of citizens to keep an open mind; an economy that produces a reasonable level of material wellbeing and at least rough equality of wealth and opportunity; habits of thought and action that encourage compromise in the pursuit of political goals; the patience to listen to others and respond flexibly to changed conditions; and a minimal sense of common purpose and respect for fellow citizens. Put differently, a skeptic’s constitution cannot be reduced to a set of rules or written down on a piece of paper. It is a way of life rather than a series of commands.
Of course, none of that, standing alone, determines the particular institutions of government. It does not tell us when a bill becomes a law, whether the District of Columbia is a state, or when the President’s term ends. Because matters like this are important, written constitutions may be crucial to get new polities up and running. But our government has been functioning for several centuries by now. We have established understandings and ways of doing things. If the skeptic’s constitution is in place – if we have the habits of thought and mutual understandings that the constitution consists of – then most people will not want to induce chaos and anarchy by lightly challenging established institutions. Of course, institutional redesign will be on the table in the way that it currently is not. If someone challenges the composition of the United States Senate, it will not be a sufficient response to say “Article I of the Constitution says it has to be this way.” But it may be a sufficient answer to say “changing things at this late date is not worth the disruption that it would produce.” That answer, in turn, invites rather than shuts down dialogue.

Paradoxically, and in some tension with what I have just written, we can might find a guide to the skeptic’s constitution in the text of our written constitution -- but only if we look in the right place. Our focus should not be on specific, technical commands, like, for example the prohibitions in section 9 of Article II against a state “lay[ing] any Duty of Tonnage” or against “Capitation or other direct, Tax[es]” being imposed unless “in Proportion to the Census or Enumeration.” Our focus instead should be on the open-textured but nonetheless powerful rhetoric in the Constitution’s Preamble:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the defence and promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution of the United States of America.
A skeptic’s constitution should provide a guide for how to achieve these great ends not in the tiny, rural, slave-dependent republic that we were in the late eighteenth century, but in the sprawling, complicated, disorderly country that we have become. Accordingly, I have organized this book around some of the goals contained in the Preamble. How might a constitutional skeptic go about achieving those goals in today’s environment?

Chapter One takes seriously the Framers’ claim to speak for “We the People.” Whatever the truth of that claim in the beginning (and there are plenty of reasons to doubt it), there can be no doubt that the conventional Constitution today stands in opposition to true democracy. It entrenches indefensible hierarchies of power, both between different groups of people alive today and between the living and the dead. The beginning of realizing the Framers’ promise is to imagine a constitutional system that in fact creates a government authorized to speak for “We the People.”

Chapter Two addresses the problem of “establish[ing] Justice” with particular focus on the United States Supreme Court. Instead of uniting us around a common set of ideals, the modern Supreme Court regularly divides us into warring factions. Instead of a palladium of justice, it has become a site of incompetence, arrogance, and unaccountability. This chapter addresses the kinds of reforms that would be necessary to create a Court that actually established justice.

Chapter Three casts a skeptical gaze on whether the Constitution actually “promote[s] the general Welfare.” I argue that liberal and conservative constitutionalists alike regularly assume that existing and unfair distributions of wealth should serve as the baseline for constitutional analysis. This assumption, in turn, means that far from promoting the general welfare, constitutional law entrenches privilege and inequality.
Of course, the Constitution is not only about economics. It also affects cultural and social power. In Chapter Five, I address the ways in which the constitutional goal of “securing the blessings of liberty” have been perverted to entrench the cultural power of elites.

Chapter Six turns to the issue creating a “more perfect union.” I argue that the rhetoric of rights that constitutional law promotes drives us apart in ways that are both unnecessary and divisive.

Finally, Chapter Seven turns to the problem of history. Given our past, is it really possible to “ordain and establish” a skeptical constitution. I argue that if one only looks in the right places, one can find in our history a vibrant tradition of skeptical constitutionalism that we might build upon to make our country a more just, humane, and decent place.

A concluding Chapter returns to the theme of constitutionalism as a way of life and habit of thought instead of as a set of rules. We live in an era when that way of life and habit of thought is threatened as it has been only a few times in our nation’s history. Our sense of common purpose is unravelling, customary constraints rooted in mutual respect are eroding, and our hopes for equality and material wellbeing are fading. Things are coming apart, and conventional constitutionalism is contributing to, rather than solving, the problem.

There is no more urgent task than thinking in a sustained and serious way about what will put things back together. Undertaking that work is the ultimate project of this book.